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

Proceeding	86542301
Applicant	The Art of Vape, LLC
Applied for Mark	THE ART OF VAPE
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re Application of:	)	Law Office 108
	)	
Art of Vape LLC	)	Examining Attorney:
	)	Lindsey Ben
	)	
Serial No.: 86/542,301	)	
	)	
Filed: February 23, 2015	)	
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)

United States Patent and Trademark Office
Trademark Trial and Appeal Board
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Alexandria, VA 22313-1451

APPLICANT'S APPEAL BRIEF

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ARGUMENT

The Marks Are Not Similar in Sight, Sound, or Meaning When Considered in the Context of the Highly Suggestive, if Not Descriptive, Term "THE ART OF" for Retail Services

For purposes of determining the degree of similarity between two marks one must consider du Pont factor that looks at the degree of the prior mark's "strength". *See Skincode AG v. Skin Concept AG* Opposition No. 91206091 (Sept. 10, 2014) ("In conjunction with the similarity of the marks factor, we also consider the sixth du Pont factor that requires consideration of any evidence pertaining to "the number and nature of similar marks in use on similar goods." In essence, this factor involves the notion that as a result of a certain degree of third-party use of similar marks for similar goods, consumers may be able to differentiate between such marks and that confusion is not likely even if the marks contain a common element").

The evidence of record shows that the term "THE ART OF" is a very common formative in trademarks for retail services (see Applicant's Request for Reconsideration containing printouts of third party registrations disclosed in Applicant's Office Action Response dated July 16, 2015). This alone is evidence that consumers would not judge two marks to be similar based on their shared use of "THE ART OF". *Juice Generation, Inc. v. GS Enterprises LLC*, Appeal No. 2014-1853 (Fed. Cir. July 20, 2015) [precedential] ("In addition, "[a] real evidentiary value of third party registrations per se is to show the sense in which . . . a mark is used in ordinary parlance." 2 McCarthy on Trademarks and Unfair Competition § 11:90 (4th ed. 2015)

(emphasis added). "Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak." Id.; see Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 917 (CCPA 1976) (even if "there is no evidence of actual use" of "third-party registrations," such registrations "may be given some weight to show the meaning of a mark in the same way that dictionaries are used"). Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts").

In such a crowded field of "THE ART OF" marks, consumers are able to distinguish among slight variations of such marks. This ability to distinguish is further aided by the very significant differences in the appearances of the marks. Applicant recognizes that the cited mark THE ART OF VAPOR is a standard character mark that is given some latitude in terms of how it might conceivably be depicted and thus how broad its protection might be in relation to stylized marks. However, this protection only extends to variations in "font, style, size, and color". *In re Viterra* 101 U.S.P.Q.2d 1905 (Fed. Cir. March 6, 2012). It cannot be reasonably said that

is a variation in font or style of "THE

ART OF VAPOR". In addition to the extremely abstract appearance of the word VAPE, it also has an omega symbol embedded within the "P".

The differences in the marks is made all the more significant when considered in light of the very weak nature of "THE ART OF VAPOR" and thus the narrow scope of protection to which it is deserving. The terms "vape" and "vapor" are highly descriptive of the services and the term "THE ART OF" is extremely commonplace for trademarks associated with retail stores and, based on its inferred descriptive meaning (see *Juice Generation*), it is also inherently weak. In sum, this is a case where the threshold degree of similarity between the marks is not met and thus this factor alone is determinative of the ultimate issue of likelihood of confusion.