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Filing date: **12/28/2009**

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

Proceeding	91169312
Party	Plaintiff Swatch AG
Correspondence Address	JESS M. COLLEN COLLEN IP The Holyoke-Manhattan Bldg., 80 South Highland Avenue Ossining, NY 10562 UNITED STATES
Submission	Plaintiff's Notice of Reliance
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Signature	/Thomas P. Gulick/
Date	12/28/2009
Attachments	98885 Redacted second notice of reliance.pdf (119 pages)(7932673 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

-----	X	
Swatch S.A. (Swatch AG) (Swatch Ltd.)	X	
	X	
Opposer,	X	Opposition No.: 91169312
	X	Mark: SWAP
v.	X	
	X	
Amy T. Bernard and	X	
Beehive Wholesale LLC	X	
Applicant.	X	
-----	X	

OPPOSER'S SECOND NOTICE OF RELIANCE

Notice is hereby given that pursuant to 37 C.F.R. §2.121, Opposer, Swatch S.A., offers into evidence, and will rely upon the following documents and materials identified below.

(a). United States Federal Trademark Application

Opposer relies on the following Federal Trademark Application Serial No. 78/850,063 pursuant to 37 C.F.R. § 2.122(e) as an example of the descriptive nature of the term "swap" in association with watches. Said copy of the application is issued by the U.S. Patent and Trademark Office is attached hereto as Exhibit A.

(b). Printed Publications and Official Records

The following official records reference the issues raised by Applicant and its reliance on the discovery deposition of a third party. Opposer will rely on the following official records pursuant to 37 C.F.R. § 2.122(e), copies of the order and hearing transcript are attached hereto as Exhibits B-C:

Exhibit B

January 23, 2007 – Case No. 06-4242 (D. N.J.) – hearing transcript – The Swatch Group (U.S.), Inc., v. Bernard.

Exhibit C

March 20, 2007 – Case No. 06-4242 (D. N.J.) – Order – In re: Application Pursuant to Rule 45 of The Swatch Group (U.S.), Inc. to Quash a Subpoena, Etc.

The following official records reference Applicant's involvement in another trademark infringement action. Opposer will rely on the following official records pursuant to 37 C.F.R. § 2.122(e).

Exhibit D

November 24, 2009 – Case No. 4:2009 cv 204 (E.D. N.C.) – Complaint – The Mainstreet Collection, Inc. v. Beehive Wholesale, LLC and corresponding PACER docket;

(c). **Discovery depositions of Amy Bernard and Brent Bernard**

Opposer will rely on the discovery depositions of Amy Bernard and Brent Bernard and exhibits thereto pursuant to 37 C.F.R. § 2.120(j)(3)(i). These materials may be relied on for impeachment purposes. These depositions and exhibits contain material highly confidential under the protective order.

Exhibit E

September 7, 2006 discovery deposition of Amy Bernard

Exhibit F

September 7, 2006 discovery deposition of Brent Bernard

Exhibit G

Exhibits for discovery depositions of Amy and Brent Bernard

(d) **Declaration Of Edith Garvey and Exhibit of Orange County Creations Website on December 28, 2009**

Opposer will rely on the Declaration of Edith Garvey and Exhibit to show that on December 28, 2009, the exhibit shown was how the website www.occreations.net/build_a_watch_swap_faces appeared on that date.

Exhibit H

Declaration of Edith Garvey and Exhibit of Orange County Creations Website on December 28, 2009.

(e) **Correspondence of Opposer to Applicant on November 16, 2006 including Supplemental Interrogatory Response to Interrogatory 21.**

Opposer will rely on the November 16, 2006 correspondence to Applicant's counsel including portions of Opposer's Supplemental Interrogatory Response to Interrogatory 21 to show Applicant was on notice of those individuals listed in the response as of that date.

Exhibit I

November 16, 2006 correspondence to Applicant's counsel and portions of the Opposer's Supplemental Interrogatory Response to Applicant's Interrogatory No. 21.

(f) **Documents showing use of the word "swap" for interchangeable watches in the watch industry**

Opposer will rely on the documents in Exhibit J to show how other retailers of watch products use the word "swap" for interchangeable watches.

Exhibit J

Use of the term "swap" for the sale of interchangeable watches by Puma on Ebay

Exhibit K

Use of the term "swap" for the sale of interchangeable watches by Puma on Amazon.com

Exhibit L

Use of the term "swap" for the sale of interchangeable watches by Orange
County Creations

Respectfully submitted
for Opposer,

By: Thomas P. Gulick

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Attorneys for Opposer

JMC/TPG/eg
Dated December 28, 2009

COLLEN IP
THE HOLYOKE-MANHATTAN BUILDING
80 SOUTH HIGHLAND AVENUE
OSSINING, NEW YORK, 10562

SHOULD ANY OTHER FEE BE REQUIRED, THE PATENT AND TRADEMARK
OFFICE IS HEREBY REQUESTED TO CHARGE SUCH FEE TO OUR DEPOSIT
ACCOUNT 03-2465.

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING FILED
ELECTRONICALLY WITH THE UNITED STATE PATENT AND TRADEMARK
OFFICE.

COLLEN IP

BY: Edo Grey

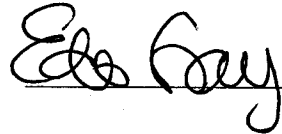
DATE December 28, 2009

CERTIFICATE OF SERVICE

I, Edith Garvey, hereby certify that a copy of the foregoing Opposer's Second Notice of Reliance and Exhibits thereto, has been served on counsel for Applicant, at the following address:

Mr. William J. Utermohlen
Oliff & Berridge, PLC
277 South Washington Street
Suite 500
Alexandria, VA 22314

Said service having taken place via First Class Mail, this 28th of December, 2009.



EXHIBIT

A

Thank you for your request. Here are the latest results from the TARR web server.

This page was generated by the TARR system on 2009-12-24 13:04:00 ET

Serial Number: 78850063 Assignment Information Trademark Document Retrieval

Registration Number: (NOT AVAILABLE)

Mark



(words only): SW SWAPPWATCH

Standard Character claim: No

Current Status: Further action on the application has been suspended.

Date of Status: 2009-11-18

Filing Date: 2006-03-30

Transformed into a National Application: No

Registration Date: (DATE NOT AVAILABLE)

Register: Principal

Law Office Assigned: LAW OFFICE 106

Attorney Assigned:
NELSON EDWARD H

Current Location: L60 -TMEG Law Office 106

Date In Location: 2009-05-07

LAST APPLICANT(S)/OWNER(S) OF RECORD

1. Pera Group LLC

Address:
Pera Group LLC
2201 Anderson Circle

Stevensville, MI 49127
United States
Legal Entity Type: Limited Liability Company
State or Country Where Organized: Michigan
Phone Number: 773-331-3813

GOODS AND/OR SERVICES

International Class: 014
Class Status: Active
Watches
Basis: 1(b)
First Use Date: (DATE NOT AVAILABLE)
First Use in Commerce Date: (DATE NOT AVAILABLE)

ADDITIONAL INFORMATION

Description of Mark: The mark consists in part of male and female biological symbols that are interconnected and superimposed over the letters SW

Design Search Code(s):
24.17.02 - Biological symbols (male and female)

MADRID PROTOCOL INFORMATION

(NOT AVAILABLE)

PROSECUTION HISTORY

NOTE: To view any document referenced below, click on the link to "Trademark Document Retrieval" shown near the top of this page.

- 2009-11-18 - Report Completed Suspension Check Case Still Suspended
- 2009-05-07 - Report Completed Suspension Check Case Still Suspended
- 2008-11-04 - Report Completed Suspension Check Case Still Suspended
- 2008-05-02 - Report Completed Suspension Check Case Still Suspended
- 2007-11-01 - Report Completed Suspension Check Case Still Suspended
- 2007-05-01 - LETTER OF SUSPENSION E-MAILED
- 2007-05-01 - Suspension Letter Written
- 2007-04-17 - Amendment From Applicant Entered

2007-04-17 - Communication received from applicant

2007-04-17 - Assigned To LIE

2007-03-13 - FAX RECEIVED

2006-09-13 - Non-final action e-mailed

2006-09-13 - Non-Final Action Written

2006-09-13 - Assigned To Examiner

2006-04-05 - Notice Of Design Search Code Mailed

2006-04-04 - New Application Entered In Tram

ATTORNEY/CORRESPONDENT INFORMATION

Correspondent

PERA GROUP LLC

2201 ANDERSON CIR

STEVENSVILLE, MI 49127-9777

Phone Number: 773-331-3813

EXHIBIT
B

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

3 THE SWATCH GROUP (U.S.),
4 INC.,

5 Movant,

6 vs.

7 AMY BERNARD,

8 Movant.

. Case No. 06-4242

. Newark, New Jersey

. January 23, 2007

9 TRANSCRIPT OF HEARING
10 BEFORE THE HONORABLE CLAIRE C. CECCHI
11 UNITED STATES MAGISTRATE JUDGE

12 APPEARANCES:

13 For the Movant The
14 Swatch Group
15 (U.S.), Inc.:

MATTHEW WAGNER, ESQ.
Collen IP, P.C.
The Holyoke-Manhattan Building
80 South Highland Avenue
Town of Ossining, Westchester County,
NY 10562 USA

PETER E. MORAN, ESQ.
Dillon, Bitar & Luther, LLC
55 Maple Avenue
Morristown, NJ 07963

18 For the Movant Amy
19 Bernard:

JOHN RALPH HOLSINGER, ESQ.
Two University Plaza, Suite 300
Hackensack, NJ 07601

21 WILLIAM J. UTERMOHLEN, ESQ.
22 Cliff & Berridge, PLC
23 277 South Washington Street,
24 Suite 500
25 Alexandria, Virginia 22314

1 Audio Operator:

2 Transcription Service: KING TRANSCRIPTION SERVICES
3 65 Willowbrook Boulevard
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6 Proceedings recorded by electronic sound recording;
7 transcript produced by transcription service.

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1 (Commencement of proceedings)

2

3 THE COURT: All right. Good afternoon, everyone.

4 UNIDENTIFIED SPEAKERS: Good afternoon, Your Honor.

5 THE COURT: All right. We're here today on the
6 enforcement of a subpoena.

7 Can I have your appearances, please?

8 MR. WAGNER: Certainly. Good afternoon,
9 Your Honor, Matthew Wagner, from the firm Collen IP, on
10 behalf of the Swatch Group, (U.S.), Inc.

11 THE COURT: Okay.

12 MR. MORAN: Peter Moran, Dillon, Bitar & Luther,
13 Morristown, New Jersey, also on behalf of the movant Swatch
14 Group (U.S.) Inc. Mr. Wagner has been admitted pro hac vice.

15 THE COURT: Very good.

16 MR. HOLSINGER: Your Honor, my name is John
17 Holsinger. I'm from Hackensack, New Jersey. And we are here
18 for Amy Bernard. And I will introduce to you Bill
19 Utermohlen, from Alexandria, Virginia, who has been also
20 admitted pro hac vice.

21 THE COURT: Okay. Thank you very much.

22 All right. Now -- and let me just put for the
23 record, this is No. 06-4242. It's Swatch -- Swatch Group
24 matter.

25 All right. Before we get to argument on it, I'd

1 | like to know -- I mean, this is regarding a deposition.
2 | Wasn't there some way to work this out instead of all this
3 | motion practice? I mean, the local rules require that you
4 | confer and attempt to work out most of your discovery
5 | problems. If it's something that can't be worked out, then
6 | of course you come to the Court. But it looks like this was
7 | something pretty simple and straightforward, and I just want
8 | to understand why it got to this level.

9 | MR. UTERMOHLEN: Your Honor, I mean, I don't know
10 | if Mr. Wagner wants --

11 | THE COURT: Whoever would like to start is fine.

12 | MR. UTERMOHLEN: Well, think the issue as I
13 | understand it primarily, Your Honor, is that Swatch has taken
14 | the position that they don't want to provide anyone for an
15 | oral deposition, period. Mr. Wagner can speak to that, if
16 | he'd like. But that, I think, is why it couldn't be
17 | resolved.

18 | MR. WAGNER: I'd be happy to speak to that.
19 | Nothing could be further from the truth.

20 | The facts are in this case that Ms. Bernard had
21 | ample opportunity during the TTAB proceedings to take the
22 | deposition by written questions of the opposer, Swatch AG.
23 | They also had ample opportunity to subpoena third parties for
24 | deposition, such as the Swatch Group (U.S.), Inc., or even
25 | Ms. Caroline Faivet, who's the president of the Swatch Group

1 (U.S.), Inc., at some point during the discovery period.

2 But instead they chose to wait until the very last
3 week of the discovery period before they served a subpoena on
4 the Swatch Group (U.S.) and identified her, Ms. Faivet, as
5 the person by whom, quote, unquote, they sought to take a
6 deposition. It was -- I mean, we'll get to the merits of the
7 argument when we do, but the notion that we're resisting this
8 subpoena simply because we don't want to provide anyone for
9 an oral deposition is just simply not true.

10 Ms. Faivet is the president of the Swatch Group
11 (U.S.), Inc. Now, that's not just some distributor for
12 Swatch watches. This is a multi-million dollar company that
13 is the brand manager and distributor in the United States for
14 some dozen watch brands.

15 THE COURT: Did you discuss maybe -- I mean, if it
16 was -- if you had an issue with respect to producing her in
17 particular, did you have any conversations regarding maybe
18 someone else that you might be able to depose? Was that part
19 of this?

20 MR. WAGNER: Well, part of our argument in these
21 proceedings here, is that Ms. Bernard failed to identify the
22 subject matters upon which they sought a deposition of the
23 Swatch Group (U.S.), Inc. And as a result that, there was no
24 way for the Swatch Group (U.S.) even to comply with the
25 deposition subpoena for a corporate representative.

1 THE COURT: Okay. But if you look at 30(b)1, that
2 requires either a designation of someone specific, or it
3 allows you to say, you know, to just get a corporate
4 representative and describe the subject matter.

5 MR. WAGNER: Sure.

6 THE COURT: So to me it looks like an either/or.

7 MR. WAGNER: Well, 30(b)1, Your Honor -- and this
8 really -- now we're getting into one of the strains of the
9 merits of the case -- 30(b)1, Your Honor, applies to parties.
10 Doesn't apply to third parties.

11 THE COURT: Okay. Have you taken a look at the
12 following case?

13 MR. WAGNER: Which one?

14 THE COURT: Okay. This is Sugarhill Records v.
15 Motown Record Corporation, 105 F.R.D. 166.

16 MR. WAGNER: Yes, Your Honor, we have.

17 THE COURT: Okay.

18 MR. WAGNER: In fact, the party -- you know what?
19 I'm not going to use the word "party." Let's use the word
20 "deponent." The deponent that was sought there, I think her
21 name was -- her initials were BB. She was, in fact, an
22 employee of the party in the case, Motown Records. Motown
23 had been involved in the case. This woman submitted a
24 declaration in support of a motion for a preliminary
25 injunction that had been filed in the case. She was clearly

1 a relevant witness that that party in the proceeding had put
2 up in the case. And the service of that subpoena for her
3 testimony was specific to that party, relevant to that
4 proceeding in that case.

5 Now, in this proceeding, Ms. Bernard is trying to
6 circumvent the rules of TTAB practice, and has refused to
7 take the written deposition of the opposer, Swatch AG. Why?
8 We don't know. But to date and during discovery, they have
9 failed to elect to take the deposition of the opposer.

10 Instead, they have tried to take the position that
11 the Swatch Group (U.S.), Inc., is the managing agent for
12 Swatch AG in the U.S., and through that mechanism, they have
13 tried to take the oral deposition of the Swatch Group (U.S.),
14 Inc.

15 Now, that is simply a flawed procedural vehicle.

16 Now, the Swatch Group (U.S.), Inc., first of all,
17 is not the managing agent of Swatch AG. But second of all,
18 by identifying Ms. Caroline Faivet specifically as the person
19 for whom they are seeking deposition, there is absolutely no
20 authority that Ms. Faivet can bind Swatch AG at an oral
21 deposition in the TTAB proceedings.

22 And quite honestly, that is the crux of the
23 resistance for this deposition. It has nothing to do with
24 whether they're entitled to or could have been entitled to a
25 deposition, if they had done it properly.

1 THE COURT: Okay.

2 MR. WAGNER: But they never have.

3 THE COURT: What is -- I'm sorry. What is your
4 support for the proposition that 30(b)1 only applies to
5 parties?

6 MR. WAGNER: Every case that's been cited by
7 Ms. Bernard, every case that's been discussed. We actually
8 make that statement specifically in our papers. And I just
9 want to find it.

10 THE COURT: Take your time.

11 MR. WAGNER: We actually cite specifically to that
12 proposition. It's -- well, the pages aren't numbered, but it
13 is -- opposer's opposition to applicant's motion to compel
14 discovery -- actually -- I'm sorry. This is in a brief
15 before the TTAB.

16 That's the other complication in this case,
17 Your Honor, is they're also seeking to compel the deposition
18 of Swatch Group (U.S.) at the TTAB as the managing agent of
19 Swatch AG. Which leads into, I think, an overriding point
20 that I was actually going begin my argument with, which is
21 the mootness of this entire proceeding, because discovery is
22 now closed at the TTAB, and Ms. Bernard has done absolutely
23 nothing to preserve any right whatsoever to even take a
24 deposition, if Court were to order it.

25 And Ms. Bernard makes statements in her papers

1 that, in fact, it only needs to be noticed during the
2 deposition -- during the discovery period. And I just wanted
3 to point out -- while I'm here, I might as well --

4 THE COURT: Yes, no absolutely --

5 MR. WAGNER: -- I might as well get it done.

6 THE COURT: -- please do.

7 MR. WAGNER: Okay.

8 -- is that 37 C.F.R. 2.120 states specifically:
9 Discovery depositions must be taken and interrogatories,
10 requests for productions of documents -- request for
11 production of documents and things, and requests for
12 admission must be served within, on or before the closing
13 date of discovery.

14 And in addition the T.B.M.P. 404.01, quote:
15 Discovery depositions must be both noticed and taken prior to
16 the expiration of the discovery period, unless the parties
17 stipulate otherwise, or a party, you know, moves for a valid
18 extension.

19 So I think it is crystal clear -- I mean, that's
20 pretty explicit in the rules --

21 THE COURT: Although wouldn't that be something to
22 be addressed before the TTAB, whether this is moot or not?

23 MR. WAGNER: Well, no. I mean, it's an issue to be
24 addressed before the TTAB as to whether an extension of the
25 discovery period could be had by the applicant on the grounds

1 that this proceeding was open, and that the potential existed
2 for this Court to order a further deposition of the party
3 sought in the subpoena.

4 But, in fact, Ms. Bernard has done absolutely
5 nothing to preserve any right to do that. So even if this
6 Court were to decide that -- which we obviously don't
7 concede -- that the subpoena was validly issued and that
8 someone, whether it's Ms. Faivet or someone else, needed to
9 appear, it would not even be valid in the TTAB proceedings
10 because discovery's closed and it wouldn't be taken within
11 that discovery period.

12 So I note that as a procedural issue that moots
13 even the notion of their, you know, further requesting of
14 this deposition to be taken.

15 The same is true for the motion to compel. I guess
16 there is technically pending a cross-motion to compel here.
17 The same is true there, because they have pending at the TTAB
18 a motion to compel. Now, that motion to compel actually
19 crystallizes what we believe to be an improper procedural use
20 of this managing agent theory that they've conjured up. And
21 that, in fact, properly before the TTAB is a motion that they
22 have to compel a deposition of Swatch Group (U.S.), because
23 they contend Swatch Group (U.S.) is the managing agent of the
24 Swiss opposer, Swatch AG.

25 Now, we're going to brief those issues. The TTAB

1 is going to decide whether or not they're entitled to rely on
2 that as a position; and if so, if Swatch Group U.S. is found
3 by the TTAB to be a managing agent here in the States, then
4 they'll be entitled to take an oral deposition of that
5 domestic party.

6 But to come into this Court and to say, no, no, I'm
7 going to sort of pull the wool over your eyes a little bit
8 here, and I'm going to say I'm entitled to this, because I
9 did a little quirky thing under 30(b)1 where I think it might
10 apply to a third party, but I'm actually naming a specific
11 corporate officer, who happens to be the top of the food
12 chain. I mean, you know, forgive me, but Swatch is a pretty
13 big company, you know? The brands that Swatch Group (U.S.)
14 controls and distributes in the States are: Omega, Breguet,
15 RADO, Tissot, Longines, Calvin Klein. I mean, Ms. Faivet is
16 not just --

17 THE COURT: Isn't that really an issue -- isn't
18 that a different issue and maybe the one that I brought up
19 first, which is, if you really don't want to produce her
20 because you thought maybe that was not -- maybe she didn't
21 have the knowledge or maybe she was too high up in the chain
22 that she wouldn't really have anything relevant, couldn't you
23 have had a conversation to discuss someone who would be an
24 alternate choice?

25 MR. WAGNER: So my question then in that vein is:

1 On what topics? No notice topics were included.

2 THE COURT: But precisely. I mean, that's
3 something that you could have communicated and had some
4 dialog on.

5 MR. WAGNER: There was no dialog. In fact, this is
6 another interesting point that I wanted to bring out for your
7 Your Honor. And now I'm referring to -- these are exhibits
8 to the declaration of William Utermohlen -- and I'm referring
9 to the argument in their papers that's at page 7 here. This
10 is page 7 of the brief in opposition to the motion to quash
11 and in support of the cross-motion to enforce -- at page 7,
12 Mr. Utermohlen goes through some of the chronology, of
13 course, in a light, we have to assume is most favorable to
14 his position, and in which, at the end of the page, he
15 states -- this is five lines up from the bottom: However, the
16 August 29th facsimile letter directed to counsel for
17 Swatch SA noted that if the date was not convenient,
18 alternative dates would be considered.

19 There was no phone call. There was no dialog.
20 Mr. Utermohlen simply issued a subpoena in the name of the
21 this Court and had it delivered to the corporation service
22 company listing Swatch Group (U.S.) by and through Caroline
23 Faivet. Ms. Faivet was out of the country at the time.

24 Now, they --

25 THE COURT: But isn't he suggesting that he would

1 be amenable to trying to work out the schedule? Isn't that
2 what's intended here? I mean, I also looked through the
3 exhibits, which are the letters, and that's what I get out of
4 them.

5 MR. WAGNER: Well, the letter to Ms. Faivet, which
6 was noted as served by hand with a copy of the subpoena, was
7 mailed to my partner, Jess Collen. He didn't fax it to us on
8 August 29th, before the Labor Day holiday weekend, when on
9 the same day, by fax -- now I'm looking at Exhibit N -- by
10 fax he writes a letter to Mr. Collen. He doesn't attach a
11 copy of the subpoena. He doesn't give us notice of the
12 subpoena.

13 In the letter, now at Exhibit O, to Ms. Faivet,
14 who, again, is out of the country as she often is in her
15 position, he says to Ms. Faivet: We enclose a subpoena for
16 your deposition. We are willing to discuss alternative dates
17 or locations for the deposition subject to the constraint
18 that discovery in this matter is scheduled to close on
19 September 10th.

20 Now, even in the best construction of their -- of
21 their procedural tactics in this case, the best construction,
22 if that subpoena was delivered by hand on August 29th, given
23 the Labor Day holiday when most people are traveling, which
24 she was in this instance, the deposition still would have
25 been noticed on less than ten days' notice. This was the

1 very last week of the discovery period, where they had more
2 than six months to do this kind of thing. But they failed to
3 do that.

4 Now, if, in fact, they wanted Ms. Faivet for some
5 reason, then they failed to serve her personally. And, in
6 fact, it's my understanding that she didn't come even back
7 into the country until well into this small period before the
8 10th.

9 THE COURT: Although, didn't they fax her a letter
10 on August 25th, basically stating that they would be, you
11 know, taking this type of deposition? You knew that that
12 was -- that was really something that was intended to happen.

13 MR. WAGNER: Well, on August 25th, that's right,
14 they -- my date that I have is August 29th, where they
15 alerted us to that. I think that the August 25th date maybe,
16 you can -- I hate to ask, but if you have an exhibit tab
17 there --

18 THE COURT: Okay. August 25 --

19 MR. WAGNER: Oh, I'm looking at Exhibit L.

20 THE COURT: -- L, and then the other one is N.

21 MR. WAGNER: That's right. Yeah, L precisely is --
22 is notification that -- is -- this is actually a response to
23 our objection to their trying to take the deposition of
24 Mr. Furlan, who is an officer of Swatch SA, by oral
25 deposition. Okay?

1 I mean, the TTAB rules are very clear: If you have
2 a nondomestic, outside-the-United-States party or person that
3 you seek a deposition for, you do it on written questions.
4 This is not an -- with due respect to the agency involved in
5 the federal courts, this is not a federal trademark
6 infringement litigation proceeding. This is a TTAB
7 opposition proceeding.

8 And in that vein, the rules set out that you're not
9 going to require an official from Switzerland, Germany, or
10 France to come to the United States to sit for a deposition
11 in this proceeding. If you want to take that deposition, you
12 do so on written questions.

13 Their problem was they didn't do it. They didn't
14 do it in time, and they were scrambling at the end of
15 discovery to try to figure out how to get around that.

16 THE COURT: But weren't a lot of things going on at
17 the end of discovery? It looks like from the correspondence
18 that Ms. Bernard's deposition was getting scheduled right at
19 the end of discovery. So it looks like there was a certain
20 amount of activity right at the end.

21 MR. WAGNER: They moved that, all right? That was
22 not at our request. That deposition was rescheduled. It had
23 been noticed well in advance. And we were entirely at
24 liberty to take that deposition, and we did so within the
25 time that we were allowed.

1 This letter that you're identifying on August 25 is
2 them acknowledging that under the rules to take Mr. Furlan's
3 deposition that they would have to do so by written
4 questions. And they raise for the first time now that it is
5 their position that Swatch SA operates in the United States
6 at least through a wholly-owned subsidiary known as Swatch
7 Group (U.S.). And now, I'm quoting: Accordingly, it has
8 representatives in the United States capable of appearing on
9 its behalf, meaning Swatch AG.

10 This is an improper application of the managing
11 agent procedure at the TTAB. And that is why his request for
12 the deposition of the Swatch Group (U.S.) is unacceptable.
13 That is why his specific subpoena to the Swatch Group (U.S.)
14 by and through Ms. Caroline Faivet is unreasonable, because
15 she is not and cannot bind Swatch AG.

16 Their purpose for taking this deposition, under the
17 guise as a managing agent for Swatch AG, is it's -- it's not
18 acceptable.

19 To the extent that they wanted to depose the Swatch
20 Group (U.S.) as a fact witness in the TTAB proceeding, then
21 they were required to serve a subpoena with a 30(b)6 list of
22 topics, at which time we could designate who we thought would
23 be most appropriate for those topics to sit for a deposition.
24 But they're required to do so not on two business days'
25 notice at the end of the discovery period.

1 THE COURT: Well, if you look at this -- if you
2 look at the date of this letter, August 25th, the close of
3 discovery was September 11th, so you had 17 nonbusiness days
4 from that date to discuss this matter, and you had
5 approximately 9 business days to discuss this matter. I
6 would think that that would be enough time for you to tell
7 him, Look, if you actually give me the topics, maybe I can
8 give you someone different.

9 MR. WAGNER: Well, we -- we didn't -- that was not
10 done. Okay?

11 Instead, they elected to issue the subpoena. It
12 was an improper subpoena. It was on a mere several days'
13 notice. And it was procedurally and substantively defective.

14 Now, to the extent that they wanted to depose
15 Ms. Faivet for some reason, as they sought to do, then they
16 were required to serve her personally, not just deliver it to
17 the corporation service company. And so, if that's the case
18 on a personal subpoena, then it was defective in that regard
19 as well.

20 There's --

21 THE COURT: If it was a 30(b)1 subpoena, how would
22 you deem service to be made?

23 MR. WAGNER: On Ms. Faivet personally.

24 THE COURT: Even under 30(b)1?

25 MR. WAGNER: 30(b)1 is that a party may take the

1 testimony of any person, including a party by oral
2 examination, without leave of court, provided by paragraph 2,
3 okay? The attendance of the witnesses may be compelled by
4 subpoena as provided in Rule 45.

5 THE COURT: Okay. But if she's -- they aren't
6 listed as a corporate representative, you don't think that
7 personally delivering it to the corporate agent would be
8 sufficient?

9 MR. WAGNER: No.

10 THE COURT: Do you have any case law to that
11 effect?

12 MR. WAGNER: We could not find any case law that
13 said that service on the corporation for an officer is
14 sufficient. They're seeking to command her appearance
15 personally or deposition in a case in which discovery closed
16 September 10th, and yet they failed to serve her personally
17 with that subpoena. I don't believe that is -- is lawful.

18 And that is what forms one of the bases on which we
19 had to move to quash the subpoena. We offered to have them
20 withdraw the subpoena. And they resisted, and instead forced
21 us to file this motion.

22 And we believe that the law is very clear, very
23 clear, and the facts are really beyond dispute here. The
24 subpoena is defective, and it should be quashed. And that's
25 what forms the basis of our request for attorney's fees,

1 because quite frankly, they're -- the evidence that exists in
2 the TTAB proceeding -- I -- you know, I hesitate to even get
3 into the TTAB proceeding and the substance of that, because
4 it's really irrelevant here.

5 I mean, what's relevant here is a third-party
6 subpoena that is issued in -- that has defectively issued by
7 Mr. Utermohlen. And that's it. They admit in one of their
8 letters and one of their attachments that it's at the very
9 end of these proceedings, where he says, you know, this is
10 about a third-party enforcement of a third-party subpoena.

11 I can't find it right now. But it's in the last
12 set of letters that Mr. Utermohlen wrote to the Court, where
13 he's talking about the surreply issues.

14 I mean, he makes it -- he makes it crystal clear.
15 Their position here is that that's an effort to enforce a
16 third-party subpoena in this TTAB action. Well, then we have
17 to look at the subpoena. And we really ought not to get into
18 all these TTBA -- TTAB issues because they really are
19 irrelevant to the enforcement of this subpoena.

20 And when you look at the subpoena on its face, it's
21 defective. It was served on August 29th. It was even sent
22 to the opposer, as is required under the rules, until
23 September 1st, so we got it even after it was served, which
24 is another defect that we haven't even talked about.

25 The fact that he by -- hand-delivered the subpoenas

1 to Ms. Faivet -- or not even to Ms. Faivet, but the
2 corporation service company, and yet only mailed them to
3 Mr. Collen? I mean, with three business days before the
4 noticed deposition, the subpoenaed deposition, and I think
5 you just calculated -- or I calculated it to be even less
6 than 10 business days before the close of discovery, he
7 didn't even fax the subpoena to Mr. Collen?

8 Now, you know, so we look at the subpoena, the face
9 of the subpoena, it's to a company without a Rule 30(b)6
10 designation of topics. If it was, in fact, to Ms. Faivet
11 personally, then it should have been served on her
12 personally. It couldn't have been. And maybe that's why he
13 went to the corporation service company because she was out
14 of the country. I don't know. Maybe he can fill us on in
15 that. Maybe he can fill us in on why he felt comfortable
16 mailing the subpoena given the time constraints involved as
17 well.

18 THE COURT: Now, is this other proceeding before
19 the TTAB still going on, or is it --

20 MR. WAGNER: Yes, absolutely. And, in fact,
21 Your Honor, the discovery is over. Ms. Bernard has not
22 sought to extend that period or preserve any rights with
23 respect to this subpoena at all, whatsoever --

24 THE COURT: So what's --

25 MR. WAGNER: -- we are in --

1 THE COURT: Yeah, what stage are you at?

2 MR. WAGNER: We are in what's called the "testimony
3 period," where -- or maybe those dates haven't quite opened
4 yet. But the next phases of the proceeding is called the
5 "testimony periods," where each party puts in front of the
6 Board the record, quote, unquote, that they intend to rely on
7 in the proceedings. And following that, there are
8 briefing -- there is a briefing period where the parties then
9 argue the record that they've now made before the TT --
10 before the Board.

11 At that point, one or both parties may request oral
12 argument. And at that point, it's like going before a --
13 almost like an appellate -- 3-member -- three-board member
14 argument where, you know, it's very much like an appellate
15 argument.

16 Now, in that context, you've got discovery closed.
17 They can't take any more depositions even if they wanted to
18 or even if this Court decided that it -- that they -- that
19 they could, unless the TTAB gave them an opportunity to do
20 that.

21 They have --

22 THE COURT: -- the TTAB give them that opportunity
23 on its own? If they made an application, you opposed it,
24 they could grant it.

25 MR. WAGNER: They could.

1 But why am I doing this work for him? Why are we
2 now 6 months after the close of discovery, first now going to
3 be putting ideas in their mind about how they can perpetuate
4 these proceedings? You know, it's not appropriate. It's not
5 right.

6 So the discovery period is closed, and the
7 testimony period is upon us. And they have a motion to
8 compel discovery that's currently pending. And what is that
9 for?

10 Well, they contend that we stonewalled. And I
11 haven't talked about that yet, and I'm happy to, and I want
12 to, because I think their papers are very misleading on this
13 stonewalling thing. So let me get back to that.

14 But their motion to compel asks for documents,
15 interrogatory responses, and the deposition of Swatch Group
16 (U.S.), Inc. as the managing agent for Swatch AG.

17 They've already taken that step.

18 Now, if they get further discovery, they're not
19 entitled to take anymore because they didn't seek to extend
20 the discovery period. But they are entitled to use that
21 discovery in their testimony period to make that record
22 before the TTAB.

23 So if the TTAB finds that the Swatch Group (U.S.)
24 is the managing agent in the United States for Swatch AG,
25 then Mr. Utermohlen will be entitled to take that deposition.

1 It shouldn't be decided by this Court, not here,
2 not on the subpoena. The subpoena is procedurally and
3 substantively defective, and it should be quashed.

4 Now if, in fact, he makes some motion down the line
5 to reopen the discovery proceedings, which I can't stop him
6 from doing, but if six months down the line and in the middle
7 of the testimony period, he finally, you know, decides to do
8 that and the board grants a reopening of the discovery
9 period, then that's what happens. But here today on this
10 record, the subpoena should be quashed.

11 Now, back to stonewalling, because they make that
12 an issue here, and that's what they -- they urge here that
13 the reason it happened so late in the game was because
14 Omega SA, quote, unquote, stonewalled them in discovery.

15 Well, that is simply not the case. They try to put
16 in front of the Court a very carefully excerpted section of
17 the interrogatory responses, which, by the way, were served
18 late in the discovery period by them, and were responded to
19 by Omega SA in a timely fashion. And there they highlight
20 Interrogatory No. 3.

21 Now, the full text -- they don't give you the whole
22 section of the discovery. It's at Exhibit E to the
23 declaration of William Utermohlen. And if you look -- I'd --
24 well -- if you go to the substance of their brief, they
25 excerpt this one little thing where they show our objection,

1 right, where they say, all we asked -- all we asked was for
2 them to tell us who the three people most knowledgeable of
3 the advertising, marketing, distribution, and sales in the
4 United States of the products listed in response to
5 Interrogatory No. 1. They don't tell you what the
6 interrogatory was. All they do is show the Court that we
7 objected to the Interrogatory No. 3, and said, we'll
8 supplement as soon as you give us some more better clue here
9 as to what you're seeking, because if you look at
10 Interrogatory No. 1, which appears on the preceding page,
11 Number 3, it asks for the -- to identify all products sold or
12 licensed under the Swatch marks in the United States.

13 Now, that is issued to Swatch AG, which is a
14 division of the Swatch Group Limited, which is the
15 second-largest watch manufacturer in the world. The
16 interrogatory is so vague and so overbroad and so burdensome
17 that we had to object.

18 Now in response, though, we tried to give them some
19 information. I mean, this is a company that's been in
20 business in decades. It sells millions of dollars' worth of
21 product every year in the United States and around the world.
22 And if you look at the bottom of that page 3, notwithstanding
23 our objection, we say: We sell watches, watch parts, clocks,
24 parts for clocks, watch cases, watch protectors, neck chains,
25 jewelry, earrings, necklaces, pendants, bracelets, rings,

1 ornamental novelty pins, retail stores services, retail shops
2 featuring watches and so forth. And there are other goods
3 that are sold under the watch -- under the Swatch brand.

4 Now, this opposition proceeding is not about a
5 mountain full of goods. Ms. Bernard has an application
6 pending for the mark "SWAP" S-W-A-P, for watches and
7 watchbands and parts, and basically -- well, again I'm loathe
8 to get into the details of the TTAB proceeding, but, you
9 know, she admitted in her deposition that they chose this
10 mark because it was functional, it described the function,
11 that you swap the watch in and out of the bands so that you
12 have different bands associated with it. So I mean, there's
13 a very solid indication that the mark here is not even
14 protectable, because it's descriptive of a function of the
15 good.

16 Be that as it may, the goods that they solicited in
17 response to Interrogatory No. 1 are hugely disproportionate
18 to the scope of the TTAB proceeding, so that in response to
19 Interrogatory No. 3, we say: Who do you want? For what time
20 period? For what scope of goods? I mean, if I have to list
21 for you the three people most knowledgeable, when? By year?
22 The three people most knowledgeable today? The three people
23 most knowledgeable 5 years ago? 10 years ago? 15 years ago?
24 20 years ago? Because one of the things that's also relevant
25 is the market and our presence in the market. So do you want

1 me to tell you about who was the most knowledgeable of those
2 things when we -- at the inception of the brand --

3 THE COURT: But again -- I mean, first of all, I
4 think this is getting a little off the point of the --

5 MR. WAGNER: I hear you. I'm just trying to give
6 you the background.

7 THE COURT: -- of the subpoena. But in addition,
8 it seems like those type of issues are things that could have
9 been addressed during a conversation. Anyway --

10 MR. WAGNER: And they were.

11 THE COURT: Okay.

12 MR. WAGNER: And they were. My point is that their
13 own discovery devices as they have used them in the TTAB
14 proceeding, have led them to the point where they are right
15 now. It's not by any dilatory or otherwise untoward tactics
16 of Omega SA, or even the Swatch Group (U.S.), Inc.

17 And the fact of the matter is, they served their
18 discovery late; their discovery requests were overbroad,
19 were -- some of them incomprehensible. We did our best to
20 answer them, to object, and to give them information that we
21 could. And we did work with them in the process to give them
22 information as they, you know, honed their discovery
23 requests.

24 But the problem was they waited too long to yet at
25 that point take a deposition on written questions of the

1 opposer, which they should have done months before the close
2 of discovery. They waited then until the last week of the
3 discovery period to serve a defective subpoena on the
4 president of the Swatch Group (U.S.), Inc. under this -- this
5 theory that that is the managing agent in the United States
6 for Swatch AG, so we're going to take the oral deposition of
7 that party because we can't do it of that one, and we don't
8 want to do it on written questions anyway.

9 Well, they're not entitled to it. The Court should
10 quash this subpoena. It's defect; it's improper; it's
11 unfair. And we should be awarded our attorney's fees for
12 having to put the Court through this, because the law and the
13 facts are clear here. And we would respectfully ask that
14 Your Honor grant that relief.

15 THE COURT: Thank you very much for your argument.

16 MR. WAGNER: Thank you.

17 Counsel?

18 MR. UTERMOHLEN: Your Honor, let me just explain
19 why we proceeded with the subpoena.

20 We had filed -- we had served interrogatories in
21 June asking for the three most knowledgeable people about
22 marketing of the Swatch goods which are the goods at issue.
23 That's the basis -- the U.S. trademarks owned by the Swiss
24 company, are the basis for the opposition against our
25 client's mark, SWAP. So U.S. activity is at issue.

1 We didn't get a response. Counsel just pointed you
2 to the response, which says -- which refuses to identify
3 those people. There isn't any doubt who actually takes care
4 of distribution of the Swatch products in the United States.
5 That's Swatch U.S., which is a sizable subsidiary of the
6 Swiss parent.

7 So we tried to figure out in the absence of a
8 response to the interrogatory, who can we get an oral
9 deposition from, because we weren't willing to live with
10 written questions of a foreign party, for obvious reasons.

11 We looked in Swatch SA's -- one of its officers,
12 vice president for sales, therefore relevant, was Frank
13 Furlan. We also looked on the Internet and found that
14 Mr. Furlan was listed in connection with the 2005 New Years'
15 Eve celebration in Times Square as the president of Swatch
16 U.S. So we noticed his deposition.

17 We -- that was on August 18. We got a letter the
18 next week saying that he's actually in Switzerland now and
19 that no one would be produced for an oral deposition because
20 they're all in Switzerland and they weren't willing to
21 produce any.

22 So that's when we wrote the letter on August 25th
23 saying we intended to proceed nonetheless with an oral
24 deposition through the president of Swatch U.S. It took us a
25 few days to determine through corporate records who the

1 president of Swatch U.S. was. And then we used the 30(b)1
2 procedure to serve Swatch U.S. by and through Caroline
3 Faivet, which we submit is an appropriate procedure under the
4 rules. The advisory committee notes make that clear. And
5 the cases we cited make clear that that's an available
6 procedure for any corporation. Doesn't matter whether
7 they're a party or not.

8 THE COURT: Could you read into the record the
9 portion that you're referring to in terms of the
10 appropriateness of using 30(b)1 for a nonparty and also for a
11 corporation?

12 MR. HOLSINGER: Well, I think 30(b)1, all it says
13 is in 30(b)1 is a person desiring to take the deposition of
14 any person upon oral examination -- a corporation is a person
15 within the meaning of that rule.

16 And we cited in our initial brief -- we quoted from
17 the advisory committee note that explains how 30(b)6 came up
18 and was introduced because people had been doing Swatch U.S.
19 by Frank Furlan, Swatch U.S. by Caroline Faivet, Swatch U.S.
20 by John Doe, not finding the person they need that had the
21 relevant information, so you were given the extra option of
22 doing 30(b)6. But that did not destroy the 30(b)1 option,
23 and that's at pages 2 to 3 of our opposition, and the cases
24 we cite are under that, including the Sugarhill case that
25 Your Honor made reference to.

1 And the reason that we went by third-party subpoena
2 was because we didn't want to have this fight about is it or
3 is it not a managing agent. We wound up with that fight
4 anyway. The present status of the TTAB proceeding is a
5 motion to compel by Ms. Bernard seeking proper responses to
6 the written discovery and also seeking a deposition of the
7 party Swatch AS (sic) by and through Swatch U.S. And it's
8 going to be relevant there as to whether Swatch U.S. is a
9 managing agent. We don't think it's relevant here. We think
10 this is just a question of enforcing the Swatch U.S. subpoena
11 as served.

12 The argument -- one of the -- some of the arguments
13 that were originally made, we understand, have been basically
14 dropped. But they're still making the argument that the
15 discovery period is closed in the TTAB, and that that somehow
16 deprives this Court of the power to enforce the subpoena.

17 We submit that it doesn't. It's very clear under
18 the TTAB procedures that once the subpoena issues here, this
19 Court is the one to enforce it.

20 And it's not true that you have to make a motion to
21 reopen the discovery period there in order to seek
22 enforcement. We scheduled the deposition prior to the end of
23 the discovery period. The cases that have been cited -- for
24 instance, the Rhone-Poulenc case by Swatch -- involved
25 somebody who scheduled deposition after the end of the

1 discovery period.

2 We didn't do that here. We indicated we were
3 willing to move it to any convenient date including up to
4 September 11th, which was the last day, or we would have been
5 willing to do it at a later date, if that were necessary.

6 But the procedure in the TTAB, if it were the one
7 to enforce this, you don't to make a motion to extend there
8 either. All you have to do is file a motion to compel. And
9 that's under 37 C.F.R. § 2.120 sub E. And that's, in fact,
10 what we've done there.

11 THE COURT: I'm sorry. Could you read that off
12 again one more time?

13 MR. HOLSINGER: It's 2.120 sub E. The time limit
14 for bringing a motion to compel in the TTAB is not the end of
15 discovery. It's prior to the beginning of the trial
16 testimony period, which is approximately 2 months later.

17 So we submit that there really is no authority that
18 we have to make separate argument -- or file a separate
19 motion to extend the discovery period. It's really, I think,
20 a bootstrapping-type argument by Swatch, who relies on this
21 word, has to be taken by the end; by just not appearing, then
22 they say it hasn't been taken. But once it's been scheduled
23 for a -- time, it's up to the Court to enforce that, and then
24 it'll have to be taken whenever a party comes in compliance
25 with the court order.

1 I don't think that -- I think counsel may have
2 misstated about moving the deposition. One reason we
3 scheduled it for the 5th rather than later in the week is
4 because that was the time that they had already scheduled the
5 deposition of our client. And we didn't want to interfere
6 with that date in case there was travel for counsel going
7 back and forth from Louisiana.

8 THE COURT: Now, what about their argument in terms
9 of not receiving the actual subpoena until a little later on?
10 I think it was -- what did you say? August 31st?

11 MR. WAGNER: No, September 1st.

12 THE COURT: September 1st.

13 MR. HOLSINGER: Your Honor, the procedure under the
14 rules, under Rule 30, you give notice of the deposition to
15 the party. That's what we did. We did that by fax on the
16 29th. There's nothing in the rule that you serve the
17 subpoena on the party. You serve the subpoena on the
18 witness, under Rule 45. That's what we also did. We -- as
19 soon as we could get it to New Jersey, we had it served the
20 next day.

21 There isn't any procedure that says you have to
22 file -- serve the subpoena on the party that's not being
23 subpoenaed. And one of the things that makes that clear, for
24 instance, is Rule 30(g)2 of the federal rules, which says if
25 somebody should, pursuant to a notice, come to a deposition

1 and the party that noticed deposition has failed to serve the
2 subpoena, as a result deponent doesn't appear, then that's a
3 potential sanction. It's clear that the notice is directed
4 to the party to give them the opportunity to come to the
5 deposition or to make any objections they have. And the
6 subpoena is a separate matter that really goes only --
7 compels the attendance of the witness at the deposition.

8 THE COURT: Okay.

9 MR. HOLSINGER: In any event, we did forward it
10 when they requested it prior to the time of the deposition.

11 THE COURT: Okay. And again, the date that you
12 actually delivered it to the agent for the corporation?

13 MR. HOLSINGER: That was on the 30th.

14 THE COURT: Okay.

15 MR. HOLSINGER: And we submit that under 30(b)1,
16 you don't serve Ms. Faivet personally. You serve the
17 corporation because you're taking the deposition of the
18 corporation by and through any designated officer.

19 Today is the first I've heard that Ms. Faivet, they
20 feel, is not the appropriate person. We're willing to
21 consider alternative people, but we want to make sure that
22 the person that comes to a deposition is one -- somebody who
23 does the information that we're seeking. And so we scheduled
24 the president of the company to come.

25 THE COURT: Now, with respect to that, I mean, are

1 you -- are both sides agreeable to discussing this? I mean,
2 I can take a break while you discuss whether there is someone
3 you would be willing to put forward, whether that would be
4 someone that -- maybe, would be someone you'd want to
5 depose --

6 MR. UTERMOHLEN: I think --

7 THE COURT: I mean, in terms of trying to resolve
8 it.

9 MR. WAGNER: No, I can answer that directly. We're
10 not interested in that. The subpoena is defective. We
11 believe it should be quashed. They have a motion before the
12 TTAB to compel a deposition, which, if granted, will entitle
13 them to take the deposition that they want to take. I won't
14 get into any more opposition -- or in reply to his arguments
15 until I'm afforded the opportunity.

16 But with respect to a dialog at this point about
17 some attempted resolution, I don't even know the issues on
18 which they would seek to have that deposition, because we
19 didn't even get 30(b)6 topics. It's now for the first time
20 he's saying, well --

21 THE COURT: Yeah, but it was --

22 MR. WAGNER: -- Ms. Faivet --

23 THE COURT: -- would be contingent upon him
24 providing some information so that you could --

25 MR. WAGNER: Well --

1 THE COURT: -- evaluate that.

2 MR. WAGNER: At this point in the procedure, it is
3 far too complicated for us to go there. The discovery period
4 in the TTAB is closed. The testimony period is upon us.
5 It's not --

6 THE COURT: Well, it sounds like there's --

7 MR. WAGNER: -- not clear --

8 THE COURT: -- there's a dispute as to the whether
9 this -- I guess, the proceeding could be opened with respect
10 to discovery at this point.

11 MR. WAGNER: And I understand the nuance that
12 Mr. Utermohlen is drawing out. And I don't disagree with him
13 that if the TTAB, the proper forum in which to seek to compel
14 the deposition of the Swatch Group (U.S.), is granted, I
15 don't disagree with him that he's entitled to take that
16 deposition within the TTAB proceeding and use it in his
17 testimony period as if that deposition was taken during the
18 discovery period. And that's different from the third-party
19 subpoena.

20 And again, I'll reserve my reply to his arguments,
21 which I would like an opportunity to do. But at this point
22 in the proceedings, I can confirm for the Court that Swatch
23 Group (U.S.), Inc. is not willing at this time to cooperate
24 in the taking of its deposition or that of one of its
25 officers for the purposes of this proceeding.

1 THE COURT: Okay. Thank you.

2 And what was your comment going to be? because I
3 know he jumped in before you.

4 MR. HOLINGER: Well, that's all right.

5 Frankly, Your Honor, one of the reasons we want
6 this third-party deposition, it's not solely for the
7 TTAB-underlying issues. It's also because we want to be able
8 to show that they are the managing agent. We haven't been
9 able to get any relevant discovery from them on that topic,
10 so once we get the subpoena and get the deposition of
11 Ms. Faivet, we expect that will support our motion to compel
12 in the TTAB as well.

13 So unless Your Honor has other questions, I think
14 I've responded.

15 THE COURT: No, thank you very much. I appreciate
16 it.

17 Anything further?

18 MR. WAGNER: Yeah, thank you, Your Honor.

19 Several of the things which Mr. Utermohlen just
20 stated, I think are -- are really profoundly accurate. And
21 that is he said that they couldn't live with a deposition on
22 written questions in the proceeding. I don't understand why
23 that could be. I mean, the rule is that way for everybody --
24 everybody else. The deposition on written questions exists
25 for those proceedings, and he should have availed himself of

1 that.

2 The rule that the deposition must be noticed and
3 taken during the period is what it is. I mean, it's there in
4 black and white. What he said was that once, quote,
5 scheduled for a proper time, closed quote, the deposition may
6 be conducted outside the period. And I don't dispute that
7 either.

8 But to agree with Ms. Bernard's and
9 Mr. Utermohlen's arguments here today, I could serve a
10 subpoena on a third party in a TTAB action the day before
11 discovery closes, scheduling that deposition to occur the
12 last day, the next day, the last day of the discovery period
13 and then fight out all this stuff. Only seek an order
14 enforcing that subpoena to occur after the close of
15 discovery.

16 That's an abuse of the process. It's a misuse of
17 the rules that, if, in fact, that is adopted as an
18 interpretation of that rule.

19 In fact, this deposition was not scheduled for a
20 proper time. He mentioned that they served their discovery
21 request in June. Discovery in this case opened in March.
22 March, April, May, June, 4 months went by. They didn't do
23 anything. They served their discovery on us. We responded
24 in July. And then they realized that they didn't have time
25 to do something. And they tried to get this deposition

1 through this -- this theory of Swatch U.S. -- Swatch Group
2 (U.S.) as this managing agent, which is just plain simply
3 wrong.

4 THE COURT: Okay. I have a question: With respect
5 to the mootness argument and how it relates to the
6 enforcement of the subpoena --

7 MR. WAGNER: Yes.

8 THE COURT: -- aren't they really two separate
9 things?

10 MR. WAGNER: Yes.

11 THE COURT: Can't the subpoena be enforceable, and
12 then wouldn't it be subject to whether the TTAB was willing
13 to have it admitted in that proceeding?

14 MR. WAGNER: I think Your Honor could fashion an
15 order like that if the Court is so inclined, subject to the
16 TTAB reopening the discovery period for the purposes of
17 taking that deposition. I don't suggest that that's beyond
18 the power of this Court.

19 I think, though, that the Court has to first come
20 to the conclusion that the subpoena served on the corporation
21 service company on August 30th was, quote, scheduled for a
22 proper time, that the notice was reasonable to schedule for
23 September 5th, the day after the Labor Day holiday; and that
24 given the circumstances, that it was proper for
25 Mr. Utermohlen to simply drop a copy of that subpoena in the

1 mail.

2 Now, he says he gave notice of the deposition. But
3 that's not the same as providing a copy of the subpoena,
4 because certainly at that point, the letters made clear, we
5 didn't know how it was captioned, we didn't know how it was
6 served, we didn't whether it contained topics, we didn't know
7 the detail of that.

8 And quite frankly given the holiday weekend, we
9 were under a significant gun to make this application to this
10 Court to protect Ms. Faivet, who was out of the country at
11 the time from being subject to the contempt powers of this
12 Court because --

13 THE COURT: See, but that's where I think the
14 conferring comes into play, because --

15 MR. WAGNER: There was no attempt at conferring.

16 THE COURT: At that point, once you had notice that
17 her deposition was sought, wouldn't it have suggested some
18 communication, getting on the telephone and saying, I see
19 that you have this noticed. Now, who are you really looking
20 for? What type of person are you looking for? Maybe this is
21 not the appropriate person. Maybe I can get someone for you.
22 Maybe we could work out the schedule.

23 Wasn't that the appropriate time for that kind of
24 discussion?

25 MR. WAGNER: It may have been. We wrote them back

1 identifying the various deficiencies that we saw with the
2 subpoena, and the issues that we raised before the Court.
3 We're not raising different issues here in the Court than we
4 did in our correspondence with them. And they didn't meet
5 and confer with us. How is it that it's our burden now, to
6 come back to them to say, Oh, well, let me see -- you know,
7 here are all these deficiencies in your subpoena, and here's
8 all this stuff that you did wrong, and we have pointed it all
9 to you. And yet, okay, but we're going to try and help you
10 along.

11 They didn't come back to us following our letter
12 saying, Look, we'll withdraw the subpoena if we can agree
13 XYZ. These are the topics we want. This is kind of person
14 we want. They never attempted that either.

15 THE COURT: Well, I'm suggesting that if you got
16 notice that they were searching for Ms. Faivet for her
17 deposition, that you would think to yourselves, well, maybe
18 she's not right individual. We don't want to put her forward
19 for a variety of reasons. Maybe we could offer someone else.
20 That just seems to me the natural progression of something
21 like that.

22 MR. WAGNER: Well, that's not the progression that
23 they chose to take. They didn't get back to us and ask for
24 someone else or provide us with any topics that they sought
25 to take the deposition on -- before the close of discovery.

1 Basically they said, Do what you go to do. So we filed our
2 application.

3 THE COURT: Okay.

4 MR. WAGNER: I mean, I don't think that the Court
5 should be looking at Swatch Group (U.S.) here as the bad guy
6 in this circumstance. I mean, at some point the Court has to
7 recognize it's not okay to serve a subpoena on August 30th,
8 given the circumstances, not even fax a copy to your opposing
9 counsel, and have that subpoena call for a deposition on the
10 Tuesday following labor day, the Labor Day holiday. And
11 that's not okay. It's unreasonable. And it should be
12 quashed.

13 THE COURT: Okay. Thank you very much.

14 MR. WAGNER: Thank you very much.

15 THE COURT: Anything further?

16 MR. HOLSINGER: No, Your Honor, other than to say
17 that I don't -- I think the question here is just enforcement
18 of the subpoena. The question of what should -- Your Honor
19 was correct: What the TTAB should do with it is a separate
20 issue and really shouldn't be addressed in Your Honor's
21 order.

22 THE COURT: Okay. Thank you very much. I'm just
23 going to take a few minutes.

24 (A break was taken)

25 THE COURT: All right. Well, thank you very much.

1 | for your arguments. I found them very helpful. Thank you
2 | for your submissions. I know you all have spent a
3 | considerable amount of time on this.

4 | I will, however, be thinking about this further and
5 | issuing a decision. So you'll be getting it later on. You
6 | can look on ECF for it.

7 | However, in the meantime, what I suggest is that
8 | you continue to think about some of the comments that I've
9 | made in terms of attempting to resolve this. And if you find
10 | after speaking o your clients that maybe there is some way to
11 | work on this issue, you know, I suggest that you continue
12 | down that path.

13 | If you are able to resolve it, I'd like you to give
14 | us a call so we know, you know, that you've made some effort
15 | or that the actual issue has been resolved, in which case, we
16 | will not issue a substantive decision on this. But
17 | otherwise, that's what we will be working on, and we'll put
18 | it on to ECF, okay?

19 | Any questions from anyone?

20 | MR. WAGNER: No, Your Honor. Thank you very much
21 | for your time.

22 | THE COURT: Thank you. I appreciate it.

23 | UNIDENTIFIED SPEAKERS: Thank you very much,
24 | Your Honor.

25 | (Conclusion of proceedings)

Certification

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I, Sara L. Kern, Court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Sara L. Kern

April 15, 2007

Signature of Approved Transcriber

Date

Sara L. Kern, CET**D-338
King Transcription Services
65 Willowbrook Boulevard
Wayne, NJ 07470
(973) 237-6080

EXHIBIT
C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

IN THE MATTER OF:	:	
	:	
APPLICATION PURSUANT TO RULE 45	:	Civil Action No.
OF THE SWATCH GROUP (U.S.), INC.	:	06-4242 (SRC)
TO QUASH A SUBPOENA, ETC.	:	
	:	
	:	
	:	ORDER
	:	
	:	
	:	

This matter having come before the Court by way of The Swatch Group (U.S.), Inc.'s Motion to Quash a Subpoena Issued in Connection with the Matter of Swatch A.G. v. Amy T. Bernard, and Amy T. Bernard's Cross Motion to Enforce the Subpoena; and both motions having been opposed; and the Court having held oral argument on the motions on January 23, 2007; and the Court having considered the arguments presented in the parties' written submissions and in oral argument; and for good cause shown, and

WHEREAS the Court finds that the subpoena at issue, which seeks to depose The Swatch Group (U.S.), Inc. by and through Caroline Faivet, President of The Swatch Group (U.S.), Inc., is proper in all respects under Fed. R. Civ. P. 30(b)(1); and

WHEREAS the Court finds that service of the subpoena upon The

Swatch Group (U.S.), Inc., through its service agent Corporation Service Company, was proper in all respects; and

WHEREAS the Court finds that notice of the deposition sought by way of the subpoena was proper and reasonable in all respects; and

WHEREAS the Court finds that any technical defects in the subpoena were cured and/or waived; and

WHEREAS the Court lacks the authority to determine the use or admissibility of the deposition testimony sought by way of the subpoena and notes that any applications regarding same are properly directed to the Trademark Trial and Appeal Board;

IT IS on this 19th day of March, 2007, **ORDERED** that:

1. The Swatch Group (U.S.), Inc.'s Motion to Quash [Docket Entry #1] be and hereby is **DENIED**.
2. Amy T. Bernard's Cross Motion to Enforce [Docket Entry #2] be and hereby is **GRANTED**.
3. The Swatch Group (U.S.), Inc.'s application for costs and fees be and hereby is **DENIED**.
4. Amy T. Bernard's application for costs and fees be and hereby is **DENIED**.
5. The parties shall direct any applications regarding the use or admissibility of the deposition testimony sought by way of the subpoena to the Trademark Trial and Appeal

Board.

s/ Claire C. Cecchi

HON. CLAIRE C. CECCHI

United States Magistrate Judge

EXHIBIT
D

MEDIATION, USMJ_Webb

**U.S. District Court
EASTERN DISTRICT OF NORTH CAROLINA (Eastern Division)
CIVIL DOCKET FOR CASE #: 4:09-cv-00204-D**

The Mainstreet Collection, Inc. v. Beehive Wholesale, LLC
Assigned to: Judge James C. Dever, III
Cause: 15:44 Trademark Infringement

Date Filed: 11/24/2009
Jury Demand: Plaintiff
Nature of Suit: 840 Trademark
Jurisdiction: Federal Question

Plaintiff

The Mainstreet Collection, Inc.

represented by **Anthony J. Biller**
Coats & Bennett, PLLC
1400 Crescent Green, Suite 300
Cary , NC 27511
919-854-1844
Fax: 919-854-2084
Email: abiller@coatsandbennett.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Beehive Wholesale, LLC

Date Filed	#	Docket Text
11/24/2009	<u>1</u>	COMPLAINT against Beehive Wholesale, LLC (Filing fee \$ 350 receipt number 0417000000001036606.), filed by The Mainstreet Collection, Inc.. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Supplement Civil Summons to Beehive Wholesale LLC) (Biller, Anthony) (Entered: 11/24/2009)
11/24/2009	<u>2</u>	FINANCIAL DISCLOSURE STATEMENT by The Mainstreet Collection, Inc.. (Biller, Anthony) (Entered: 11/24/2009)
11/25/2009		Case Selected for Mediation - A printable list of certified mediators for the Eastern District of North Carolina is available on the court's Website, http://www.nced.uscourts.gov/applications/mediators.asp . Please serve this list on all parties. (Beasley, B.) (Entered: 11/25/2009)
11/30/2009	<u>3</u>	Summons Issued as to Beehive Wholesale, LLC. Counsel should print summons to effect service. (Mears, C.) (Entered: 11/30/2009)

PACER Service Center
Transaction Receipt

12/28/2009 20:40:43

PACER Login:	ci2017	Client Code:	98885
Description:	Docket Report	Search Criteria:	4:09-cv-00204-D
Billable Pages:	1	Cost:	0.08

**THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION**

**THE MAINSTREETCOLLECTION,)
INC.)
)
 Plaintiff,)
)
v.)
)
BEEHIVE WHOLESALE, LLC,)
)
 Defendant.)**

COMPLAINT

Plaintiff The Mainstreet Collection, Inc. (“Mainstreet”) by and through its counsel, complaining of Defendant Beehive Wholesale, LLC (“Beehive”) alleges and says:

PARTIES

1. Mainstreet is a North Carolina corporation with its principal place of business in Washington, North Carolina.
2. Beehive is a Louisiana LLC with its principal place of business in Ruston, LA and, upon information and belief, the members of Beehive Wholesale LLC are citizens of Louisiana.

JURISDICTION AND VENUE

3. This is an action for trade dress infringement, false designation of origin and unfair competition, arising under the Lanham Act, 15 U.S.C. §§ 1051 *et seq.*, the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1 *et seq.*, and common law trade dress infringement. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338 and 1367.
4. Upon information and belief, Beehive regularly engages in business in this judicial district and markets and sells its infringing products in this judicial district.

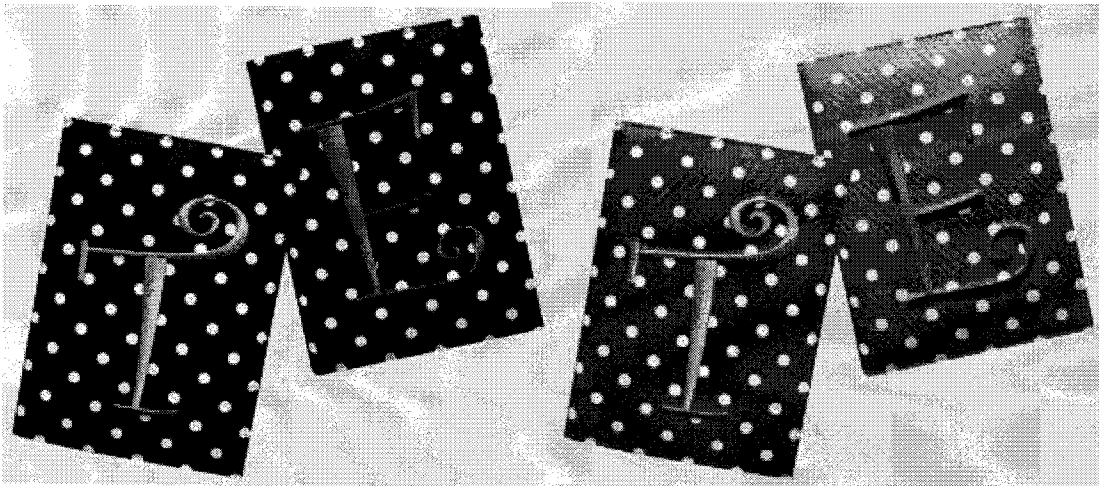
5. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391.

**MAINSTREET AND ITS DISTINCTIVE
HIGH CONTRAST, POLKA DOT MONOGRAM TRADE DRESS**

6. Over the past decade, Mainstreet and its founder, Ms. Tracy Mayo, have built one of the most successful gift product companies in the United States. Mainstreet's product line includes gifts, crafts, kitchenware and other accessories.

7. Mainstreet markets and sells its products nationwide through nationally recognized retailers. The retailers in turn market and sell Mainstreet's products through retail stores, over the Internet, and through direct mail catalogues.

8. In 2008, Mainstreet's sales to retailers skyrocketed from millions of dollars per year to tens of millions of dollars in revenues. Underlying Mainstreet's success was and is a new and highly distinctive line of products that Mainstreet introduced to the market in November 2007. As shown below, these products feature a high contrast polka dot design, typically with contrasting, fluorescent monograms in the distinctive Curlz font:



9. Among other things, the Mainstreet trade dress consists of, but is not limited to, (1) closely and symmetrically arranged, white polka dots on a background of either black, hot

pink, or lime green color, the background often consisting of Moire fabric, and (2) a single, capital letter monogram in Curlz font, colored either lime green, hot pink, or black embroidered on and contrasting with the underlying color.

10. Mainstreet's high contrast, polka dot monogram trade dress is non-functional, as demonstrated by the number of third-party monogram gift products that have alternative packaging and product designs and color schemes.

11. Mainstreet's high contrast, fluorescent monogram polka dot trade dress is inherently distinctive. It was unique, elegant, and new to the gift industry, and as a result, it was an overnight commercial success.

12. Since introducing its high contrast, polka dot monogram gift products, Mainstreet's sales have rapidly increased, with the majority of sales coming from its high contrast, polka dot monogram product line. Specifically, since introducing its distinctive trade dress, Mainstreet has generated over \$30 million in sales. Prior to Mainstreet's introduction of its high contrast, polka dot monogram product line, it conducted sales of approximately \$5 million per year; now, Mainstreet's annual sales are over \$17 million per year and are likely to soon be over \$20 million a year.

13. Since November 2007, Mainstreet has spent approximately \$300,000 in advertising, catalogues, and marketing. Most of Mainstreet's marketing, catalogues, and advertising show and highlight its distinctive and popular high contrast, polka dot monogram products.

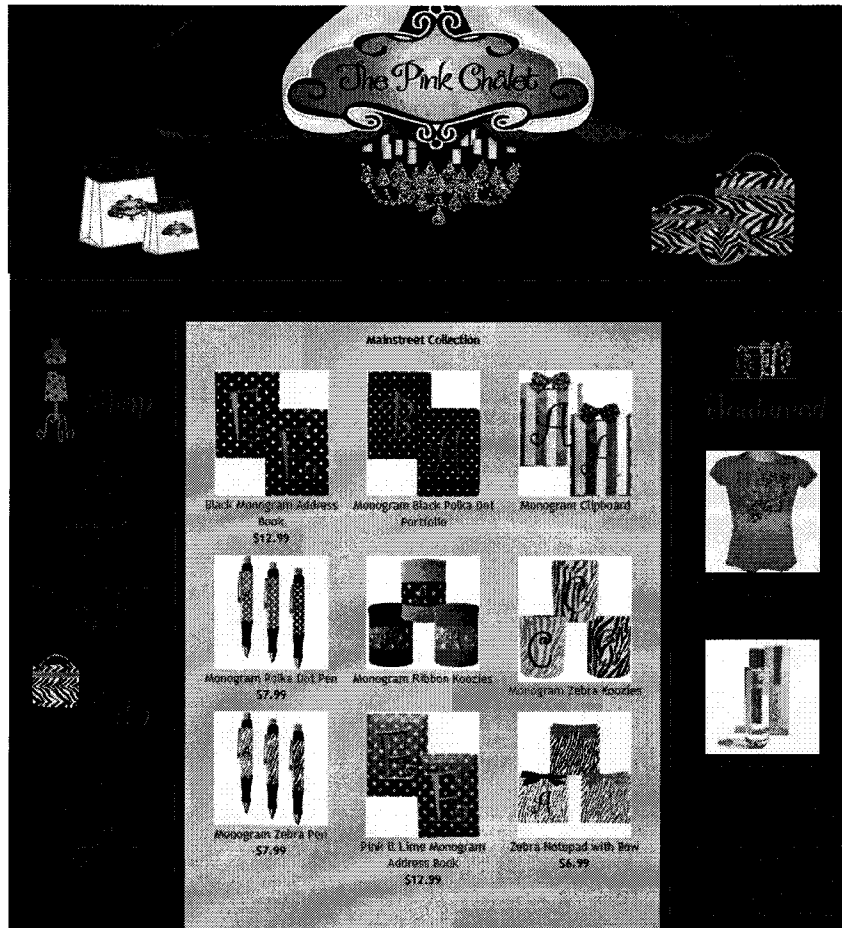
14. In 2008, the leading national retailer of gift items, Hallmark[®], began purchasing Mainstreet's high contrast, polka dot monogram product line and now includes those products in its Hallmark[®] stores nationwide.

15. Approximately 6,000 retail stores across the United States sell Mainstreet's distinctive polka dot monogram product line.

16. Over one hundred Internet websites market Mainstreet's products and feature its distinctive trade dress, to include the following representative examples:



(<http://www.merrybelles.com/macopodotnow.html>)

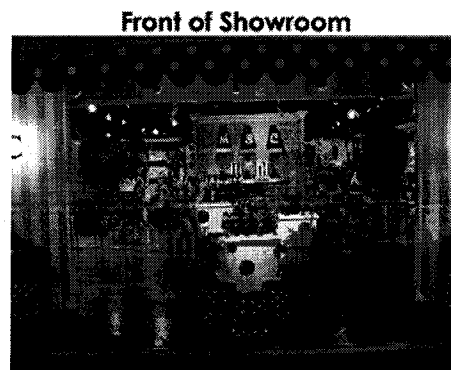


(http://thepinkchalet.com/category_49/Mainstreet-Collection.htm)

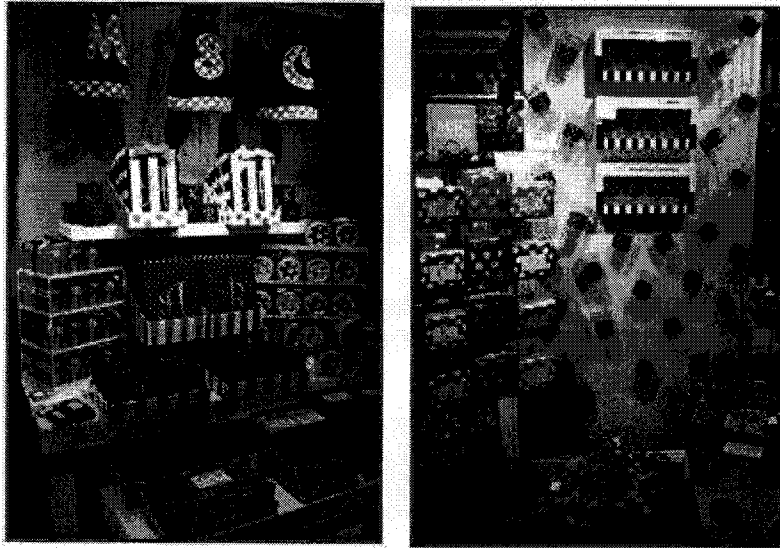
17. Mainstreet also markets its products to retailers through a secure and password protected website at www.gowhimsey.com. Although access to the Mainstreet website is limited to retailers, since it began tracking users in mid-August 2009, the site has generated over 76,100 views through November 23, 2009. MSC's online catalogue at Active Merchandiser's website generated over 931,000 page views over the same period.

18. Mainstreet maintains two permanent corporate showrooms that prominently display Mainstreet's high contrast polka dot trade dress through both the actual merchandise and the showroom décor. Presently, Mainstreet has 5,000 square feet of showroom space at the AmericasMart® Atlanta market center, the largest wholesale gift market of its kind. Mainstreet's

corporate showroom at AmericasMart® Atlanta won the coveted “Best of Floor” award in July 2009. As depicted below, Mainstreet’s showrooms prominently display Mainstreet’s distinctive, polka dot monogram trade dress:



Mainstreet maintains a second permanent showroom at the Dallas Market Center, the second largest wholesale gift marketplace. Presently, Mainstreet’s Dallas showroom spans 2,800 feet and is depicted below:



19. Mainstreet participates in the market trade shows hosted by the campuses housing its showrooms in the AmericasMart® Atlanta and Dallas Market Center. AmericasMart® Atlanta hosts major trade shows in January and July of each year, and mini shows in March and September. Dallas Market Center hosts major shows in January and June, and mini shows in March and September. Tens of thousands of retailers attend each market show in Dallas and Atlanta and witness Mainstreet's trade dress prominently displayed both in its showroom and throughout the trade show campuses. Mainstreet spends significant time and money to promote its brand and products during these national trade shows, including:

- a. Developing large advertisements for Mainstreet's products that span walls, climb pillars, and frame doors throughout the marketplace. These advertisements incorporate Mainstreet's high contrast polka dot line through the products showcased in the advertisements, as well as in the artwork on the advertisements.

Examples of Mainstreet's trade show advertising include:



- b. Participating in television interviews from Mainstreet's corporate showrooms. At past trade shows, television stations from Atlanta, New York, and Dallas produced television segments about Mainstreet. Mainstreet's most recent television segment occurred in Dallas in June 2009.
- c. Hosting a cocktail hour with live entertainment as part of the showroom grand opening festivities at the last markets.
- d. Displaying its signature high contrast polka dot monogram merchandise.

Mainstreet's efforts in promotion during trade shows resulted in millions of dollars at wholesale from the most recent trade shows.

20. Prominent trade show publications feature Mainstreet's line of high polka dot monogram products in their trade show publications. These industry publications are sent to thousands of retailers. *The Market Magazine*, AmericasMart® Atlanta's premier catalogue, features Mainstreet's monogram catalogue. Nearly all the items displayed in the monogram catalogue feature Mainstreet's high contrast polka dot trade dress. One hundred twenty five thousand (125,000) retailers received a copy of *The Market Magazine*. Mainstreet also places a

full page advertisement in *The Source*, the Dallas Market's trade publication that is mailed to 50,000 retailers. Mainstreet's high contrast polka dot line of products is prominently displayed in these advertisements.

21. Mainstreet's high contrast, polka dot monogram products are also featured in Palmer Marketing's premier catalogue *Idea Book*. In October 2008, Palmer distributed six million copies of *Idea Book* with Mainstreet's distinctive product line to consumers nationwide. In addition to *Idea Book*, Palmer Marketing creates catalogs for retail stores and allows wholesalers from its *Idea Book* to include insert pages in those retail store catalogues. Mainstreet's inserts featuring its distinctive product line reached 758,000 consumers in Spring 2009; 659,000 consumers in Winter 2008; and 600,000 consumers in Winter 2009. These inserts also showcased Mainstreet's high contrast polka dot products.

22. Since the introduction of Mainstreet's high contrast, polka dot monogram line of products, the leading gift industry trade publication ranks Mainstreet at or near the top of its categories nationwide. *Gift Beat*, the gift industry's premier rankings newsletter, now ranks Mainstreet among the top gift and product companies in the nation. The rankings and accolades *Gift Beat* has awarded to Mainstreet include:

- a. In August 2009, Mainstreet topped *Gift Beat's* national charts, placing first for monogrammed gifts.
- b. In February 2009, *Gift Beat* awarded Mainstreet high accolades for personalized gifts, ranking Mainstreet second in the nation, first in the South, second in the Midwest, and fourth in the northeast.
- c. In September of 2008, *Gift Beat* ranked Mainstreet number two in the nation for personalized gifts.

- d. *Gift Beat* ranked Mainstreet sixth in the nation for highest markups, ninth in the nation for reorders, and ninth in the nation for fashion accessories in September 2009.
- e. *Gift Beat* ranked Mainstreet fourth in the nation for girl themed gifts and awarded it an honorable mention for graduations gifts in July 2009.
- f. *Gift Beat* ranked Mainstreet third in the South and seventh in the nation for stationary accessories, fourth in the South and eight nationally for reorders, and fifth in the nation for friendship gifts in May 2009.
- g. In June 2006, Mainstreet placed third in the South and seventh in the nation for gifts costing five dollars (\$5) or less. *Gift Beat* also awarded MSC honorable mentions for glassware gifts and functional gifts.
- h. March 2009, *Gift Beat* ranked Mainstreet eighth in the nation for teen/tween gifts.
- i. In October 2009, Mainstreet placed fourth in the South for wine-themed gifts, and fifth in the South for fabric-themed gifts. Mainstreet earned honorable mentions on *Gift Beat's* national charts for steady sellers, tabletop/accessories, fabric-themed gifts, and wine-themed gifts.
- j. In August 2008, *Gift Beat* ranked Mainstreet third in the south for summer/seasonal gifts, a category in which it won an honorable mention nationally.

23. In the past two years, Mainstreet has sold tens of millions of dollars worth of product bearing its high contrast, polka dot monogram trade dress, and has invested hundreds of thousands of dollars and countless hours advertising, marketing and promoting its high contrast, polka dot monogram trade dress. As a result of such investments of time, effort, and resources in

the development of its distinctive and well known trade dress designs, Mainstreet's trade dress has acquired secondary meaning amongst consumers and is widely recognized as emanating from a single source and reflective of the highest quality standards. Mainstreet has accordingly built up substantial goodwill and selling power in its high contrast, polka dot monogram trade dress, and this trade dress has become an asset of tremendous value.

24. Mainstreet's high contrast, polka dot monogram trade dress is inherently distinctive, non-functional, and is well known and exclusively identified in the minds of the relevant public with monogram gift items made and sold by a single source.

BEEHIVE'S WRONGFUL ACTS

25. Beehive is a Louisiana entity that directly competes with Mainstreet and its retail customers. Beehive operates retail stores where, upon information and belief, it sells the accused products, maintains a website to sell its wholesale products at <http://www.beehivewholesale.com>, and also shows its products at the same trade shows as Mainstreet: AmericasMart® Atlanta and Dallas Market Center.

26. During 2008, Beehive purchased products at wholesale from Mainstreet, to include thousands of dollars worth of products bearing Mainstreet's distinctive high contrast, polka dot monogram trade dress.

27. Mainstreet's products were very popular with Beehive's customers, and Beehive prominently placed Mainstreet's products in its retail stores so that Mainstreet products were one of the first things their customers saw upon entering the Beehive stores. Mainstreet's products sold rapidly.

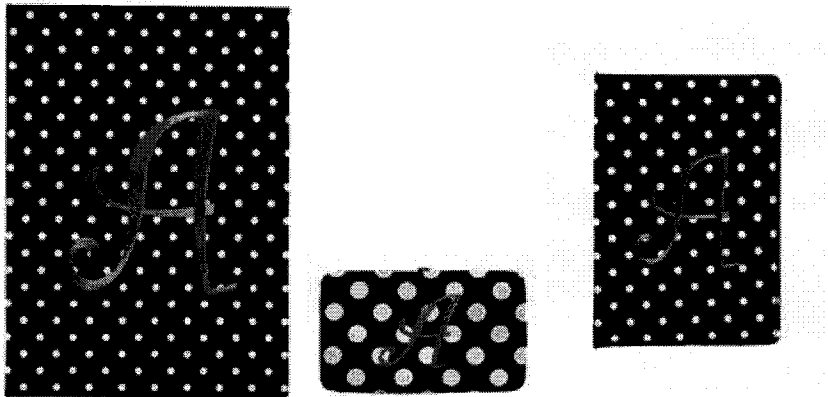
28. In February 2009, Mainstreet discontinued selling to Beehive based on concerns that Beehive was or would be copying Mainstreet products.

29. On or about November 13, 2009, Beehive distributed an email solicitation in which Beehive advertises at wholesale prices, products flagrantly copying Mainstreet's distinctive, high contrast, polka dot monogram and trade dress. The email was distributed into North Carolina and, upon information and belief, was distributed nationwide. A copy of Beehive's email advertisement is shown below.



30. Mainstreet visited Beehive's website and learned that Beehive markets and sells numerous products that flagrantly copy Mainstreet's distinctive high contrast, polka dot monogram trade dress. Examples of Beehive's infringing products include, but are not limited to:

a. Beehive's "Black Dot Collection" portfolio, flat wallet, and small notepad;



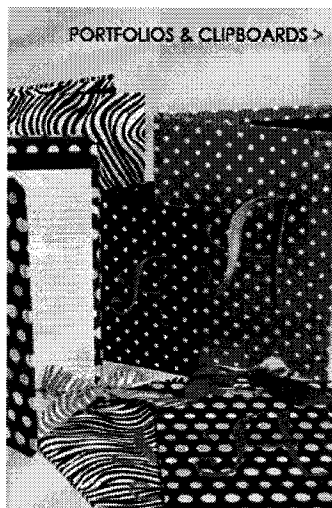
b. Beehive's "Green Dot Collection" coin purse, flat wallet, and photo wallet; and



c. Beehive's "Pink Dot Collection" portfolio, coin purse, and make-up bag



31. On November 23, 2009, Mainstreet discovered that Beehive is marketing Mainstreet's trade dress on the front page of Beehive's website, using the same image as was distributed in the aforementioned email advertisement, as follows:



32. Beehive slavishly copies Mainstreet's distinctive high contrast, polka dot monogram trade dress and offers it on numerous products that directly compete with the products Mainstreet offers. Beehive simply counterfeited Mainstreet's distinctive, well known, and highly successful product line.

33. Beehive's "Black Dot Line" slavishly copies the salient features of Mainstreet's high contrast, black with white polka dot monogram trade dress. With regard to these products, Beehive:

- a. Copies using black fabric with white polka-dots for the exterior covers of the products;
- b. Upon information and belief, uses the same Moire fabric for the exterior cover;
- c. Upon information and belief, uses the same sized dots at the same relative locations;
- d. Copies the same fluorescent monogram coloring: lime green and hot pink;

- e. Uses the identical Curlz font for each monogram;
- f. Upon information and belief, copies the identical size, position, and boldness for each monogram; and
- g. Upon information and belief, uses the same denier thread for each monogram.

34. Beehive's "Green Dot Line" slavishly copies the salient features of Mainstreet's high contrast, green with white polka dot monogram trade dress. With regard to these products, Beehive:

- a. Copies using green fabric with white polka-dots for the exterior covers of the products;
- b. Upon information and belief, uses identical Moire fabric for the exterior cover;
- c. Upon information and belief, uses the same sized dots at the same relative locations;
- d. Copies the same fluorescent monogram coloring: hot pink;
- e. Uses the identical Curlz font for each monogram;
- f. Upon information and belief, copies the identical size, position, and boldness for each monogram; and
- g. Upon information and belief, uses the same denier thread for each monogram.

35. Beehive's "Pink Dot Line" slavishly copies the salient features of Mainstreet's high contrast, pink with white polka dot monogram trade dress. With regard to these products, Beehive:

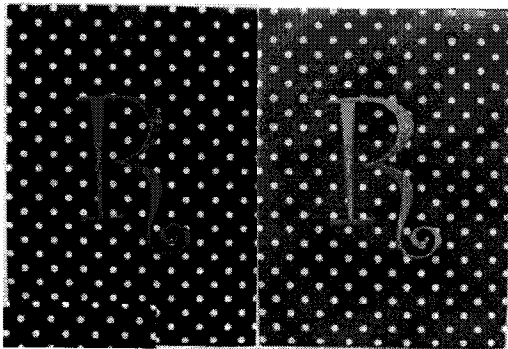
- a. Copies using pink fabric with white polka-dots for the exterior covers of the products;
- b. Upon information and belief, uses identical Moire fabric for the exterior cover;

- c. Upon information and belief, uses the same sized dots at the same relative locations;
- d. Copies the same fluorescent monogram coloring: lime green;
- e. Uses the identical Curlz font for each monogram;
- f. Upon information and belief, copies the identical size, position, and boldness for each monogram; and
- g. Upon information and belief, used the same denier thread for each monogram.

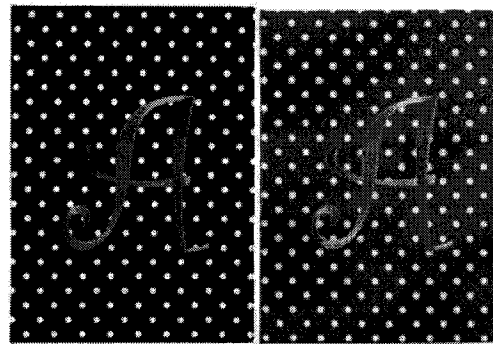
36. To the ordinary observer, Beehive is marketing and selling identical copies of Mainstreet's high contrast, pink with white polka dot monogram products, Mainstreet's high contrast, green with white polka dots monogram products, and Mainstreet's high contrast, black with white polka dots monogram products.

37. Mainstreet recognized that many of the products Beehive offers are products Mainstreet advertised in its monogram catalogue that was distributed by *The Market Magazine*. For example:

- a. Mainstreet advertised its portfolios with its distinctive, high contrast, polka dot monogram trade dress in its monogram catalogue (below left). Beehive now offers portfolios that incorporate Mainstreet's trade dress (below right).

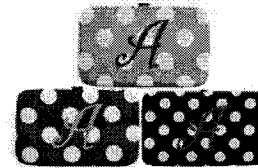
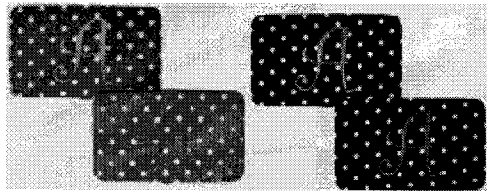


Mainstreet Portfolios

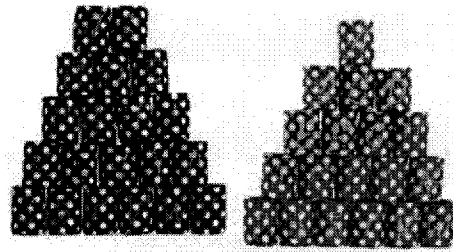


Beehive Portfolios

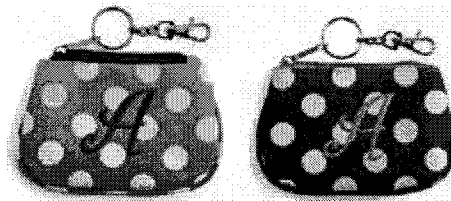
- b. Mainstreet advertised its flat wallets with its distinctive, high contrast, polka dot monogram trade dress in its monogram catalogue (below left). Beehive now offers flat wallets that incorporate Mainstreet's trade dress (below right).



- c. Mainstreet advertised its koozies with its distinctive high contrast, polka dot trade dress in its monogram catalogue (below left). Beehive now offers koozies that incorporate Mainstreet's trade dress (below right).



- d. Mainstreet advertised its coin purses incorporating its distinctive, high contrast, polka dot monogram trade dress in its monogram catalogue (below left). Beehive now offers coin purses incorporating Mainstreet's distinctive trade dress (below right).



38. Beehive was aware of Mainstreet's high contrast, polka dot monogram product line prior to marketing and selling its accused portfolio.

39. Upon information and belief, Beehive attended the 2009 trade shows at AmericasMart® Atlanta. Like every attendee of the 2009 trade shows at AmericasMart® Atlanta, Beehive received a copy of Mainstreet's monogram catalogue with Beehive's copy of *The Market Magazine*.

40. Beehive purposefully copied Mainstreet's trade dress and product offerings to directly compete against Mainstreet.

41. Undoubtedly, Beehive's counterfeit product confuses the ultimate purchasers and consumers of Mainstreet's products into believing that Beehive's product originates from, is associated with, or is otherwise approved by Mainstreet. This consumer confusion unfairly benefits Beehive and irreparably harms Mainstreet.

42. Upon information and belief, with full knowledge of Mainstreet's high contrast, polka dot monogram trade dress, Beehive purposefully and intentionally copied Mainstreet's trade dress to capitalize on the valuable goodwill and recognition established by Mainstreet's marketplace success in the monogram gift industry.

43. The parties' respective products are sold through retail outlets that often times compete in the same geographic marketplaces for the same consumers. The parties' respective products are also marketed and sold to the same wholesalers, to include at the same trade shows, namely AmericasMart® Atlanta and the Dallas Market Center.

44. Beehive's use of Mainstreet's high contrast, polka dot monogram trade dress in connection with the sale of monogram gift items has caused consumer confusion and irreparable

damage to Mainstreet and, if not enjoined, will continue to cause consumer confusion and irreparable injury to Mainstreet, its retailers, and to the consuming public.

COUNT I
UNFAIR COMPETITION
15 USC § 1125(a) & NC Common Law

45. Mainstreet repeats and realleges, as if fully set forth herein, each and every allegation contained in the foregoing paragraphs.

46. Beehive's actions have caused and are likely to continue causing confusion, mistake, and deception as to the origin, sponsorship, or approval of Beehive's high contrast, polka dot monogram products, and thus constitute trade dress infringement, false designation of origin, passing off, and unfair competition with respect to the distinctive look and feel of the Mainstreet high contrast, polka dot monogram trade dress, all in violation of § 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), and North Carolina common law.

47. Mainstreet's trade dress is valid and enforceable, not functional and inherently distinctive and has attained secondary meaning such that consumers identify it as originating from a single source.

48. On information and belief, Beehive's copying has been deliberate, willful, intentional and in bad faith, with disregard of Mainstreet's rights and with intent to deceive or to create mistake or confusion in the minds of Mainstreet's customers and of the public generally, including the relevant public in North Carolina.

49. Beehive's wrongful conduct has permitted or will continue to permit Beehive to earn substantial revenues and profits on the strength of Mainstreet's extensive advertising, consumer recognition, and goodwill.

50. The goodwill of Mainstreet's business is of enormous value, and as a result of Beehive's acts as alleged herein, Mainstreet has suffered and will continue to suffer irreparable harm should Beehive's unfair competition be allowed to continue to the detriment of Mainstreet's trade, reputation and good will.

51. Mainstreet cannot be adequately compensated for these injuries by damages alone, and Mainstreet has no adequate remedy at law for Beehive's infringement of its rights. Mainstreet is entitled to injunctive relief, as well as enhanced damages and attorneys' fees.

COUNT II
N.C. GEN. STAT. § 75-1.1

52. Mainstreet repeats and realleges, as if fully set forth herein, each and every allegation contained in the foregoing paragraphs.

53. Beehive is trading upon Mainstreet's goodwill and reputation and passing off Beehive's goods and services as affiliated with Mainstreet, and Beehive's use of the Mainstreet trade dress has caused and is likely to continue causing confusion, mistake, and deception as to the affiliation, connection, or association of Beehive with Mainstreet, or as to the origin, sponsorship, or approval of Beehive's goods and services or commercial activities by Mainstreet.

54. Beehive's conduct constitutes unfair or deceptive acts, practices, and methods of competition in violation of N.C. Gen. Stat. § 75-1.1(a).

55. Beehive's passing off has a tendency to deceive and is unfair because it offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers within the State of North Carolina.

56. On information and belief, Beehive's conduct has been deliberate, willful, intentional and in bad faith.

57. Beehive's wrongful conduct has caused Mainstreet to suffer and, absent intervention of the Court, will cause Mainstreet to continue to suffer actual damages and damage to its business, reputation, and goodwill.

58. Beehive's wrongful conduct has caused Mainstreet to suffer and, absent intervention of the Court, will cause Mainstreet to continue to suffer irreparable harm for which there is no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE Mainstreet respectfully prays the Court to:

- (a) issue preliminary and permanent injunctive relief, enjoining Beehive, and its agents, servants, employees, successors and assigns, and all other persons acting in concert with or in conspiracy with or affiliated with Beehive, from: (1) reproducing, distributing, displaying or creating any copies or derivative works of any products or product packaging that are substantially similar to Mainstreet's trade dress; (2) using any advertising or promotional material referencing Mainstreet or its trade dress; (3) using any of Mainstreet's trade dress, including without limitation hot pink, lime green, white and black polka dot, with monograms in Curlz font, or any confusingly similar designs, colors, symbols, or combinations thereof in connection with the sale of Beehive's goods; (4) using any other designation which is confusingly similar to Mainstreet's trade dress or that is likely to create the impression that Beehive's business or services are associated with Mainstreet or are endorsed, authorized, or sponsored by Mainstreet; (5) engaging in unfair competition by infringing, misappropriating, or diluting Mainstreet's trade dress; (6) advertising or representing, directly or

indirectly, that Beehive is in any way affiliated with Mainstreet; (7) engaging in any actions in which Beehive holds itself out as having any association with Mainstreet; and (8) engaging in any other activities constituting an infringement of Mainstreet's trade dress and copyright rights;

- (b) Order Beehive to sequester, forfeit, and deliver up for destruction all infringing product in its possession, custody, or control, or in the possession, custody, or control of any of its agents or representatives, that bear Mainstreet's high contrast, polka dot monogram trade dress, or confusingly similar variations thereof;
- (c) Order Beehive to deliver up for destruction all materials in its possession, custody, or control, or in the possession, custody, or control of any of its agents or representatives, that display or show Mainstreet's high contrast, polka dot monogram trade dress, or confusingly similar variations thereof, including but not limited to signage, electronic publications, labels, catalogs, advertisements, pictures, promotional materials, and the like;
- (d) Find that Beehive's acts were willful and intentional and order Beehive to pay Mainstreet additional damages equal to three times the actual damages awarded to Mainstreet pursuant to 15 U.S.C. § 1117(a) and/or N.C. Gen. Stat. § 75-16;
- (e) Require Beehive to account to Mainstreet for its profits and the damages suffered by Mainstreet as a result of Beehive's acts alleged herein, including but not limited to an accounting by Beehive of all revenue and profits derived from its sales of goods as a result of Beehive's infringement under 15 U.S.C. § 1117, and that Mainstreet be awarded Beehive's profits as a consequence of the acts of infringement and that such award be trebled pursuant to 15 U.S.C. § 1117(a)

and/or N.C. Gen. Stat. § 75-16;

- (f) that Mainstreet be awarded punitive damages;
- (g) that this Court award Mainstreet its taxable costs and disbursements in this action pursuant to 15 U.S.C. §1117;
- (h) Award pre-judgment and post-judgment interest as allowed by law;
- (i) Award Mainstreet its reasonable attorneys' fees and expenses pursuant to 15 U.S.C. § 1117, N.C. Gen. Stat. § 75-16.1 and/or North Carolina common law; and
- (j) that Mainstreet be afforded such other relief to which it is entitled pursuant to the Lanham Act, the North Carolina Unfair and Deceptive Trade Practices Act, North Carolina common law, and as this Court deems just and equitable.

MAINSTREET DEMANDS A TRIAL BY JURY

COATS & BENNETT, P.L.L.C.
Attorneys for Mainstreet Collections, Inc.

/s/ Anthony J. Biller
N. C. State Bar No.: 25,117
abiller@coatsandbennett.com
Emily M. Haas
N.C. State Bar No.: 39,716
ehaas@coatsandbennett.com
1400 Crescent Green, Suite 300
Cary, North Carolina 27518
Telephone: (919) 854-1844
Facsimile: (919) 854-2084

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

<p>I. (a) PLAINTIFFS THE MAINSTREET COLLECTION, INC.</p> <p>(b) County of Residence of First Listed Plaintiff _____ (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p>(c) Attorney's (Firm Name, Address, and Telephone Number) Coats & Bennett, PLLC, 1400 Crescent Green, Suite 300 Cary, NC 27518 (919) 854-1844</p>	<p>DEFENDANTS BEEHIVE WHOLESALE, LLC</p> <p>County of Residence of First Listed Defendant _____ (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.</p> <p>Attorneys (If Known) _____</p>
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<p>II. BASIS OF JURISDICTION (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input type="checkbox"/> 2 U.S. Government Defendant</p> <p><input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p>III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td></td> <td>PTF</td> <td>DEF</td> <td></td> <td>PTF</td> <td>DEF</td> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		PTF	DEF		PTF	DEF	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
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Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p>PERSONAL INJURY</p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury	<p>PERSONAL INJURY</p> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p>PERSONAL PROPERTY</p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <p>PROPERTY RIGHTS</p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input checked="" type="checkbox"/> 840 Trademark	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	SOCIAL SECURITY
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentence <p>Habeas Corpus:</p> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))
			IMMIGRATION	FEDERAL TAX SUITS
			<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS Third Party 26 USC 7609

V. ORIGIN (Place an "X" in One Box Only)

1 Original Proceeding

2 Removed from State Court

3 Remanded from Appellate Court

4 Reinstated or Reopened

5 Transferred from another district (specify)

6 Multidistrict Litigation

7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 15 U.S.C. Sections 1051, et seq

Brief description of cause:
 Trade dress infringement, false designation of origin, & unfair competition

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23


DEMAND \$ _____

CHECK YES only if demanded in complaint:
 JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY (See instructions):

JUDGE _____ DOCKET NUMBER _____

DATE: 11/24/2009

SIGNATURE OF ATTORNEY OF RECORD: 

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFF _____ JUDGE _____ MAG. JUDGE _____

UNITED STATES DISTRICT COURT

for the

Eastern District of North Carolina

THE MAINSTREET COLLECTION, INC.

Plaintiff

v.

BEEHIVE WHOLESALE, LLC

Defendant

Civil Action No.

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Beehive Wholesale, LLC
c/o Brent Bernard, Registered Agent
1901 North Service Rd. East
Ruston LA 71270

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it) — or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address are:

Anthony J. Biller
Coats & Bennett, PLLC
1400 Crescent Green, Suite 300
Cary, NC 27518
Telephone: (919) 854-1844
Facsimile: (919) 854-2084
E-mail: abiller@coatsandbennett.com

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

DENNIS P. IAVARONE, CLERK OF COURT

Date:

Signature of Clerk or Deputy Clerk

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4(1))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
_____ on *(date)* _____ ; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
_____ on *(date)* _____ ; or

I returned the summons unexecuted because _____ ; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

EXHIBIT

E

REDACTED

EXHIBIT

F

REDACTED

EXHIBIT
G

REDACTED

EXHIBIT
H

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

-----X		
Swatch S.A. (Swatch AG) (Swatch Ltd.)	x	
	x	
Opposer,	x	Opposition No.: 91169312
	x	Mark: SWAP
v.	x	
	x	
Amy T. Bernard and	x	
Beehive Wholesale LLC	x	
Applicants.	x	
-----X		

DECLARATION OF EDITH GARVEY

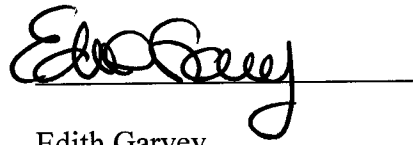
I, Edith Garvey, declare as follows:

1. I am a paralegal at the firm Collen IP, attorney for Opposer Swatch S.A. (Swatch AG) (Swatch Ltd.) in this action. I submit this declaration in support of Opposer's Notice of Reliance. The facts set forth in this Declaration are personally known to me and I have firsthand knowledge thereof. If called as a witness, I could and would competently testify to all facts within my personal knowledge, except where stated upon information and belief.

2. On December 28, 2009, I visited the website of "Orange County Creations", located at http://occreations.net/build_a_watch_swap_faces. Attached hereto as Exhibit A is a true and correct copy of the website printout. The main text area of the website describes "Changeable watch bands (also known as "Build-A-Watch)." The bottom of the main text area contains a series of hyperlinks, among which are entries for "Build-A-Watch (SWAP) Faces," "Build-A-Watch (SWAP) Bands," "Chunky SWAP Watch Faces" and "Chunky SWAP Watch Bands." The menu located on the left-hand side of the web page contains corresponding links bearing these same descriptions. The title bar of the webpage also refers to a "SWAP Watch."

I declare under penalty of perjury under the laws of the United States of America, that the foregoing is true and correct.

Executed this 28th day of December, 2009, at Ossining, New York.

A handwritten signature in cursive script, appearing to read "Edith Garvey", is written over a horizontal line. The signature is fluid and somewhat stylized.

Edith Garvey

Exhibit A

Orange County Creations

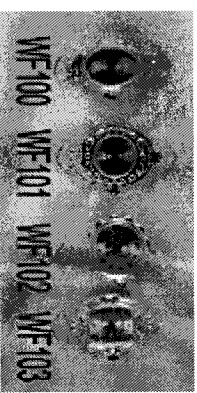
Home of the Original Build-A-Watch

- ★ HOME
- ★ HOST A VIRTUAL JEWELRY PARTY
- ★ FUND RAISING OPPORTUNITIES
- ★ NEWLY ADDED ITEMS
- ★ SAFETY PIN WATCH PARTY
- ★ SAFETY PIN BEAD WATCHES
- ★ SAFETY PIN BEAD WATCH KITS
- ★ PEACE SYMBOL ITEMS
- ★ POLKA DOT AND BUTTON WATCHES
- ★ GO GREEN, RECYCLE, UP-CYCLE
- ★ JUICY INSPIRED TEEN JEWELRY
- ★ TEEN AND GIRLS JEWELRY
- ★ ANGELS AND CROSSES
- ★ ANKLETS
- ★ AUTISM AWARENESS JEWELRY
- ★ BEADS FOR LIFE
- ★ BEADED WATCHES
- ★ BEADED WINE STOPPERS
- ★ BOOKMARKS WITH WATCH
- ★ BRACELETS
- ★ BREAST CANCER JEWELRY
- ★ BUILD-A-WATCH (SWAP) FACES
- ★ BUILD-A-WATCH (SWAP) BANDS
- ★ CHUNKY SWAP WATCH FACES
- ★ CHUNKY SWAP WATCH BANDS

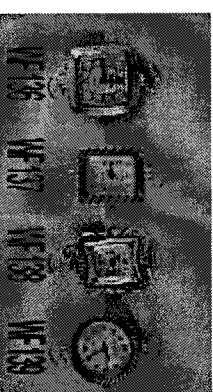
Changeable watch faces can be used on our Changeable watch bands (also known as Build-A-Watch). The Changeable watch faces and bands allow you to order just a few faces and bands and have a large variety of choices. All watch bands will fit on all watch faces. Most watch faces and loops are approximately 1 1/2" long. We specialize in Geneva and Trendz watch faces. These are of the highest quality. Most batteries last 1 year. We will replace your battery for free for as long as you own your watch. Just send the watch face to our [mailing address](#) (listed in our [About our products link](#)) and we will replace the battery and mail it back to you.

Interchangeable watch bands and faces come in Silver and Gold tone. Click below on the watch face you want to order and enter the Product ID code for the watch face.

Click on the Build-A-Watch bands link on the left to view the instructions for ordering Changeable watch bands.



Colored Watch Faces



Silver, Gold and Copper Watch Faces



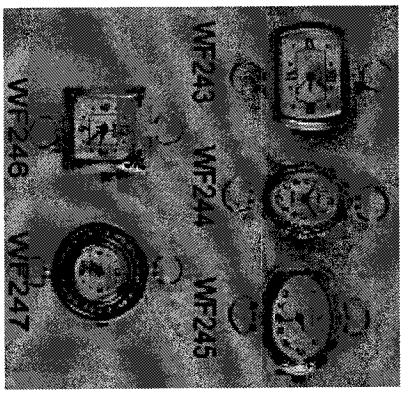
Bejeweled Watch Faces

Product See

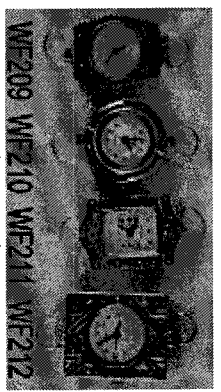
Do you
Click h
Almost
best wa
with us

We acc
Paypal
Checks

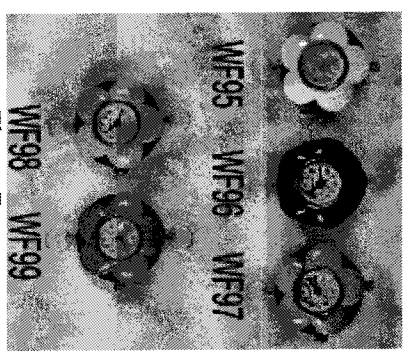
- ★ CAR JEWELRY
- ★ CELL PHONE CHARMS
- ★ CUFF AND BANGLE WATCHES
- ★ DESIGN YOUR OWN WATCH
- ★ EARRINGS AND EAR THREADS
- ★ EASTERN STAR JEWELRY
- ★ ENAMEL AND METAL WATCHES
- ★ EVIL EYE AND GYPSY JEWELRY
- ★ EYEGLASS & ID TAG HOLDERS
- ★ FLORES PEQUENAS, FLOWERS
- ★ FOSSIL BEAD COLLECTION
- ★ FREE CHARMS
- ★ KEY RINGS AND PURSE CHARMS
- ★ LAVA BEADED JEWELRY
- ★ LEATHER BAND WATCHES
- ★ MEDICAL ALERT ID
- ★ MOOD BEAD JEWELRY
- ★ NECKLACES AND PENDANTS
- ★ NEED A JOB WRIST BANDS
- ★ OLYMPIC JEWELRY
- ★ RIBBON WATCHES
- ★ SEA GLASS JEWELRY
- ★ TEEN/GIRLS WALLETS & PURSES
- ★ TWEEN WATCHES (8 -12 YRS)
- ★ JEWELRY KITS
- ★ BATTERIES/JEWELRY CARE
- ★ GIFT BOXES AND BAGS
- ★ GIFT CERTIFICATES
- ★ WHOLESALE PURCHASES
- ★ WHOLESALE KEY CHAINS
- ★ JOB OPPORTUNITIES
- ★ SHIPPING INFO
- ★ FINANCE INFO



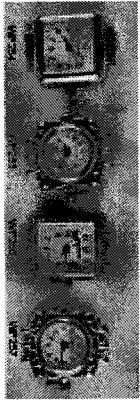
Two Tone Watch Faces



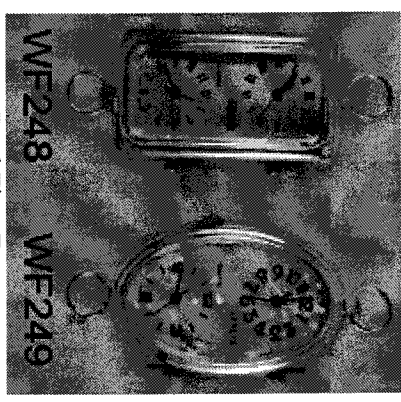
Marcasite Watch Faces



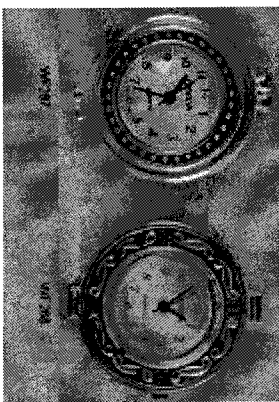
Flower Faces



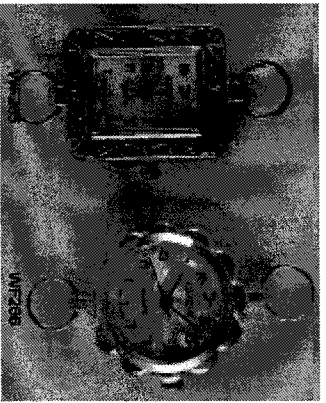
Triple Strand Faces



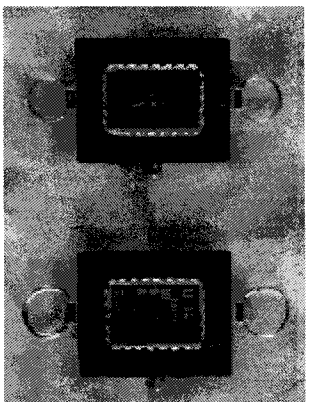
Dual Time Faces



Jumbo Watch Faces



Hebrew and Roman Numbered



Wood Watch Faces



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Facsimile (914) 941-6091
www.collenIP.com
mwagner@collenIP.com

November 16, 2006

**VIA FACSIMILE: 2 PAGES
CONFIRMATION VIA FIRST CLASS MAIL**

FAX: (703) 836-2787

Oliff & Berridge, PLC
277 South Washington Street
Alexandria, VA 22314
Attn: William P. Berridge, Esq.
William J. Utermohlen, Esq.

Re: U.S. Trademark Opposition No. 91169312
Adv. Applicant: Amy T. Bernard
Mark: SWAP
Serial No.: 78/459,527
Your Ref.: 127443
Our Ref: 98885

Gentlemen:

Enclosed please find the following:

- Opposer's Supplemental Responses to Applicant's First Set of Document Requests
- Opposer's Supplemental Responses to Applicant's First Set of Interrogatories
- Opposer's Supplemental Responses to Applicant's First Set of Requests for Admissions
- Opposer's Document Production Nos. 26 to 483.

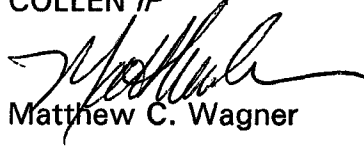
As indicated, in some cases we have provided a representative sampling of documents and partial privilege logs where a complete production of responsive documents would be unduly burdensome as Opposer has been in business for over 20 years and been involved in at least 40 different Oppositions. We are however happy to provide you with an opportunity to review these additional documents at

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80 South Highland Avenue, Ossining-on-Hudson, Westchester County, New York 10562 USA

our offices in Ossining, New York at a mutually convenient time. Please contact us if you would like to arrange an inspection.

Very truly yours,
COLLEN IP



Matthew C. Wagner

MCW/TPG/MCM

Enc.: as stated above (by first class mail only)

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Opposer,	:	
	:	Opposition No. 91169312
V.	:	
	:	Mark: SWAP
	:	
AMY T. BERNARD,	:	Serial No. 78/459527
	:	
Applicant.	:	
<hr/>	X	

**OPPOSER'S SUPPLEMENTAL RESPONSES TO APPLICANT'S
FIRST SET OF INTERROGATORIES**

Opposer, The Swatch Group S.A., ("Opposer" or "SWATCH"), hereby serves its Supplemental Objections and Responses to Applicant's First Set of Interrogatories pursuant to Rules 26 and 33 of the Federal Rules of Civil Procedure.

GENERAL OBJECTIONS

1. Opposer objects to each and every interrogatory and request for production in their entirety on the ground that Opposer is responding on the basis of its current knowledge and information. Opposer reserves the right to supplement each of it interrogatories and requests for production.
2. Opposer objects to each and every request insofar as and to the extent it seeks information protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege or immunity, and will not produce such information. Any inadvertent disclosure of such information shall not be a waiver of the attorney-

INTERROGATORY NO. 21

Identify all persons who participated in any way in the preparation of the responses to these Interrogatories. If more than one individual is identified, state specifically, with reference to Interrogatory numbers, the areas of participation of each such person.

RESPONSE NO. 21

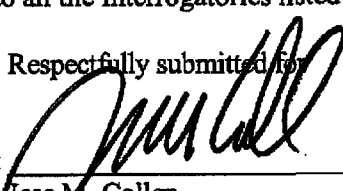
Opposer objects to this interrogatory as it does not contain a restriction insofar as to a time frame with relation to the suits, accordingly, responding to this request would be unduly burdensome. Opposer incorporates by reference its General Objections as if fully set forth herein. Notwithstanding said objections, Attorneys for Opposer participated in the preparation of responses to all the Interrogatories listed.

SUPPLEMENTAL RESPONSE NO. 21

Opposer maintains all general objections. Notwithstanding and without waiving said objections, Attorneys for Opposer, Neal Gordon, Josiane Citiso and Patricia Higgins participated in the preparation of responses to all the Interrogatories listed

Respectfully submitted for

Signed only as to objections:



Jess M. Collen
Thomas P. Gulick
Collen *IP*
The Holyoke-Manhattan Building
80 South Highland Avenue
Ossining, New York 10562
(914) 941-5668 Tel.
(914) 941-6091 Fax
Attorneys for Opposer

Dated: July 17, 2006
JMC/TPG: he

EXHIBIT

J



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- Not Specified (2)
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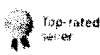





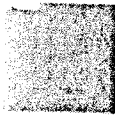

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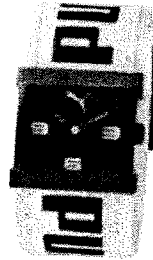
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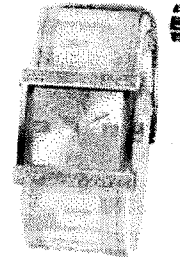
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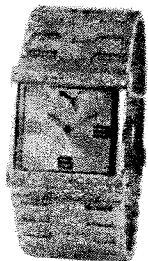
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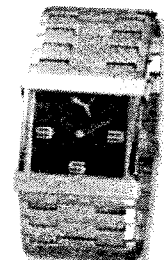
Puma Swap Women's Analog Jeweled Case Watch PU100112003
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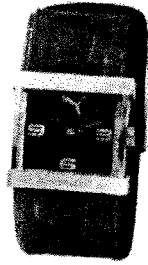
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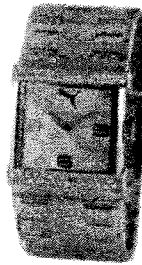
Puma Swap Interchangeable Band Women's Watch # PU100102002
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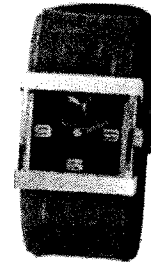
Ladies Puma Swap Stainless Steel Band Black Dial Watch
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Watch Trendz



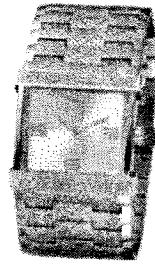
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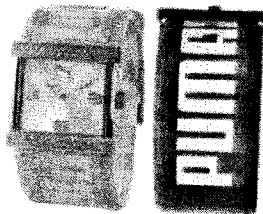
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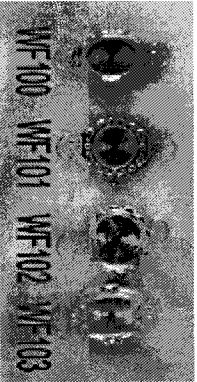
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Colored Watch Faces



Silver, Gold and Copper Watch Faces



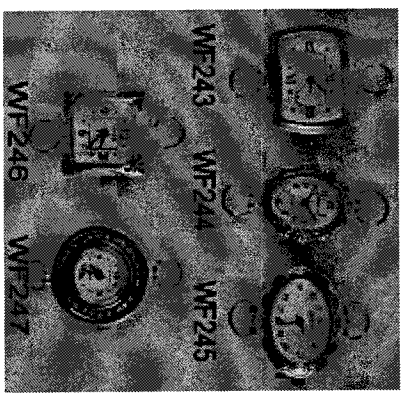
Jeweled Watch Faces

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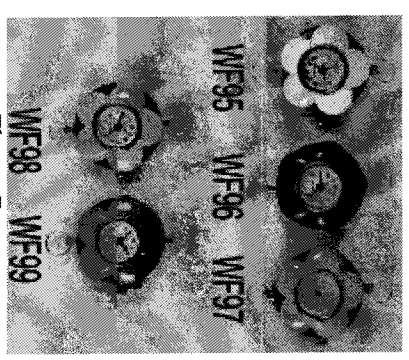
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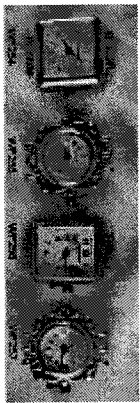
Two Tone Watch Faces



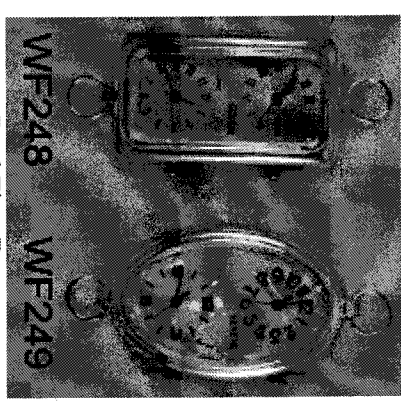
Marcasite Watch Faces



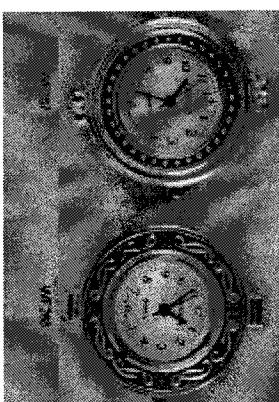
Flower Faces



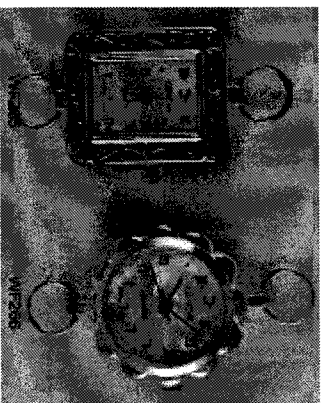
Triple Strand Faces



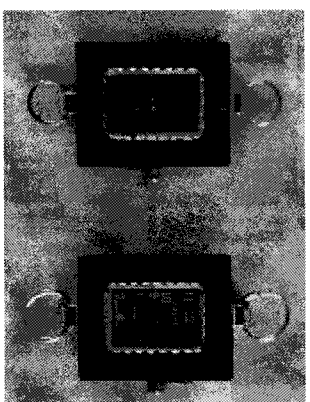
Dual Time Faces



Jumbo Watch Faces



Hebrew and Roman Numbered



Wood Watch Faces



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- ★ STORE SELLING OUR PRODUCTS
- ★ ABOUT OUR PRODUCTS (FAQ)
- ★ SWEEPSTAKES WINNERS
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