

ESTTA Tracking number: **ESTTA332739**

Filing date: **02/17/2010**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	MichaelOmmaha
Granted to Date of previous extension	02/17/2010
Address	7825 Santa Monica Blvd. West Hollywood, CA 90046 UNITED STATES

Attorney information	Christine L. Kopitzke Christine L. Kopitzke, Attorney at Law 735 State Street, Suite 532 Santa Barbara, CA 93101 UNITED STATES ipcounsel@cox.net Phone:(805) 845-3434
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Applicant Information

Application No	77642501	Publication date	10/20/2009
Opposition Filing Date	02/17/2010	Opposition Period Ends	02/17/2010
Applicant	Moody, Matthew D 5086 Elkhart Court Aurora, CO 80015 UNITED STATES		

Goods/Services Affected by Opposition

Class 005. First Use: 2009/01/21 First Use In Commerce: 2009/01/21 All goods and services in the class are opposed, namely: Nutritionally fortified beverages, namely, for relieving stress, reducing anxiety, and improving mood
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Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
Other	The application is void as filed because the incorrect owner was named, and the applicant was not entitled to use the mark in commerce.

Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	77673405	Application Date	02/19/2009
Registration Date	NONE	Foreign Priority Date	NONE

Word Mark	MARYJANE COLA
Design Mark	<h1>MaryJane Cola</h1>
Description of Mark	NONE
Goods/Services	Class 005. First use: Medicinal drinks Class 032. First use: Colas; Purified bottled drinking water; Soda pops

Related Proceedings	Opposition No. 91192756
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Attachments	77673405#TMSN.jpeg (1 page)(bytes) Notice of Opposition to MARY JANE'S SODA pdf.pdf (6 pages)(701767 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Christine L. Kopitzke/
Name	Christine L. Kopitzke
Date	02/17/2010

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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Christine L. Kopitzke
Attorney at Law
735 State Street, Suite 532
Santa Barbara, CA 93101
Attorney for Opposer Michael Ommaha

In the Matter of Application Serial No. 77/642,501
Mark: MARY JANE'S SODA
Application Filed: January 2, 2009
Published for Opposition: October 20, 2009

MICHAEL OMMAHA,

Opposer,

v.

MATTHEW D. MOODY,

Applicant/Respondent

Opposition No. _____

NOTICE OF OPPOSITION

Michael Ommaha, an individual with a business address of 7825 Santa Monica Boulevard, West Hollywood, California 90046 ("Opposer"), files this Notice of Opposition against the application for registration filed by Matthew D. Moody ("Respondent") for the mark MARY JANE'S SODA in International Class 5 for the goods "Nutritionally fortified beverages, namely, for relieving stress, reducing anxiety, and improving mood."

Opposer believes he will be damaged by the registration of the mark identified above, and hereby opposes same. The grounds for this opposition are as follows:

1. Respondent filed application Serial No. 77/642,501 for the mark MARY JANE'S SODA on January 2, 2009, for use in connection with "Nutritionally fortified beverages, namely, for relieving stress, reducing anxiety, and improving mood" in International Class 5. The application was filed on an intent-to-use basis, and an Amendment to Allege Use was later filed alleging January 21, 2009 as the date the MARY JANE'S SODA mark was first used anywhere and first used in commerce.

2. Opposer filed trademark application Serial No. 77/673,405 for the mark MARYJANE COLA on February 19, 2009, for use in connection with "Medicinal drinks" in International Class 5 and "Colas; Purified bottled drinking water; Soda pops" in International Class 32.

3. Opposer's application has a current filing basis of 1(b), and Opposer continues to have a bona fide intention to use or use through Opposer's related company or licensee the MARYJANE COLA mark in commerce with the goods identified in its application for that mark.

4. The examining attorney for Opposer's MARYJANE COLA mark cited Respondent's MARY JANE'S SODA application as a potential bar to registration of Opposer's mark in an office action dated April 6, 2009, on the basis that Respondent's filing date preceded Opposer's filing date.

5. Respondent initially filed his intent-to-use application for MARY JANE'S SODA with his name, Matthew D. Moody, DBA The Matter, as owner of the mark, but stated "limited liability company" as the entity type for the owner on the application. The Trademark Examiner for MARY JANE'S SODA noted this inconsistency in an Office Action dated March 30, 2009, and stated a requirement that Respondent must clarify whether the named applicant was an individual or a limited liability company. In an Office Action response dated March 26, 2009,

Respondent stated that he was an individual. On information and belief, Respondent never had a bona fide intention to use the MARY JANE'S SODA mark as an individual, was never entitled to use the mark in commerce as an individual, and has not in his own capacity used the mark, or used the mark in commerce, in connection with any of the goods listed in the application. Because a trademark application must be filed by the owner of the applied-for mark, the application was void as filed and must therefore be refused registration.

6. On information and belief, Respondent's alleged first dates of use and use in commerce for its MARY JANE'S SODA mark are not accurate. Respondent claims January 21, 2009 as the date the mark was first used and first used in commerce. January 21, 2009 is the date that Mary Jane's Soda Inc., a company for which Respondent serves as chief executive, filed its Articles of Incorporation with the Colorado Secretary of State. On information and belief, Respondent has not, as an individual, used the MARY JANE'S SODA mark in commerce, and his company (not the Applicant/Respondent here) did not launch a product bearing the applied-for mark until mid-August of 2009. On information and belief, Opposer's filing date and constructive use date of February 19, 2009 for its MARYJANE COLA mark predates the actual date of first use, if any, by Respondent of his MARY JANE'S SODA mark.

7. The trademark proposed for registration by Respondent is likely to cause confusion in the marketplace as to the source of its beverages and the source of Opposer's beverages. The marks MARYJANE COLA and MARY JANE'S SODA are closely similar in appearance, sound, and commercial impression. Further, "MARY JANE'S" is the strong, non-descriptive initial element of Respondent's mark, and is virtually identical to Opposer's strong initial element "MARYJANE."

8. Respondent's nutritionally fortified beverages are so closely related to Opposer's medicinal drinks as to be likely to cause confusion or mistake or to deceive purchasers when Opposer enters the marketplace with a closely similar mark in which Opposer has priority, resulting in damage and detriment to Opposer and his reputation.

9. Opposer's goods and Respondent's goods are capable of sale to and use by the same class of purchasers.

10. Opposer's goods and Respondent's goods are capable of being sold in the same channels of trade.

11. Upon information and belief, the registration and use (if any) by Respondent of the mark MARY JANE'S SODA for nutritionally fortified beverages for relieving stress, reducing anxiety, and improving mood would enable Respondent to establish market recognition that will confuse the purchasing public when Opposer launches its intended beverage products in connection with his MARYJANE COLA mark.

12. If, as the examining attorney for Opposer's application contends, the registration of Opposer's mark and Respondent's mark might result in a likelihood of confusion as to source when used with Opposer's and Respondent's respective goods, then Respondent's application should be refused because Opposer has constructive priority of use over Respondent's actual first use of his mark, if any.

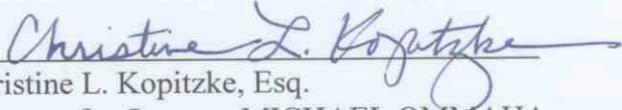
13. By reason of the foregoing facts, Opposer will be damaged by the registration of Respondent's mark for use with beverage products that are closely similar to Opposer's beverage products.

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WHEREFORE, Opposer prays that Respondent's Application Serial No. 77/642,501 be rejected, that no registration be issued thereon to Matthew D. Moody, and that this opposition be sustained in favor of Opposer Michael Ommaha.

Dated: February 17, 2010


Christine L. Kopitzke, Esq.
Attorney for Opposer MICHAEL OMMAHA
735 State Street, Suite 532
Santa Barbara, CA 93101

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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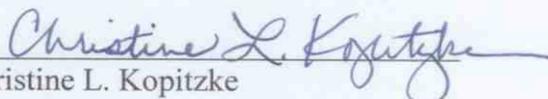
Opposition No. _____

NOTICE OF OPPOSITION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing NOTICE OF OPPOSITION has been served on counsel for Matthew D. Moody by mailing said copy on February 17, 2010, via First Class Mail, postage prepaid, to:

John L. Skari, Jr.
Zakhem Law, LLC
700 17th Street, Suite 2000
Denver, CO 80202


Christine L. Kopitzke