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

In the matter of U.S. Trademark Application  
Serial No.: 76/475,501  
Filed: December 15, 2002  
Trademark: ATMOSPHERE  
Published: November 11, 2003



01-05-2004  
U.S. Patent & TMO/TM Mail Rcpt Dt. #22

Sean Daley,

Opposer,

vs.

Lori Persing and Eric Persing dba  
Spectrasonics,

Applicants.

Opposition No. 91,158,448

**AMENDED**

**APPLICANT'S ANSWER TO NOTICE OF OPPOSITION**

Applicants, Lorey Persing and Eric Persing dba Spectrasonics (collectively "Applicant"),  
hereby answer Opposer's Notice of Opposition as follows:

1. Applicant admits the allegations contained in paragraph 1 of the Notice of Opposition.
2. Applicant admits the allegations contained in paragraph 2 of the Notice of Opposition.

**CERTIFICATE OF MAILING**

I, Victoria Haynes, hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Trademark Trial and Appeal Board, Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3514 on December 31, 2003.

*Victoria Haynes* 12.31.03  
Victoria Haynes

3. Applicant does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 3 of the Notice of Opposition and accordingly denies the allegations.

4. Applicant does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 4 of the Notice of Opposition and accordingly denies the allegations.

5. Applicant does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 5 of the Notice of Opposition and accordingly denies the allegations.

6. Applicant does not have sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph 6 of the Notice of Opposition and accordingly denies the allegations.

7. Applicant denies the allegations contained in paragraph 7 of the Notice of Opposition.

8. With regard to paragraph 8 of the Notice of Opposition, Opposer repeats and realleges Paragraphs 1 through 7 above as though fully set forth herein.

9. Applicant denies the allegations contained in paragraph 9 of the Notice of Opposition.

10. Applicant denies the allegations contained in paragraph 10 of the Notice of Opposition.

### AFFIRMATIVE DEFENSES

Applicant hereby asserts the following affirmative defenses:

11. The Notice of Opposition fails to state a claim upon which relief can be granted.

12. There is no likelihood of confusion, mistake or deception because, *inter alia*, Applicant's mark and the pleaded marks of Opposer are not confusingly similar.

13. There is no likelihood of confusion, mistake or deception because, *inter alia*, Applicant's goods sold under Applicant's mark and Applicant's channels of trade are **not** similar to the services and goods provided under Opposer's mark and Opposer's channels of trade.

14. According to the records of the U.S. Patent and Trademark Office, Opposer's pleaded marks are currently suspended, pursuant to Lanham (Trademark) Act, Section 2(d), 15 U.S.C. Section 1052(d), for likelihood of confusion pending the disposition of U.S. Trademark Application Serial No. 75/838,592 for the mark ATMOSPHERES in International Class 9 in the field of music.

15. In addition, the records of the U.S. Patent and Trademark Office show that registration of the application for Opposer's pleaded mark ATMOSPHERE (Serial No. 76/318,031) has been refused pursuant to Lanham (Trademark) Act, Section 2(d), 15 U.S.C. Section 1052(d) for likelihood of confusion with U.S. Trademark Registration No. 2,224,417 for the mark ATMOSFEAR for pre-recorded video tapes in International Class 9 and U.S. Trademark Registration No. 1,351,450 for the mark SONIC ATMOSPHERES for phonograph records, audio tapes and video tapes in International Class 9.

16. Applicant further alleges that according to the records of the U.S. Patent and Trademark Office, Opposer responded to the above mentioned 2(d) refusals and submitted arguments in support of registration of Opposer's pleaded mark ATMOSPHERE (Serial No.

76/318,031). However, the U.S. Patent and Trademark Office found the arguments submitted by Opposer unpersuasive and the refusal to register Opposer's pleaded mark ATMOSPHERE (Serial No. 76/318,031) has been maintained.

17. Based on the above and on information and belief, Opposer has no rights on which to base its opposition to Applicant's mark.

18. Upon information and belief, Applicant further asserts that the term "ATMOSPHERE" has been used and registered by numerous third parties in International Class 9 in the field of music. As a result, Opposer's alleged rights, to the extent any exist, are limited and narrow and do not preclude Applicant's right to use its mark ATMOSPHERE.

19. Applicant further affirmatively alleges that as a result of its continuous and substantial use of its mark since adoption, its mark is a valuable asset of Applicant and carries considerable goodwill and consumer acceptance of the goods offered under the mark. Such goodwill and widespread usage has made the mark distinctive to the Applicant.

20. Applicant further affirmatively alleges that Applicant's mark and the pleaded marks of Opposer have been used by the respective parties and have co-existed in the marketplace since at least September 2003 without any instance of actual confusion.

21. Applicant further affirmatively alleges that Opposer is barred from maintaining this opposition because of the doctrine of unclean hands.

22. Applicant further affirmatively alleges that Opposer is barred from maintaining this opposition because of the doctrine of laches.

23. Applicant further affirmatively alleges that Opposer is barred from maintaining this opposition because of the doctrine of acquiescence.

In view of the foregoing, Applicant contends that this opposition is groundless and baseless in fact; Opposer has not shown wherein it will be, or is likely to be, damaged by the registration of Applicant's trademark; and Applicant's trademark is manifestly distinct from any alleged mark of the Opposer or any designation of the Opposer. Applicant therefore prays that this opposition be dismissed and that Applicant be granted registration of its trademark.

It is not believed that any fees are due in connection with the filing of this paper. However, if any fees are due, please charge such fees to our Deposit Account No. 50-1833.

Respectfully submitted,

Eric Persing And Lorey Persing  
dba Spectrasonics

Dated: December 31, 2003

By:

  
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**CERTIFICATE OF SERVICE**

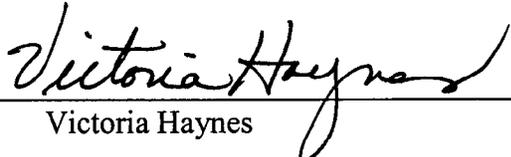
The undersigned hereby certifies that a true and correct copy of the foregoing document entitled:

**AMENDED APPLICANTS' ANSWER TO NOTICE OF OPPOSITION**

was served on the attorneys for Opposer via first class mail in a sealed envelope addressed as follows:

Luke W. Demarte  
Jeffrey H. Brown  
Seyfarth Shaw LLP  
55 East Monroe Street, Suite 4200  
Chicago, IL 60603

Executed on the 31st day of December, 2003 in Los Angeles, California.

By:   
Victoria Haynes