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

Proceeding	91181462
Party	Defendant Make-Up Art Cosmetics Inc.
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Submission	Answer
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Date	09/25/2008
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 77/210127
For the Mark MOISTURELUSH

Cosmetics Warriors Ltd.,	)	Opposition No.: 91/181462
Opposer,	)	
v.	)	
Make-up Art Cosmetics, Inc.,	)	
Applicant.	)	

ANSWER TO NOTICE OF OPPOSITION

Applicant Make-up Art Cosmetics, Inc. ("Applicant" or "MAC") for its answer to the Opposition filed by Cosmetics Warriors Ltd. ("Opposer") opposing registration of Applicant's Application No. 77/210127 for the mark MOISTURELUSH, by its counsel Fross, Zelnick, Lehrman & Zissu, states as follows:

1. Admits the allegations in Paragraph 1 of the Opposition.

2. Admits the allegations of Paragraph 2 of the Opposition and further notes that this Answer is timely filed pursuant to the Order of the TTAB issued July 23, 2008.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Opposition and therefore denies the same except notes that Opposer has attached to the Notice of Opposition a copy of Registration No. 2,282,428 for the mark LUSH and refers to the exhibit for the contents thereof and admits that the dates of first use or filings alleged in Paragraph 3 are prior to Applicant's filing or first use date for MOISTURELUSH.

4. Denies knowledge or information sufficient to form a belief as to the first two sentences of the allegations in Paragraph 4 of the Opposition and therefore denies the same. As to the final sentence of Paragraph 4 of the Opposition, Applicant admits that Opposer has alleged that Applicant's mark is likely to cause confusion but denies the allegation and all claims made in the last sentence including that the marks of the Parties are highly similar, that the Parties' products are identical or that Applicant's mark is likely to cause confusion or cause mistake or to deceive.

5. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Opposition and therefore denies the same.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 6 of the Opposition and therefore denies the same.

7. Admits that the filing date of Applicant's application is June 19, 2007 and otherwise denies knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 7 of the Opposition and therefore denies the same.

8. Denies the allegations contained in Paragraph 8 of the Opposition.

9. Denies the allegations contained in Paragraph 9 of the Opposition.

10. Denies the allegations contained in Paragraph 10 of the Opposition.

11. Denies knowledge or information concerning the channels of trade in which Opposer's products are sold or the class of consumers to whom Opposer sells its products and therefore denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Opposition and therefore denies the same.

12. Denies the allegations contained in Paragraph 12 of the Opposition.

13. Denies the allegations contained in Paragraph 13 of the Opposition.

14. Denies the allegations contained in Paragraph 14 of the Opposition.

15. Denies the allegations contained in Paragraph 15 of the Opposition.

16. Denies the allegations contained in Paragraph 16 of the Opposition.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

17. Because the mark herein opposed is not identical to any of the marks pleaded by Opposer, Opposer cannot establish the requisite element of a claim for dilution and therefore Opposer has failed to state a claim for relief for dilution.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

18. Opposer's LUSH marks are not sufficiently famous to qualify for dilution protection. As such, Opposer has failed to state a claim for relief for dilution.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

19. Opposer's claims are barred by acquiescence not only in connection with the use of the mark herein opposed but in connection with third party uses of LUSH formative marks for goods in International Class 3. Opposer's co-existence with such third party marks constitutes an admission on behalf of Opposer that it can co-exist with Applicant's MOISTURELUSH mark.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

20. Various paragraphs of the Notice of Opposition do not comply with Fed. R. Civ. P. 8(a) and (e), which require a "short and plain statement of the claim showing the pleader is entitled to relief" and 37 CFR § 2.104(a) and TBMP § 312.03, which require "a short and plain statement" of the reasons why Opposer believes it would be damaged by the

registration of the mark at issue. As such, Applicant is not required to separately admit or deny each of the allegations contained therein.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

21. Opposer's mark LUSH is descriptive of Opposer's goods in that it clearly describes or refers to a property, quality or characteristic of Opposer's products or describes an effect of the products on the user. As such, Opposer has no valid rights to assert against Applicant.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

22. The term "Lush" is commonly used in the cosmetic industry as it is descriptive of the characteristics or effects of cosmetic products and skin care. As a result, Opposer's claimed mark is weak. The protection afforded to Opposer's mark does not extend to Applicant's mark which is not identical to Opposer's mark and is not being used in connection with goods identical to those that Opposer offers under its mark.

WHEREFORE, Applicant Make-Up Art Cosmetics, Inc. respectfully requests that the Notice of Opposition be dismissed with prejudice and that Application Serial No. 77/210127 for the mark MOISTURELUSH in International Class 3 proceed to registration.

Dated: New York, New York
September 25, 2008

FROSS ZELNICK LEHRMAN
& ZISSU, P.C.

By: _____
Barbara A. Solomon

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New York, New York 10017
(212) 813-5900

Attorneys for Applicant Make-Up Art Cosmetics, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Answer To Notice Of Opposition was served by First Class Mail postage prepaid on counsel for Opposer Cosmetic Warriors Ltd. by mailing a copy of the same to:

John A. Clifford
Merchant & Gould P.C.
P.O. Box 2910
Minneapolis, MN 55402-0910

on this 25th day of September, 2008.

Barbara A. Solomon