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

Proceeding	91198063
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
The Trademark Trial and Appeal Board**

AlpinBreeze, LLC,	:	
	:	
Opposer,	:	Opposition No. 91198063
	:	
vs.	:	
	:	
Evertec Information Technology Co., LTD.,	:	Serial No.: 77922346
	:	Mark: ALPINBREEZE and design
Applicant.	:	Published: September 7, 2010
_____	:	

**TRIAL BRIEF OF OPPOSER ALPINBREEZE, LLC**

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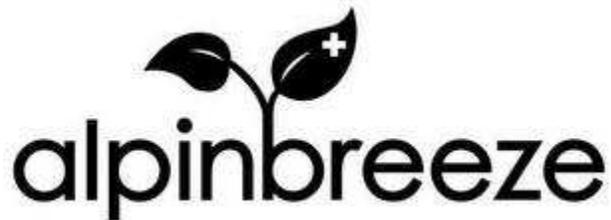
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## PRELIMINARY STATEMENT

Opposer, AlpinBreeze, LLC (hereinafter “Opposer”), is a Delaware LLC formed and operated by Ms. Samanta Ng (hereinafter “Ms. Ng”), a resident of Switzerland. Ms. Ng developed the below-referenced trademark to be used in connection with her and AlpinBreeze, LLC’s line of aromatherapy diffusers (aka electric aromatherapy machines):



(hereinafter “Opposer’s Trademark”). The Opposer began use of Opposer’s Trademark in connection with diffusers and other products in commerce in June of 2009.

After Opposer’s first use thereof both internationally and in interstate commerce in the United States, Evertec Information Technology Co., LTD. (hereinafter “Applicant”), began selling unauthorized units of diffusers bearing Opposer’s Trademark. As the record reflects, Applicant employees or is otherwise owned or operated by Mr. Frans Lin, aka You-Yi Lin, of Taiwan (hereinafter “Mr. Lin”).

In the course and scope of designing an initial version of the logo when the product’s name was slated to be SWISSBREEZE, Ms. Ng used Mr. Lin to assist her in, among other tasks, locating an affordable logo designer in Taiwan as well as prospective manufacturers for the diffusers which would ultimately bear the Opposer’s Trademark as identified above and in Ser. No. 85140585.

Ultimately, the Opposer's Trademark as it appears today was designed by Ms. Ng herself as well as a Swiss graphic artist. The Opposer's Trademark was affixed to diffusers and Opposer began sales as stated above.

After sales began Ms. Ng received reports that the Applicant was selling unauthorized units of Opposer's diffusers bearing Opposer's Trademark. Said unauthorized use even extended to attempts to register the trademark by the Opposer. In the instant case, the Applicant has sought to register the following logo in connection "[h]umidifiers, electric air deodorizers, air purifiers, electric aromatherapy machines" in International Class 11:



Ser. No. 77922346 (hereinafter "Applicant's Trademark").

The instant proceeding has now been commenced as registration of the Applicant's Trademark has blocked Opposer's legitimate attempts to register Opposer's Trademark before the U.S. Patent and Trademark Office as well as would confer upon the Applicant rights in Opposer's Trademark that it does not, or should not, have.

#### **DESCRIPTION OF THE RECORD**

The record in the instant proceeding consists of the following:

1. Deposition upon Written Questions of Samanta Ng with Exhibits, April 17, 2013;
2. Deposition upon Written Questions of You-Yi Lin with Exhibits, June 25, 2013;
3. Application Ser. No. 77922346 (Applicant's Trademark); and
4. Application Ser. No. 85140585 (Opposer's Trademark).

## **MOTION TO STRIKE**

As a preliminary matter, Opposer moves to strike the testimony of You-Yi Lin and exhibits as not having been properly taken in accordance with Fed. R. Civ. P. 28 and § 703.02(b) of the TBMP.

Prior to the testimony periods of the parties, discussions were had as to the format of the testimony to be entered. Opposer offered to have testimony submitted upon affidavit, however, Applicant refused or otherwise did not grant its permission to the same. Notwithstanding this fact, Applicant's submitted deposition on written questions appears to be a typed affidavit rather than trial testimony as required by relevant statutes.

Accordingly, Opposer hereby moves to strike the Deposition upon Written Questions of You-Yi Lin with exhibits for its failure to comply with Fed. R. Civ. P. 28 and § 703.02(b) of the TBMP.

## **STATEMENT OF FACTS**

### **A. Origins of Opposer's Aromatherapy Diffuser Business and Initial Trademark Design**

1. In 2008 Ms. Ng decided to form her own aromatherapy diffuser business. See Deposition upon Written Questions of Samanta Ng dated April 17, 2013 (hereinafter "Ng Deposition") at p. 7.

2. To do so, Ms. Ng searched for aroma diffuser manufacturers in Asia to build the products that she would eventually sell under Opposer's Trademark. *Id.*

3. The concept was to have the manufacturer build the products to Ms. Ng's specifications, including affixing Opposer's Trademark on the same, and then to sell and

distribute the same around the world initially focusing on the United States, Europe, and Asia.  
Id. at p. 8.

4. In November of 2008 Ms. Ng contacted Day & Day Trading Corp., a Taiwanese manufacturing company, to potentially build the products she would sell under Opposer's Trademark. Id. at pp. 8-9.

5. Day & Day Trading Corp. had an internal design company named Toast Living. Ng Deposition at p. 9; See also Exhibit 1 to Ng Deposition.

6. Initially, Ms. Ng had decided to use the trademark SWISSBREEZE to identify her new diffuser products. Ng Deposition at p. 10.

7. Ms. Ng independently came up with the initial trademark SWISSBREEZE. Id.

8. Specifically, at that time (2008) Ms. Ng owned and operated the website SwissCarving.com. Id. at p. 13.

9. Borrowing from her Swiss residency, the idea for the "breeze of Switzerland" came to mind for Ms. Ng. Id.

10. As a result, Ms. Ng initially settled upon the trademark SWISSBREEZE to name her products and, accordingly, registered swissbreeze.com, swissbreeze.ch, and swissbreeze.fr to market the same at some future date. Id.

#### **B. Frans Lin (aka You-Yi Lin)**

11. After Ms. Ng had decided upon the trademark SWISSBREEZE, she sought assistance from various graphic designers to create the logo for the product including Toast Living. Ng Deposition at p. 10.

12. At the time, Ms. Ng was friends with a man named Mike Chen who worked for ViewSonic<sup>®</sup> in Taiwan. Id. at p. 37.

13. Mr. Chen suggested that Ms. Ng hire an acquaintance of his, Mr. Lin, as a part-time employee or business-finder to assist her in this new endeavor. Id. at pp. 37-38.

14. From the onset of the relationship, however, Ms. Ng made the decision never to allow Mr. Lin to be in on or advised of critical decisions in the business. Id. at p. 38.

15. Specifically, Ms. Ng did not discuss branding or trademark selection with Mr. Lin. Id.

16. However, in an effort to keep costs to a minimum, Ms. Ng requested that Mr. Lin assist her in locating a cost-effective logo designer in Taiwan. Id. at p. 10.

17. Mr. Lin suggested that his friend “Karen” be permitted to design the logo for Ms. Ng’s trademark. Id.

18. The charge for her services was only \$100 U.S. As such, Ms. Ng contracted with Karen to design the logo for the product. Id.

19. Of note, there were payment issues concerning the \$100 U.S. fee to the designer given her employment status for another as well as possible under reporting of income to the Taiwanese revenue service. Ng Deposition at p. 10.

20. As such, Mr. Lin and Ms. Ng had an agreement whereby she gave Mr. Lin 24 of the Opposer’s diffusers as compensation for the logo design and Mr. Lin, in turn, gave Karen the \$100 U.S.. Id. at pp. 11-12.

21. Mr. Lin was compensated per the agreement and he, in turn, compensated the logo designer Karen for her services. Id. at p. 12.

22. Of note, at all times relevant hereto Mr. Lin was Ms. Ng's subordinate, a translator, sales representative, and merely someone who assisted her in contacting and communicating with her supplier. Ng Deposition at pp. 39, 42-43. See also Exhibit 15 to Ng Deposition.

23. Ms. Ng and Mr. Lin were never partners in the provision of the diffusers under Opposer's Trademark. Id. at p. 40.

### **C. Ms. Ng's Development of the ALPINBREEZE Logo at Issue**

24. Returning to the design of the logo, Ms. Ng was not satisfied with the first draft of the logo Karen provided and she herself came up with the two leaf design which is now prominently featured in Opposer's Trademark. Ng Deposition at p. 12.

25. During this time, approximately December of 2008, Ms. Ng was also informed that branding issues could arise from naming a product "Swiss" when, in fact, it is produced in another country and not Switzerland. Id. at p. 13.

26. Without informing the logo designer Karen or Toast Living Ms. Ng changed the impending name to be used in connection with Opposer's Trademark to ALPINBREEZE to avoid any issues of retaining "SWISS" in the trademark for the products. Id. at pp. 13-14.

27. Thereafter, Ms. Ng hired a professional Swiss graphic Artist, Mark Sonderegger, to transform the SWISSBREEZE logo into the ALPINBREEZE logo. Id. at pp. 14-19. See also Exhibits 2 - 4 to the Ng Deposition.

28. As Ms. Ng testified, every portion of the trademark that she created has personal significance to her. Ng Deposition at p. 16.

29. The two leaves coming out of the “B” in the logo represent her thirtieth birthday.

Id.

30. The cross used in the design refers to the power of natural therapies. Id.

31. “Breeze” symbolizes the air and “Alpine” the love of her country and mountains utilizing both French and English languages to do so. Id.

**D. Production, Sales, and Marketing of the Goods Begin for Alpinbreeze LLC**

32. After completing the logo design with Mr. Sonderegger, Ms. Ng returned to Day & Day Trading and Toast Living to have them manufacture the product under the new ALPINBREEZE logo, Opposer’s Trademark. Ng Deposition at pp. 19, 43-44. See also Exhibit 16 of Ng Deposition.

33. Ms. Ng registered the domain name alpinbreeze.com on January 9, 2009 to promote her brand under the trademark at issue. Ng Deposition at pp. 20-21. See also Exhibit 5 to Ng Deposition.

34. On or about March 10, 2009 Ms. Ng formed Alpinbreeze LLC, the instant Opposer, a Delaware LLC, for the purpose of initiating her diffuser business in the United States. Ng Deposition at pp. 26-28. See also Exhibit 10 to Ng Deposition.

35. Ms. Ng further sought and secured insurance for Alpinbreeze LLC and its products in preparation for the sale thereof. Ng Deposition at pp. 28-29. See also Exhibit 11 to Ng Deposition.

36. On or about June 15, 2009 Ms. Ng and Opposer launched alpinbreeze.com to sell her diffuser products under her Opposer’s Trademark. Ng Deposition at p. 22.

37. Since June 15, 2009 to the present the web site alpinbreeze.com has been active permitting purchasers throughout the world, including here in the United States, to order diffusers and other products bearing the Opposer's Trademark. Id. at pp. 22-25. See also Exhibits 6-7 to Ng Deposition.

38. In September of 2009, Opposer contracted with H2O At Home Group to sell Opposer's products bearing the Opposer's Trademark throughout the United States. Ng Deposition at pp. 29-32. See also Exhibit 12 to Ng Deposition.

39. H2O At Home Group placed its first order for Opposer's products bearing the Opposer's Trademark on or about October 19, 2009. Ng Deposition at pp. 32-34. See also Exhibit 13 of Ng Deposition.

40. Opposer sold approximately 192 diffusers in the United States in 2009 bearing the Opposer's Trademark. Ng Deposition at p. 34.

41. In 2010 Opposer sold approximately 463 diffusers in the United States bearing the Opposer's Trademark. Id. See also Exhibit 14 to Ng Deposition.

42. In 2011 Opposer sold approximately 180 diffusers in the United States in bearing the Opposer's Trademark. Ng Deposition at pp. 34-35.

43. In 2012 Opposer also sold approximately 180 diffusers in the United States in bearing the Opposer's Trademark. Id. at p. 35.

44. Since beginning sales in 2009, Opposer has continued to sell its diffusers and other products under the Opposer's Trademark in the United States without interruption. Id.

45. In addition to the web site, Ms. Ng and the Opposer have also advertised the Opposer's goods bearing the Opposer's Trademark by and through catalogs in the United States and abroad. Ng Deposition at pp. 25-26. Exhibits 8-9 to Ng Deposition.

46. Opposer's products bearing the Opposer's Trademark are also marketed by Opposer's distributor H20 At Home Group. Ng Deposition at p. 36.

47. Opposer's products bearing the Opposer's Trademark and sold or distributed by H20 At Home Group reach the end consumer by and through H20 At Home Group's 1200 nationwide salespersons. Id. at p. 37.

#### **E. Global Trademark Registrations for the Opposer's Trademark**

48. Opposer and/or Ms. Ng retain global registrations for Opposer's Trademark in other countries and economic units around the world including, but not limited to, Switzerland, France, and the European Community. Ng Deposition at pp. 45-46. See also Exhibit 17 of Ng Deposition.

49. Mr. Lin has previously challenged Ms. Ng's and Opposer's rights in Opposer's Trademark before the Office for Harmonization in the International Market. Ng Deposition at pp. 47-49.

50. However, prior to trial Mr. Lin withdrew all objections allowing Ms. Ng's and Opposer's Trademark to register. Id. See also Exhibit 18 to Ng Deposition.

#### **F. Applicant's Misappropriation of Opposer's Trademark**

51. In 2009, after sales of Opposer's products bearing Opposer's Trademark had commenced in the U.S., the president of H20 At Home Group contacted Ms. Ng to express his displeasure that Opposer's Trademark was being used on or in connection with goods being sold at [www.evertec.asia](http://www.evertec.asia). Ng Deposition at pp. 50-51.

52. After Ms. Ng received notice of the same, Ms. Ng contacted Mr. Lin to object to the use of Opposer's Trademark and determine whether Mr. Lin was somehow involved in the same. Id.

53. Mr. Lin explained to Ms. Ng that the company, Evertec Information Technology Co., LTD., the Applicant, was a small company owned by one of his friends. Id. at p. 51.

54. Mr. Lin further explained to Ms. Ng that he worked for the Applicant and begged Ms. Ng not to object to the provision of products by the Applicant bearing Opposer's Trademark or he would get fired inflicting upon him severe financial hardship. Id.

55. Mr. Lin further explained that the diffusers for sale on the Applicant's web site located at [www.evertec.asia](http://www.evertec.asia) were the 24 diffusers that Ms. Ng had provided to Mr. Lin as compensation for Karen, the original logo designer of the SWISSBREEZE logo. Id. at pp. 51-52.

56. In 2010, however, evidence began to surface that Mr. Lin's explanation for Applicant's use of Opposer's Trademark was a lie.

57. For instance, in 2010 a former colleague from ViewSonic<sup>®</sup> notified Ms. Ng that diffusers bearing Opposer's Trademark were being sold at a retail store establishment in Taiwan that was not affiliated with Opposer's distribution list. In short, the counterfeit units were being supplied by Applicant. Ng Deposition at p. 52.

58. Thereafter, Ms. Ng discovered that the Applicant had registered [www.alpinbreeze.com.tw](http://www.alpinbreeze.com.tw) and was selling diffusers with Opposer's Trademark thereon on the Internet. Id.

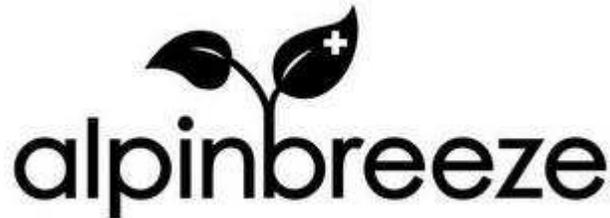
59. Ms. Ng soon learned that the Applicant had applied to register Opposer's Trademark as its own in several countries around the world including in the United States before the U.S. Patent and Trademark Office. Id. at pp. 52-53.

60. The instant opposition was thus instituted to cease Mr. Lin, and the Applicant's, unauthorized use and piracy of Opposer's Trademark.

## ARGUMENT

### A. Ownership and Priority

There can be no dispute that Opposer owns and created Opposer's Trademark as set forth below:



Ms. Ng of the Opposer came up with the initial name for the product, SWISSBREEZE, as well as the elements that appeared in that design. Ng Deposition at pp. 10, 12-19. She then conceptualized the current version of the Opposer's Trademark and hired an independent Swiss graphic designer to complete the same. Id.

Thereafter, Ms. Ng founded the Opposer in the United States in March of 2009 and began producing and selling goods under the Opposer's Trademark in the United States online at alpinbreeze.com in June of 2009 and later by and through an authorized distributor in September of 2009. Ng Deposition at pp. 20-35.

As such, Opposer's U.S. federal trademark rights affixed to its use of Opposer's Trademark in the United States as of its first use in commerce no later than June 15, 2009, the

date the Opposer's web site launched offering its products for sale under Opposer's Trademark.

In the alternative, there is no credible evidence of record that Applicant could have used or established priority of use over Opposer's actual use of Opposer's Trademark in the United States. Applicant could not have made use of Opposer's Trademark prior to Opposer as it was the Opposer who first coined or created the trademark at issue.

Moreover, although some use by the Applicant is known to exist outside of the United States, there is no credible evidence of record of use in the United States which would permit a finding of affixation of trademark rights on a use-basis for the Applicant. However, Applicant filed an intent-to-use application to register Applicant's Trademark, an identical copy of Opposer's Trademark, on January 28, 2010. See Ser. No. 77922346.

Accordingly, the earliest date upon which Applicant may rely to establish priority of use is January 28, 2010. The earliest date upon which Opposer may rely to establish its first date of use in interstate commerce is June 15, 2009 and/or September of 2009.

As such, it is respectfully submitted that the Opposer has carried its burden of proof to establish that it retains priority of use in the instant matter.

**B. Likelihood of Confusion**

**1. Legal Standard**

In determining likelihood of confusion, the Board considers the factors set forth in *In re E.I. DuPont DeNemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973). Among others, the factors are: (i) similarity or dissimilarity of the marks in their entireties

as to appearance, sound, connotation and commercial impressions; (ii) similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use; (iii) similarity or dissimilarity of established, likely-to-continue trade channels; (iv) similarity of marketing; (v) the number and nature of similar marks in use on similar goods; and (vi) any other established fact probative of the effect of use. See Dupont, 476 F.2d at 1361, 177 U.S.P.Q. at 567.

Generally, the two most important factors are the similarity of the marks and the similarity of the goods and services. See Federated Foods, Inc. v. Ft. Howard Paper Co., 544 F.2d 1098, 1103 (C.C.P.A. 1976). And, where, as here, the marks are extremely similar, the required degree of similarity of the services provided is reduced. See In re Thor Tech. Inc., 90 U.S.P.Q.2d 1634, 1636 (T.T.A.B. 2009).

## **2. Similarity of the Marks**

The first DuPont factor, the similarity of the marks, is, as noted, a "predominant inquiry." Hewlett-Packard Co. v. Packard Press, Inc., 281 F.3d 1261, 1265, 62 U.S.P.Q.2d 1001, 1003 (Fed. Cir. 2002). In the instant case, it is submitted that this factor clearly favors a finding of a likelihood of confusion.

Applicant's Trademark is:



Opposer's Trademark is:



In a side-by-side comparison there is virtually no difference between these two highly-stylized marks. The only distinction is that the Opposer's Trademark's twin-leaf design arising out of the letter "b" appears in the same shade as the rest of Opposer's Trademark whereas it appears in a lighter shade than the rest of Applicant's Trademark.

In light of the virtually identical nature of the trademarks and the fact that neither the Applicant nor the Opposer have claimed color to be a feature of their respective applied-for trademarks, it is respectfully submitted to the Board that this DuPont factor favors a finding of a likelihood of confusion in favor of Opposer's position in the instant matter.

### **3. Similarity of the Goods**

Applicant applied to register Applicant's Trademark in connection with the following goods in International Class 11: "Humidifiers, electric air deodorizers, air purifiers, electric aromatherapy machines." See Ser. No. 77922346.

Opposer applied to register Opposer's Trademark in connection with the following goods in International Class 11: "Humidifiers, electric air deodorizers, air purifiers, electric vaporizers, water ionizers and electric aromatherapy machines." See Ser. No. 85140585. Moreover, as set forth above, Opposer has been using Opposer's mark in connection with diffusers (aka electric aromatherapy machines) in interstate commerce since as early as June 15, 2009. Ng Deposition at pp. 22-37.

As such, it is respectfully submitted that the goods as applied for by the Applicant and the goods as applied for and actually used by the Opposer are identical if not virtually identical and thus the instant DuPont factor also favors a finding of a likelihood of confusion in favor of Opposer's position in the instant matter.

#### **4. Similarity of Marketing and Trade Channels**

Opposer's goods bearing Opposer's Trademark are marketed and sold both through a distributor as well as online at alpinbreeze.com. Ng Deposition at pp. 22-25. Likewise, Applicant's goods bearing Applicant's Trademark are marketed and sold online through Evertec.asia as well as alpinbreeze.tw. Id. at pp. 50-53.

Insofar as the goods of the Opposer bearing Opposer's Trademark and the goods of the Applicant bearing Applicant's trademark are both marketed and distributed through websites online it is submitted that this DuPont factor also favors a finding in favor of the Opposer. This is especially the case where the Applicant has registered a nearly identical domain name to Opposer's domain name and markets and sells Applicant's goods at a web site that merely has a different TLD apart from Opposer's primary domain name referenced above.

**5. Number of Other Similar Marks**

In the instant case, Opposer's Trademark is highly stylized. Moreover, there is no evidence of record that numerous other similar marks exist on the register which would diminish the strength of Opposer's Trademark. As such, in the absence thereof, it is submitted that this DuPont factor also favors a likelihood of confusion.

**6. Other Probative Facts**

Finally, given the totality of the involved fact pattern in this matter and the prior relationship of the parties herein it is respectfully submitted to the Board that the Applicant in the instant matter is attempting to pirate rights in the Opposer's Trademark that it knows do not belong to it.

Given the evidence submitted above, Opposer submits that the evidence of bad faith on behalf of the Applicant is substantial and that this should weigh heavily in favor of a likelihood of confusion finding in favor of the Opposer.

**CONCLUSION**

WHEREFORE Opposer submits that the evidence before the Board establish all elements necessary to sustain the instant opposition proceeding in its favor. Opposer, by and through its founder Ms. Ng, created Opposer's Trademark, the identical mark Applicant now seeks to register. Applicant learned of Opposer's Trademark by and through work for Opposer in locating manufacturers in Asia for the goods that would be sold underneath Opposer's Trademark. Because Opposer was the first to use Opposer's Mark in the United States, it established priority of use over any priority date which can be claimed by Applicant in the use or application to register Applicant's Trademark.

Moreover, because Applicant is attempting to wrongfully pirate Opposer's Trademark the analysis of the similarity of the trademarks and the similarity of the goods with which they are

used strongly favor a finding of a likelihood of confusion under DuPont. As Applicant also sells and markets its goods by and through an extremely similar web site to that of the Opposer, it is further submitted that Opposer has established its burden of proof regarding marketing and trade channels in this case.

Finally, given the totality of the circumstances more fully recited in the statement of facts above, it is submitted that this evidence also strongly favors a finding in favor of Opposer's claim here today.

Accordingly, the Opposer AlpinBreeze, LLC, by counsel, respectfully requests that the Board find in its favor and sustain the instant opposition against Evertec Information Technology Co., LTD. and its attempt to register the trademark at issue.

Respectfully submitted this 25<sup>th</sup> day of October, 2013,

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_____	:	

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I caused a copy of the foregoing this 25<sup>th</sup> day of October, 2013, to be served, by agreement, via electronic mail, upon:

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