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Filing date: **05/08/2014**

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

Proceeding	91204122
Party	Plaintiff Empire State Building Company L.L.C.
Correspondence Address	MAYA L TARR COWAN LIEBOWITZ LATMAN PC 1133 AVENUE OF THE AMERICAS NEW YORK, NY 10036 UNITED STATES mxt@cll.com, wmb@cll.com, trademark@cll.com, fxm@cll.com, mlk@cll.com
Submission	Motion to Amend Pleading/Amended Pleading
Filer's Name	Lindsay M. Rodman
Filer's e-mail	trademark@cll.com, lmr@cll.com, fxm@cll.com, wmb@cll.com, ejs@cll.com
Signature	/Lindsay Rodman/
Date	05/08/2014
Attachments	Motion to Amend NYC BEER w Declaration.pdf(3904724 bytes )



Opposer further moves that the proceeding be suspended pending the Board's consideration of this motion and, pursuant to 37 C.F.R. § 2.121(a), that the parties' pretrial disclosure and testimony periods be reset once the Board decides the motion.

## **MEMORANDUM IN SUPPORT OF MOTIONS**

### **STATEMENT OF FACTS**

Opposer initiated this opposition proceeding by filing a Notice of Opposition on March 1, 2012, against Application Serial No. 85/213,453 filed by Applicant seeking to register on an intent-to-use basis the mark NYC BEER LAGER and Design shown below:



("Applicant's Mark") for "Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer; Porter" ("Applicant's Goods") in International Class 32. Shimanoff Decl. ¶ 2. The Notice of Opposition alleged that registration of Applicant's Mark was likely to result in confusion, would falsely suggest a connection between Applicant and Opposer and/or cause a likelihood of dilution by blurring of the distinctive quality of Opposer's Empire State Building Marks, as defined in Paragraph 1 of the Notice of Opposition. Id. ¶ 3

On February 19, 2013, Opposer served Applicant with Opposer's First Set of Interrogatories and Request for Production of Documents and Things and Opposer's First Set of Requests for Admissions by first class mail. *Id.* ¶ 4 and Ex. B. After being forced to file two separate motions—one to compel and the other for sanctions—based on Applicant's failure to comply with both his discovery obligations and a Board Order compelling responses, Applicant finally served amended responses to Opposer's discovery requests on or about April 15, 2014, over one year after they originally were due. *Id.* ¶ 5 and Ex. C. While these responses still are incomplete and are in violation of the Board's most recent Order and the Federal Rules of Civil Procedure, they did reveal the following:

- (a) Neither Applicant nor any party authorized by Applicant has made use of Applicant's Mark in connection with Applicant's Goods in the United States. *Id.* Ex. C (Applicant's Amended Resp. to Opposer's Interrog. Nos. 1, 5, 6; Applicant's Amended Resp. to Opposer's Doc. Req. No 6).
- (b) Applicant cannot identify any advertising, marketing or promotional materials that he has used or intends to use in connection with Applicant's Goods bearing or rendered in connection with Applicant's Mark. *Id.* (Applicant's Amended Resp. to Opposer's Interrog. Nos. 10, 11).
- (c) Applicant has not marketed Applicant's Goods bearing or rendered in connection with Applicant's Mark in the United States and has no present intent to market such goods in the United States. *Id.* (Applicant's Amended Resp. to Opposer's Interrog. No. 13).
- (d) Applicant has no documents concerning: specimens; labels, tags or packaging; advertising, marketing, or promotional materials, including but not limited to brochures, catalogues, circulars, flyers, media plans or press kits; advertising and promotional expenditures; trade shows or conventions; licenses; websites; market research or surveys and channels of trade relating to Applicant's use or intended use of Applicant's Goods bearing or rendered in connection with Applicant's Mark. *Id.* (Applicant's Amended Resp. to Opposer's Interrogatories Nos. 10, 11; Applicant's Amended Resp. to Opposer's Doc. Req. Nos. 1–3, 6–13, 18, 20).

Additionally, in response to Opposer's specific interrogatory that Applicant state whether he "has any documentation . . . reflecting [his] bona fide intention, prior to January 8, 2011, to

use Applicant's Mark in commerce in connection with each and every [of Applicant's Goods]," Applicant identified and produced one document, consisting of a three page handwritten note in Chinese from a single meeting that apparently took place in China in 2010, which Applicant refers to as a "business plan." Id. ¶ 6 & Exs. C (Applicant's Amended Resp. to Opposer's Interrog. No. 16) & D. As discussed in detail below, this document, which states it is a "**Plan to apply for a trademark**" and sets forth no specific plan to market and sell Applicant's Goods bearing or rendered in connection with Applicant's Mark, does not show Applicant's bona fide intent to use Applicant's Mark in United States commerce.<sup>1</sup>

## ARGUMENT

### OPPOSER'S MOTION TO AMEND SHOULD BE GRANTED

"Pleadings in an opposition proceeding may be amended in the same manner and to the same extent as in a civil action in a United States district court." 37 C.F.R. § 2.107. Pursuant to Fed. R. Civ. P. 15(a), leave to amend "shall be freely given when justice so requires." Consistent with this standard, the Board "has recognized that 'amendments to pleadings should be allowed with great liberality at any stage of the proceeding where necessary to bring about a furtherance of justice unless it is shown that entry of the amendment would violate settled law or be prejudicial to the rights of any opposing parties.'" Commodore Electronics Ltd. v. CBM Kabushiki Kaisha, 26 U.S.P.Q.2d 1503, 1505 (T.T.A.B. 1993) (quoting American Optical Corp. v. American Olean Tile Co., Inc., 168 U.S.P.Q. 471, 473 (T.T.A.B. 1971)). See also Polaris

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<sup>1</sup> Although Applicant identified this "business plan" in his interrogatory response served by first class mail on or about April 15, 2014, Applicant did not **produce** this document until on or about May 5, 2014, and only after counsel for Opposer further reiterated Applicant's obligation to comply with his discovery obligations and the Board's recent Order. Counsel for Opposer immediately sent the document out for certified translation, which was delivered to counsel for Opposer on May 7, 2014. Shimanoff Decl. ¶ 6.

Industries v. DC Comics, 59 U.S.P.Q.2d 1798, 1799 (T.T.A.B. 2001); Boral Ltd. v. FMC Corp., 59 U.S.P.Q.2d 1701 (T.T.A.B. 2000).

In the present case, the amendment is plainly in keeping with existing law, which recognizes that, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. 1051(b), at the time an applicant files an intent to use application, he must have a bona fide intent to use the mark in commerce. The lack of such a bona fide intent is proper grounds for an opposition. See Commodore Electronics Ltd., 26 U.S.P.Q.2d at 1507; Lane Ltd. v. Int'l Trading Co., 33 U.S.P.Q.2d 1351, 1355 (T.T.A.B. 1994).

It is settled that “the determination of whether an applicant has a bona fide intention to use the mark in commerce is to be a fair, objective determination based on all the circumstances.” Id., at 1357. The absence of documentary evidence on the part of an applicant showing its intent to use a mark “is sufficient to prove that applicant lacks a bona fide intention to use its mark in commerce as required by Section 1(b).” Commodore Electronics, 26 U.S.P.Q.2d at 1507. Thus, in Research In Motion Ltd. v. NBOR Corp., the Board found that “Opposer has met its burden of demonstrating applicant’s lack of a bona fide intent to use the mark by showing that applicant has no documentary evidence regarding such intent” and where Applicant admitted in its discovery responses that:

it has not offered any goods or services for sale under the involved mark; the mark has not been used and no plans have been made as to how the mark may be used; there is no projected date of first use in commerce; no channels of trade have been formulated or planned for the future; the classes of consumers and geographic areas of sales have not yet been determined; applicant has not undertaken any market studies, surveys, or focus groups; and no documents exist regarding plans for expansion and growth of the product and service lines under the mark.

92 U.S.P.Q.2d 1926, 1930 (T.T.A.B. 2009) (record citations omitted).

Even an applicant's production of one or more documents will be insufficient to demonstrate a bona fide intent to use where the overall objective evidence contradicts or overshadows those scant documents, or the documents themselves do not show any concrete plans taken by the applicant in furtherance of marketing or distributing goods or services bearing or rendered in connection with the mark at issue. See, e.g., Swatch AG (Swatch SA) (Swatch Ltd.) v. M. Z. Berger & Co., 108 U.S.P.Q.2d 1463, 1472 (T.T.A.B. 2013) ("Three internal emails forwarding pictures of three stylized versions of the IWATCH mark, as well as images of one clock and two apparently identical watches featuring the IWATCH mark" insufficient to show bona fide intent to use); Lincoln Nat'l Corp. v. Anderson, 110 U.S.P.Q.2d 1271, 1281 (T.T.A.B. 2014) ("we find that the documentary evidence of record [inter alia, applicant's website setting forth general intentions, unsolicited mailings to potential licensees and handwritten list of expenditures] provides no significant support for applicant's claim that he had a bona fide intent"); SmithKline Beecham Corp. v. Omnisource DDS LLC, 97 U.S.P.Q.2d 1300, 1304 (T.T.A.B. 2010) ("the minutes from applicant's annual meetings contain only vague references to research and development of products in the dental field for consumers and dental professionals, filing various trademark applications for unspecified products, and the creation of a business plan").

In response to Opposer's discovery requests, Applicant here admitted that he has failed to take any steps regarding the exploitation of Applicant's Goods bearing or rendered in connection with Applicant's Mark in the United States. To wit, Applicant has not marketed or made use of Applicant's Mark in connection with Applicant's Goods or any other goods and services, **and has no present intention to do so**. Shimanoff Decl. Ex. C (Applicant's Amended Resp. to Opposer's Interrog. Nos. 1, 5, 6; Applicant's Amended Resp. to Opposer's Doc. Req. No 6).

Additionally, Applicant has no documents concerning: specimens; labels, tags or packaging; advertising, marketing, or promotional materials, including but not limited to brochures, catalogues, circulars, flyers, media plans or press kits; advertising and promotional expenditures; trade shows or conventions; licenses; websites; market research or surveys or channels of trade relating to Applicant's use or intended use of Applicant's Goods bearing or rendered in connection with Applicant's Mark. *Id.* (Applicant's Amended Resp. to Opposer's Interrogatories Nos. 10, 11; Applicant's Amended Resp. to Opposer's Doc. Req. Nos. 1-3, 6-13, 18, 20).

The sole document produced by Applicant in support of his purported bona fide intent to use his mark consisted of three pages of handwritten notes in Chinese from a single meeting **in China** four years ago in 2010. But this document does not show a bona fide intent to use. Although it is entitled a "business plan," it goes on to clarify that it is a "**Plan to apply for a trademark** simultaneously in China and the United States (see which one can be approved). **If it is approved**, will plan to produce beer and related beverages in the United States and sell them in the China market." *Id.* Ex. D (emphasis added). The rest of the document merely states that Applicant will need to produce and market his goods. It does not contain any details about **how** such a plan will be implemented or the specific components thereof. Nor does it show that any steps actually were taken pursuant to this "plan." This document is exactly the type of evidence that the Board found insufficient to show a bona fide intent to use in Lincoln Nat'l Corp. and SmithKline Beecham Corp

Applicant's responses to Opposer's discovery requests thus provide Opposer with a clear basis on which to assert as an additional ground of opposition that Applicant lacked a bona fide intention to use Applicant's Mark at the time that he filed his application.

Moreover, Applicant can make no claim of prejudice based on the assertion of this new ground for opposition. Opposer has acted diligently in seeking such amendment promptly (within three weeks) after receiving Applicant's responses to the discovery requests, which were delayed by over a year based on Applicant's own failure to comply with his discovery obligations and an order of the Board. Indeed, Opposer filed the instant motion within one day after receiving a certified translation of Applicant's purported "business plan" (which only was produced four days ago), the only document identified by Applicant to show his bona fide intent to use. Additionally, because the facts relating to the additional ground of opposition relate solely to Applicant's own intentions, there is no additional discovery required on its part or other undue burden imposed by the amendment. Given the absence of any prejudice to Applicant, the motion to amend should be granted. See, e.g., Polaris Industries, 59 U.S.P.Q.2d at 1800; United States Olympic Committee v. O-M Bread Inc., 26 U.S.P.Q.2d 1221, 1223 (T.T.A.B. 1993).

**OPPOSER'S MOTION TO SUSPEND  
SHOULD BE GRANTED**

In order to permit sufficient time for the Board to decide Opposer's motion prior to the onset of the pretrial disclosure and testimony periods,<sup>2</sup> thereby ensuring that the parties have full notice of the actual issues to be tried, Opposer also respectfully requests that the proceeding be suspended pending consideration of the motion to amend and that, pursuant to 37 C.F.R. § 2.121(a)(1), the pretrial disclosure and testimony periods be reset by the Board following its decision on Opposer's motion to amend.

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<sup>2</sup> The Discovery period already closed and need not be reopened since the facts relevant to bona fide intent to use are exclusively within the knowledge of Applicant.



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Opposer's Motions to Amend and to Suspend Pending Consideration of the Motion to Amend, including the supporting Declaration of Eric J. Shimanoff, Esq. and the exhibits thereto, was mailed on May 8, 2014 via First Class Mail, postage prepaid, to counsel for Applicant as follows:

David Yan, Esq.  
Law Offices of David Yan  
136-20 38<sup>th</sup> Avenue, Suite 11E  
Flushing, New York 11354-4232

/Lindsay M. Rodman/  
Lindsay M. Rodman



(“Applicant’s Mark”) for “Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer; Porter” (“Applicant’s Goods”) in International Class 32.

3. The Notice of Opposition alleged that registration of Applicant’s Mark was likely to result in confusion, would falsely suggest a connection between Applicant and Opposer and/or cause a likelihood of dilution by blurring of the distinctive quality of Opposer’s Empire State Building Marks, as defined in Paragraph 1 of the Notice of Opposition. Attached hereto as **Exhibit A** is a true and correct copy of Opposer’s proposed Amended Notice of Opposition, which sets forth as an additional ground for opposition that Applicant did not have a bona fide intent to use Applicant’s Mark in commerce in connection with Applicant’s Goods when it filed Application Serial No. 85/213,453.

4. On February 19, 2013, Opposer served Applicant with Opposer’s First Set of Interrogatories and Request for Production of Documents and Things (“Opposer’s Discovery Requests”) by First Class Mail. A true and correct copy of Opposer’s Discovery Requests is attached hereto as **Exhibit B**.

5. After Opposer filed motions to compel and for sanctions, on or about April 15, 2014, over one year after they were originally due, Applicant served Applicant’s Amended Response to Opposer’s First Set of Interrogatories and Request for Production of Documents and Things (“Applicant’s Discovery Responses”). A true and correct copy of Applicant’s Discovery Responses is attached hereto as **Exhibit C**.

6. In response to Opposer's Interrogatory No. 16 that Applicant state whether he "has any documentation . . . reflecting [his] bona fide intention, prior to January 8, 2011, to use Applicant's Mark in commerce in connection with each and every [of Applicant's Goods]," Applicant identified and produced *only one document*, consisting of a three page handwritten note in Chinese from a single meeting that apparently took place in China in 2010, which Applicant refers to as a "business plan." A true and correct copy of this document and a certified translation thereof are attached hereto as **Exhibit D**. Although Applicant identified this "business plan" in his interrogatory response served by first class mail on or about April 15, 2014, Applicant did not *produce* this document until on or about May 5, 2014, and only after counsel for Opposer further reiterated Applicant's obligation to comply with his discovery obligations and the Board's recent Order. Counsel for Opposer immediately sent the document out for certified translation, which was delivered to counsel for Opposer on May 7, 2014.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON MAY 8, 2014 AT NEW YORK, NEW YORK.



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ERIC J. SHIMANOFF

**COMPOSITE EXHIBIT A**

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

In re Application Serial No. 85/213,453  
Filed: January 8, 2011  
For Mark: NYC BEER LAGER and Design  
Published in the Official Gazette: December 6, 2011

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EMPIRE STATE BUILDING COMPANY L.L.C.,  
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Opposer,  
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:  
v.  
:  
MICHAEL LIANG,  
:  
Applicant.  
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:  
----- X

Opposition No. 91204122

**AMENDED NOTICE OF  
OPPOSITION**

Commissioner for Trademarks  
Attn: Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Opposer, Empire State Building Company L.L.C. (“Opposer”),<sup>1</sup> a New York limited liability company with offices at c/o Malkin Holdings, 60 East 42<sup>nd</sup> Street, New York, New York 10165, believes that it will be damaged by registration of the following NYC BEER LAGER and Design mark:

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<sup>1</sup> Empire State Building Company L.L.C. no longer exists as a corporate entity. On October 7, 2013, well after the close of discovery on February 19, 2013, all rights and title in Opposer’s Empire State Building Marks (as defined below) were assigned to ESRT Empire State Building, L.L.C., as recorded in the Assignment Services Division of the USPTO, which assignee will be substituted in as Opposer.



(“Applicant’s Mark”) for “Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer; Porter” in International Class 32 ( “Applicant’s Goods”), as shown in intent to use Application Serial No. 85/213,453 (the “Application”), and having been granted extensions of time to oppose up to and including April 4, 2012, hereby opposes the same.

As grounds for opposition, it is alleged that:

1. Since long prior to January 8, 2011, Applicant’s filing date and constructive first use date, Opposer, its predecessors, and its affiliated and related entities, and/or licensees have used the word mark EMPIRE STATE BUILDING and various marks depicting the visual equivalent of the world-renowned Empire State Building, which is located in New York City, including, without limitation, the following distinctive stylizations:



, alone or with other word, letter and/or

design elements (“Opposer’s Empire State Building Marks”), in connection with entertainment services, real estate services and a wide variety of goods and services, including, but not limited to, restaurant services and alcoholic beverages.

2. Opposer owns U.S. federal registrations for Opposer’s Empire State Building Marks in International Classes 36 and 41, namely, Registration Nos. 2411972, 2413667, 2429297 and 2430828, which are all incontestable.

3. Since long prior to January 8, 2011, Applicant’s constructive first use date, Opposer, its predecessors, and their affiliated and related entities, and/or licensees have promoted and advertised the sale and distribution of goods and services bearing or offered in connection with Opposer’s Empire State Building Marks, including, but not limited to, entertainment services, real estate services and a wide variety of goods and services, including, but not limited to, restaurant services and alcoholic beverages, and have offered such goods and rendered such services in commerce.

4. Opposer has built up highly valuable goodwill in Opposer’s Empire State Building Marks, and said goodwill has become closely and uniquely identified and associated with Opposer.

5. On January 8, 2011, Applicant filed the Application for Applicant's Mark for Applicant's Goods, based on an intent to use.

6. Upon information and belief, Applicant did not use Applicant's Mark in United States commerce for any of Applicant's Goods covered in the Application prior to its constructive first use date of January 8, 2011.

7. The description of Applicant's Mark in the Application indicates that "The mark consists of a building resembling the Empire State Building surrounded by three concentric circles." Moreover, the word elements of Applicant's Mark include only the descriptive or generic terms "NYC," "BEER," and "LAGER," which Applicant has disclaimed in the Application. Upon information and belief, Applicant intends to trade on the enormous good will of Opposer by using a design of the "Empire State Building" in combination with the geographic term "NYC," which is the abbreviation for New York City, in Applicant's Mark.

8. The dominant feature of Applicant's Mark is the image of the Empire State Building.

9. Upon information and belief, Applicant did not have a bona fide intent to use Applicant's Mark in commerce on the specified goods, namely, "Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed malt-based alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer; Porter" when it filed Application Serial No. 85/213,453, as confirmed by the fact that Applicant has no written document(s) that would sufficiently support such an intent.

10. The goods covered by the Application are closely related to the goods offered and services rendered in connection with Opposer's Empire State Building Marks.

11. Applicant's Mark so resembles Opposer's Empire State Building Marks as to be likely, when used in connection with Applicant's Goods, to cause confusion, to cause mistake, and to deceive the trade and public, who are likely to believe that Applicant's Goods have their origin with Opposer and/or that such goods are approved, endorsed or sponsored by Opposer or associated in some way with Opposer. Opposer would thereby be injured by the granting to Applicant of a certificate of registration for Applicant's Mark.

12. Opposer's Empire State Building Marks are distinctive and famous and were so prior to January 8, 2011, Applicant's constructive first use date of Applicant's Mark for Applicant's Goods. Registration of Applicant's Mark will also injure Opposer by causing a likelihood of dilution by blurring of the distinctive quality of Opposer's Empire State Building Marks.

13. Applicant's Mark violates Section 2(a) of the Lanham Act in that it would falsely suggest a connection between Applicant and Opposer. More specifically, Applicant's Mark violates Section 2(a) of the Lanham Act because (a) Applicant's Mark contains as an important element of its mark a design of Opposer's famous Empire State Building previously used by Opposer; (b) Applicant's Mark would be recognized as being associated with the Empire State Building in that Applicant's Mark points uniquely and unmistakably to that building; (c) Opposer is not connected with the activities performed by Applicant under Applicant's Mark; and (4) Opposer's identity is of sufficient fame or reputation that a connection with Opposer would be presumed when Applicant's Mark is used with Applicant's Goods.

WHEREFORE, Opposer believes that it will be damaged by registration of Applicant's Mark and requests that the opposition be sustained and said registration be denied.

Please recognize as attorneys for Opposer in this proceeding William M. Borchard, Mary L. Kevlin, Eric J. Shimanoff and Lindsay R. Rodman (members of the bar of the State of New York) and the firm Cowan, Liebowitz & Latman, P.C., 1133 Avenue of the Americas, New York, New York 10036.

Please address all communications to Mary L. Kevlin, Esq. at the address listed below.

Dated: New York, New York  
May 8, 2014

Respectfully submitted,

COWAN LIEBOWITZ & LATMAN, P.C.  
Attorneys for Opposer

By: /Lindsay M. Rodman/

William M. Borchard  
Mary L. Kevlin  
Eric J. Shimanoff  
Lindsay M. Rodman

1133 Avenue of the Americas  
New York, New York 10036  
(212)790-9200

**EXHIBIT B**



additional responsive information or documents between the time the answers are served and the time of the final hearing of this opposition proceeding.

**DEFINITIONS AND INSTRUCTIONS**

A. The term “Applicant” means Michael Liang, and any entities or businesses which he owns or controls, any persons, businesses or entities with which he is directly connected, and all employees, agents and/or representatives thereof.

B. The term “Opposer” means Opposer Empire State Building Company L.L.C., and all parent, subsidiary, related, predecessor and/or successor entities, divisions, employees, agents and/or representatives thereof.

C. The term “Opposer’s Empire State Building Marks” shall refer to marks used, registered and/or applied to be registered by Opposer consisting of or incorporating the words EMPIRE STATE or EMPIRE STATE BUILDING, and various marks depicting the visual equivalent of the world-renowned Empire State Building, which is located in New York City, including, but not limited to, the marks set forth in paragraphs 1 and 2 of the Notice of Opposition in this proceeding.

D. The term “Applicant’s Mark” shall refer to the mark NYC BEER LAGER and



Design as depicted here: , as applied-for in Application Serial No. 85/213,453 and any other marks used, registered and/or applied to be registered by Applicant consisting of or incorporating a building design similar to the design in Applicant’s Mark, alone or with other word, letter and/or design elements.

E. The term “commerce” means commerce subject to regulation by Congress, as defined in 15 U.S.C. §1127.

F. As used herein, the terms “entity” and “person” include natural persons, governmental entities, organizations, corporations, partnerships, associations, joint ventures and any other individual or group of individuals that has the purpose of conducting or, in fact, conducts business.

G. The term “document” shall be given the broadest possible scope under Fed. R. Civ. P. 34 and includes, but is not limited to, all writings, correspondence, memoranda, handwritten notes, drafts, invoices, contracts, purchase orders, letters, checks, receipts, books, pamphlets, flyers, advertisements, web pages, publications, stickers, posters, catalogs, labels, product packaging, product containers, displays, photographs, slides, videotapes, films, artwork, drawings, sketches, illustrative materials, layouts, tear sheets, magnetic recording tapes, microfilms, computer printouts, e-mail, work sheets, and files from any personal computer, notebook or laptop computer, file server, minicomputer, mainframe computer or any other storage means by which information is retained in retrievable form, including files that are still on any storage media, but that are identified as “erased but recoverable,” and all other materials, whether printed, typewritten, handwritten, recorded or reproduced by a mechanical or electronic process.

H. The term “identify” when used in connection with a natural person or persons requires Applicant to state the person’s full name and last known business and residential addresses, telephone number and e-mail address.

I. The term “identify” when used in connection with a document requires

Applicant to:

(i) Furnish the name or title, date and general description (e.g., letter, memorandum, etc.) of the document, the name and address of the person from whom the document originated, the name and address of the persons to whom the document was addressed or delivered, and the names and addresses of all persons to whom copies of the document were sent; and

(ii) State whether Applicant is in possession of the original of the document or a copy thereof and, if Applicant is not in possession of the original or a copy, furnish the name and address of the custodian of the original or a copy; and

(iii) Furnish a general description of the subject matter to which the document(s) pertains.

J. The term “identify” when used in connection with a company, organization or other business entity requires Applicant to state the name, address, and phone number of the company, organization or other business entity.

K. The term “concerning” means referring to, relating to, embodying, connected with, commenting on, responding to, showing, describing, analyzing or constituting.

L. The singular and plural forms are used herein interchangeably, as are the masculine and feminine forms and the present and past tenses, and such terms should be construed as necessary to bring within the scope of the interrogatory/document request all documents and information which might otherwise be construed to be outside its scope.

M. The terms “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the interrogatory/document request all documents and

information which might otherwise be construed to be outside its scope.

N. If any information or document called for in any interrogatory or request is withheld in whole or in part by reason of a claim of attorney-client privilege or any other claim of immunity from discovery, then, at the time the information or document is to be produced, a list is to be furnished identifying any such information or document withheld together with the following information: date and title of the document; name and job title of each author, writer or sender of the document; name and job title of each recipient, addressee or other person to whom the original or any copy of the document was sent or furnished; if Applicant contends that an author or recipient of the document is an attorney for purposes of claiming privilege or immunity from discovery, identify the State Bar of which he or she was a member at the time of the communication in question; the general subject matter of the information or document withheld; the basis for the claim of privilege or immunity from discovery; and the interrogatory or request to which the information or document is responsive.

O. In the event that any document called for by this request has been destroyed, lost, discarded or otherwise disposed of, identify any such document as completely as possible, including, without limitation, the date of disposal, manner of disposal, reason for disposal, person authorizing the disposal and person disposing of the document.

P. Documents shall be produced as they are kept in the ordinary course of business or shall be organized and labeled to correspond to the document request to which they are responsive.

Q. To the extent the information or documents are sought concerning Applicant's use or intended use of Applicant's Mark, the interrogatories and requests are referring to use or

intended use in the United States or in commerce.

### **INTERROGATORIES**

#### **Interrogatory No. 1**

State the date when Applicant first selected any mark comprising or containing Applicant's Mark for use or intended use in connection with any goods or services.

#### **Interrogatory No. 2**

Identify all persons who or entities that participated in or were consulted in the design, selection and/or adoption of any mark comprising or containing Applicant's Mark, including a description of the nature of each person's or entity's participation or consultation.

#### **Interrogatory No. 3**

Describe in detail the reason(s) for the selection of Applicant's Mark, including, without limitation, the intended commercial impression created by the building design in Applicant's Mark.

#### **Interrogatory No. 4**

Identify any trademark searches or other searches, opinions, investigations, analyses or studies related to the selection, design, and/or adoption of Applicant's Mark, including, without limitation, the persons involved, the date(s), and the data or results of those searches, opinions, investigations, analyses or studies.

#### **Interrogatory No. 5**

State whether Applicant (or any person or entity authorized by Applicant) has made any use of any marks comprising or containing Applicant's Mark in the United States or in commerce as of the present date, and if so, identify each product or service on or in connection with which Applicant (or any person or entity authorized by Applicant) has made such use (hereinafter "Applicant's Products/Services").

Interrogatory No. 6

For each of Applicant's Products/Services identified in response to Interrogatory No. 5 above, identify:

- (a) The date of first use for each of Applicant's Products/Services;
- (b) The period of time during which each of Applicant's Products/Services was or is being distributed, offered for sale, sold or rendered;
- (c) The geographic area(s) in which each of Applicant's Products/Services was or is being distributed, offered for sale, sold or rendered;
- (d) The annual volume of sales for each year to the present, both by dollar amount and unit amount, for each of Applicant's Products/Services;
- (e) Any other revenues, including, without limitation, any licensing or sponsorship revenues that Applicant has received in connection with each of Applicant's Products/Services;
- (f) The range of retail and wholesale price for each of Applicant's Products/Services for each year to the present;
- (g) The channels of trade (e.g., types of retail stores, catalogs, mail order, on-line, promotional sales, private sales, establishments, etc.) through which each of Applicant's Products/Services was or is being distributed or sold to the ultimate purchaser, consumer or user; and
- (h) The type of customers to whom each of Applicant's Products/Services is or was marketed, distributed, offered for sale, sold or rendered.

Interrogatory No. 7

State whether any mark comprising or containing Applicant's Mark has been used or is intended to be used in connection with any indicia, designs, stylizations, terms, imagery, marks, logos, themes, or references similar to, related to, or associated or affiliated with Opposer, and if so describe the details of each such use or intended use.

Interrogatory No. 8

Identify any persons or entities that have ever, either orally or in writing, authorized, licensed, assigned, granted, conveyed or otherwise transferred to Applicant the right to use any mark comprising or containing Applicant's Mark, and for each such person or entity, identify the date of and material terms under which such authorization, license, assignment, grant, conveyance or other transfer was made, including, without limitation, the details of the grant of rights to use Applicant's Mark and the financial terms governing such transaction.

Interrogatory No. 9

Identify any persons or entities Applicant has authorized, licensed, assigned, granted, conveyed or otherwise transferred the right to use any mark comprising or containing Applicant's Mark, and for each such person or entity, identify the date of and material terms under which such authorization, license, assignment, grant, conveyance or other transfer of right to use was made, including, without limitation, the details of the grant of rights to use Applicant's Mark and the financial terms governing such transaction.

Interrogatory No. 10

Identify each website, web auction, web hosting, web listing, web posting, web page or social media page, whether owned by Applicant or third parties, including its Internet address, on or through which Applicant's Mark and/or Applicant's Products/Services have been, are

currently being or are intended to be promoted, advertised, displayed, offered for sale, sold or otherwise distributed.

Interrogatory No. 11

(a) Identify each kind of advertising, marketing and other promotional materials, including, without limitation, point-of-sale material, signs, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other advertising material or promotional item that has been used or is intended to be used in connection with Applicant's Products/Services and/or Applicant's Mark.

(b) For each promotional material referred to in subparagraph (a) above, identify where the promotional material is advertised, posted, promoted, published or distributed (e.g. name the publication, the URL for the website, the retail store, etc.).

Interrogatory No. 12

(a) Describe each instance where any person has by word or deed or otherwise, including, without limitation, by misdirected mail, e-mail, telephone calls, orders or inquiries, suggested or reflected a belief that Applicant is licensed, endorsed or sponsored by or is a sponsor of Opposer, or that the products or services sold, offered for sale, or otherwise distributed or intended to be sold, offered for sale, or otherwise distributed by Applicant under Applicant's Mark are licensed, endorsed or sponsored by or associated with or related in any way to Opposer, and/or Opposer's Empire State Building Marks; and

(b) Identify all persons knowledgeable about any such instances referred to in subparagraph (a) above and describe the nature of their knowledge.

Interrogatory No. 13

State whether Applicant has marketed or intends to market Applicant's Products/Services bearing or rendered in connection with Applicant's Mark or is aware that such products will be marketed to consumers of Opposer's goods or services, or to consumers located in or around New York, New York and, if so, describe the means by which Applicant has marketed or intends to market Applicant's Products/Services or how such products will be marketed, to consumers of Opposer's goods or services, or to consumers located in or around New York, New York.

Interrogatory No. 14

State whether Applicant was aware of Opposer, Opposer's Empire State Building Marks, and/or goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer or under license from Opposer in connection with Opposer's Empire State Building Marks prior to:

- a) January 8, 2011, when Applicant filed Application Serial No. 85/213,453.
- b) Any use by Applicant of Applicant's Mark in connection with any goods or services.

Interrogatory No. 15

State whether Applicant has ever sought a license or other right to use any marks, logos, designs, stylizations or slogans, including without limitation, Opposer's Empire State Building Marks, from Opposer.

Interrogatory No. 16

State whether Applicant has any documentation, including without limitation, business plans, marketing plans, memos, correspondence or draft proposals of any kind, reflecting Applicant's bona fide intention, prior to or as of January 8, 2011, to use Applicant's Mark in commerce in connection with each and every good identified in International Class 32 in Application Serial No. 85/213,453.

Interrogatory No. 17

With respect to each response to Opposer's First Set of Requests for Admissions that is anything other than an unqualified admission, state the basis for the response, including, without limitation, all facts and documents upon which the response is based.

**DOCUMENT REQUESTS**

Request No. 1

Specimens of each of Applicant's Products/Services bearing or displaying any mark comprising or containing Applicant's Mark, including, without limitation, each different color combination and each different product design or stylization of products in which Applicant's Mark is used or intended to be used by Applicant and/or its licensees, sponsors or related or affiliated entities.

Request No. 2

Specimens of each label, hangtag, tag, product package, package insert, sticker, hologram, package material or other device which bears any mark comprising or containing Applicant's Mark, and which has been used or is intended to be used by Applicant and/or its licensees.

Request No. 3

Specimens of each point-of-sale material, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other advertising material or promotional item which bears any mark comprising or containing Applicant's Mark, and which has been used or is intended to be used by Applicant and/or its licensees.

Request No. 4

All documents concerning Applicant's design, clearance, selection, and/or adoption of Applicant's Mark.

Request No. 5

All documents concerning any trademark searches or other searches, opinions, investigations, analyses or studies conducted or reviewed by or on behalf of Applicant concerning Applicant's Mark.

Request No. 6

Documents sufficient to identify: (a) the date of first use of Applicant's Mark; (b) the date of first use of Applicant's Mark in commerce; (c) the geographic area(s) of use of Applicant's Mark; (d) any and all customers, distributors or other persons or entities to which Applicant's Products/Services offered in connection with Applicant's Mark have been sold or distributed; (e) Applicant's Products/Services bearing, offered for sale, sold or otherwise distributed under Applicant's Mark; (f) all retail, wholesale, commercial, or charitable entities through which goods or services bearing or rendered in connection with Applicant's Mark have been offered for sale, sold or otherwise distributed; (g) the channels of trade through which Applicant's Products/Services offered in connection with Applicant's Mark were or are being distributed or sold to the ultimate purchaser, consumer or user; (h) the annual volume of sales (in dollars and units) made under Applicant's Mark for each year from the date of first use to the present; and (i) the annual amount of revenue, including, without limitation, any licensing or sponsorship revenues that Applicant has received in connection with Applicant's Products/Services offered in connection with Applicant's Mark, for each year from the date of first use to the present.

Request No. 7

All documents concerning the advertising, marketing or promotion of Applicant's Products/Services offered for sale or otherwise distributed or intended to be offered for sale or otherwise distributed under Applicant's Mark, including, without limitation, any media plans, public relations materials, press kits and correspondence with advertising agencies, public relations firms, media planners, graphic designers, web site designers or any other such entities in the advertising and promotional field.

Request No. 8

Documents sufficient to identify the amount of money expended by Applicant in advertising and promoting Applicant's Mark and/or Applicant's Products/Services.

Request No. 9

All documents concerning each trade show, convention, exposition or conference at which Applicant's Products/Services bearing Applicant's Mark have been displayed, advertised, promoted, offered for sale or sold.

Request No. 10

All documents concerning any authorization, license, assignment, grant, conveyance or other transfer of the right to use (or proposed authorization, license, assignment, grant, conveyance or other transfer of the right to use) Applicant's Mark from any third party to Applicant, or to sell Applicant's Products/Services bearing Applicant's Mark.

Request No. 11

All documents concerning any authorization, license, assignment, grant, conveyance or other transfer of the right to use (or proposed authorization, license, assignment, grant,

conveyance or other transfer of the right to use) any of Opposer's Empire State Building Marks from Opposer to Applicant.

Request No. 12

All documents concerning Applicant's authorization, license, assignment, grant, conveyance or other transfer of rights (or proposed authorization, license, assignment, grant, conveyance or other transfer of rights) in Applicant's Mark from or on behalf of Applicant to any third party, including, but not limited to, all license agreements.

Request No. 13

Documents sufficient to identify each website, web auction, web hosting, web listing, web posting, web page or social media page (whether owned by Applicant or third parties), including its Internet address, on or through which Applicant's Mark and/or Applicant's Products/Services has been, is currently being or is intended to be promoted, advertised, displayed, offered for sale, sold or otherwise distributed.

Request No. 14

All documents concerning the use or intended use of Applicant's Mark in connection with any indicia, designs, stylizations, terms, imagery, marks, logos, themes, or references similar to, related to, or associated or affiliated with Opposer, or its trademarks, logos, designs, or stylizations, including without limitation, Opposer's Empire State Building Marks.

Request No. 15

Apart from the current opposition, all documents concerning any objections, claims, demands or actions lodged or filed against the use or proposed use or registration of Applicant's Mark, including, without limitation, cease and desist letters, complaints and/or Notices of Opposition.

Request No. 16

All documents concerning Opposer, Opposer's Empire State Building Marks, or any goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer.

Request No. 17

All documents concerning Applicant's knowledge of Opposer, Opposer's Empire State Building Marks, and/or any goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer or under license from Opposer in connection with Opposer's Empire State Building Marks prior to:

- a) January 8, 2011, when Applicant filed Application Serial No. 85/213,453.
- b) Any use by Applicant of Applicant's Mark in connection with any goods or services.

Request No. 18

All documents concerning any market research, focus groups, surveys or other investigation made or commissioned by or on behalf of Applicant concerning Applicant's Mark, Applicant's Products/Services, Opposer's Empire State Building Marks or any goods or services advertised, promoted, offered for sale, sold, licensed or rendered by Opposer.

Request No. 19

All documents reflecting or indicating any confusion on the part of any member of the public between Opposer and Applicant and/or their respective marks and/or goods or services, including, without limitation, documents referring to or evidencing misdirected mail, e-mails, telephone calls, orders or inquiries suggesting or reflecting a belief by any person that Applicant is licensed, endorsed or sponsored by, or is a sponsor of Opposer, or that the products or services sold, offered for sale or otherwise distributed, or intended to be sold, offered for sale or

Ref. No. 22690.013

otherwise distributed, by Applicant under Applicant's Mark are licensed, endorsed or sponsored by or associated or related in any way with or to Opposer, and/or Opposer's goods and services.

Request No. 20

All documents concerning the actual or intended channels of trade for goods or services sold or rendered or intended to be sold or rendered in connection with Applicant's Mark.

Request No. 21

All documents concerning any designs, logos, renditions, stylizations, (including, without limitation, font styles) or formats of or for Applicant's Mark, including without limitation any drafts or proposed versions of same.

Request No. 22

All documents, including without limitation, business plans, marketing plans, memos, correspondence or draft proposals of any kind, concerning Applicant's bona fide intent to use Applicant's Mark. in connection with each and every good identified in International Class 32 in Application Serial No. 85/213,453 prior to or as of January 8, 2011.

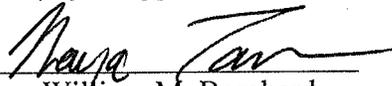
Request No. 23

All documents identified or otherwise referred to by Applicant in answering Opposer's First Set of Interrogatories above and Opposer's First Set of Requests for Admission.

Dated: New York, New York  
February 19, 2013

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.  
*Attorneys for Opposer*

By:   
William M. Borchard  
Mary L. Kevlin  
Maya L. Tarr

1133 Avenue of the Americas  
New York, New York 10036  
212-790-9200

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 19, 2013, I caused a true and complete copy of the foregoing *Opposer's First Set of Interrogatories and Request for Production of Documents and Things to Applicant* to be served by First Class Mail to Applicant's Attorney and Correspondent of Record, David Yan, Law Offices of David Yan, 136-20 38<sup>th</sup> Avenue, Suite 11E, Flushing, New York 11354 4232, United States.

Dated: New York, New York  
February 19, 2013

  
\_\_\_\_\_  
Maya L. Tarr

**EXHIBIT C**

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

In re Application Serial No. 85/213,453  
Filed: January 8, 2011  
For Mark: NYC BEER LAGER and Design  
Published in the Official Gazette: December 6, 2011

-----X  
EMPIRE STATE BUILDING COMPANY L.L.C., :  
: Opposer, :  
v. : Opposition No.: 91204122  
MICHAEL LIANG, :  
: Applicant. :  
-----X

Commissioner for Trademarks  
Attn: Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

**APPLICANT'S AMENDED RESPONSE  
TO OPPOSER'S FIRST SET OF INTERROGATORIES  
AND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS**

Pursuant to Rule 33 and 34 of the Federal Rules of Civil Procedure and 37 C.F.R. §  
2.120, Applicant, MICHAEL LIANG ("Applicant"), by and through his undersigned attorney,  
hereby submit amended responses and objections to Opposer Empire State Building Company  
L.L.C. ("Opposer")'s First Set of Interrogatories and Request for Production of Documents and  
Things:

## **OBJECTIONS PURSUANT TO PRIVILEGE**

Applicant objects to each and every Interrogatory herein to the extent that it seeks information or documents protected by any privilege or protection from discovery, including but not limited to the attorney-client privilege and the work-product doctrine. The inadvertent production of any material protected by the attorney-client privilege, the work-product doctrine or any other applicable privilege, immunity or protection from disclosure is not intended and should not be construed to constitute a waiver. Applicant reserves the right to assert all applicable privileges and protections from production.

The information provided herein is based upon, and is therefore limited by, the records and information in existence, presently collected and thus far discovered in the course of the preparation of these responses.

## **RESPONSES**

### **Interrogatory No. 1:**

State the date when Applicant first selected any mark comprising or containing Applicant's Mark for use or intended use in connection with any goods or services.

### **Response No. 1:**

In December, 2010, Applicant first selected a mark containing Applicant's Mark for intended use in connection with goods or services of Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed maltbased alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer.

Applicant has not used any mark comprising or containing Applicant's Mark in connection with any goods or services. Once the Applicant's application for registration (Serial No. 85/213,453) is approved by the U.S. Patent and Trademark Office, Applicant intends to use a mark comprising or containing the Applicant's Mark in goods or services of Alcohol-free beers; Beer; Beer, ale and lager; Beer, ale and porter; Beer, ale, lager, stout and porter; Beer, ale, lager, stout, porter, shandy; Beers; Black beer; Brewed maltbased alcoholic beverage in the nature of a beer; Coffee-flavored beer; De-alcoholised beer; Extracts of hops for making beer; Flavored beers; Ginger beer; Hop extracts for manufacturing beer; Imitation beer; Malt beer; Malt extracts for making beer; Malt liquor; Non-alcoholic beer; Pale beer.

**Interrogatory No. 2:**

Identify all persons who or entities that participated in or were consulted in the design selection and/or adoption of any mark comprising or containing Applicant's Mark, including a description of the nature of each person's or entity's participation or consultation.

**Response No. 2:**

Applicant has at least retained a design firm, Sky Blue Web Design Studio, 15 7th Avenue South, New York, NY 10014, Attn.: Raymond Yu, Tel.: (917) 916-8802, to design the Applicant's Mark. Besides that, Applicant does not remember with specificity every individual, other than the design firm mentioned above, responsive to this request.

**Interrogatory No. 3:**

Describe in detail the reason(s) for the selection of Applicant's Mark, including, without limitation, the intended commercial impression created by the building design in Applicant's Mark.

**Response No. 3:**

The selection of Applicant's Mark is to attract customers who like metropolitan life style to consume the Applicant's goods and services. The building design in the Applicant's Mark is to create the commercial impression of metropolitan life style.

**Interrogatory No. 4:**

Identify any trademark searches or other searches, opinions, investigations, analyses or studies related to the selection, design, and/or adoption of Applicant's Mark, including, without limitation, the persons involved, the date(s), and the data or results of those searches, opinions, investigations, analyses or studies.

**Response No. 4:**

(a) The design firm, Sky Blue Web Design Studio, will not disclose its work-product related confidential information and its work has no connection with the Applicant's intention to use this Applicant's Mark.

(b) Applicant searched the website of the U.S. Patent and Trademark Office shortly before Applicant submitted the application for registration on January 8, 2011. The search shows that trademark registration serial number 1247058 contains a building design resembling of Empire State Building is allowed.

**Interrogatory No. 5:**

State whether Applicant (or any person or entity authorized by Applicant) has made any use of any marks comprising or containing Applicant's Mark in the United States or in commerce as of the present date, and if so, identify each product or service on or in connection with which Applicant (or any person or entity authorized by Applicant) has made such use (hereinafter "Applicant's Products/Services").

**Response No. 5:**

Applicant has not made use any mark comprising or containing Applicant's Mark in the United States. Applicant has used a mark comprising Applicant's Mark in commerce in China.

**Interrogatory No. 6**

For each of Applicant's Products/Services identified in response to Interrogatory No. 5 above, identify:

- (a) The date of first use for each of Applicant's Products/Services;
- (b) The period of time during which each of Applicant's Products/Services was or is being distributed, offered for sale, sold or rendered;
- (c) The geographic area(s) in which each of Applicant's Products/Services was or is being distributed, offered for sale sold or rendered;
- (d) The annual volume of sales for each year to the present, both by dollar amount and unit amount, for each of Applicant's Products/Services;
- (e) Any other revenues, including, without limitation, any licensing or sponsorship revenues that Applicant has received in connection with each of Applicant's Products/Services;
- (f) The range of retail and wholesale price for each of Applicant's Products/Services for each year to the present;
- (g) The channels of trade (e.g., types of retail stores, catalogs, mail order, on-line, promotional sales, private sales, establishments, etc.) through which each of Applicant's Products/Services was or is being distributed or sold to the ultimate purchaser, consumer or user; and

- (h) The type of customers to whom each of Applicant's Products/Services is or was marketed, distributed, offered for sale, sold or rendered.

**Response No. 6:**

- (a) Applicant has not used its products or services in the United States yet;
- (b) Not applicable in the United States;
- (c) Not applicable in the United States;
- (d) Not applicable in the United States;
- (e) Not applicable in the United States;
- (f) Not applicable in the United States;
- (g) Not applicable in the United States;
- (h) Not applicable in the United States.

**Interrogatory No. 7:**

State whether any mark comprising or containing Applicant's Mark has been used or is intended to be used in connection with any indicia, designs, stylizations, terms, imagery, marks, logos, themes, or references similar to, related to, or associated or affiliated with Opposer, and if so describe the details of each such use or intended use.

**Response No. 7:**

A similar Mark comprising Applicant's Mark has been used in China since May 20, 2011 and has been registered in China since May 21, 2013 (registration no. 9509666).

Applicant lacks knowledge or information sufficient to form a belief as to the fact whether any mark comprises or contains Applicant's Mark has been used in the United States.

Applicant intends to use a mark comprising or containing Applicant's Mark in goods or services in the United States once the Applicant's application for registration (Serial No. 85/213,453) is approved by the U.S. Patent and Trademark Office.

**Interrogatory No. 8:**

Identify any persons or entities that have ever, either orally or in writing, authorized, licensed, assigned, granted, conveyed or otherwise transferred to Applicant the right to use any mark comprising or containing Applicant's Mark, and for each such person or entity, identify the date of and material terms under which such authorization, license, assignment, grant, conveyance or other transfer was made, including, without limitation, the details of the grant of rights to use Applicant's Mark and the financial terms governing such transaction.

**Response No. 8:**

No.

**Interrogatory No. 9:**

Identify any persons or entities Applicant has authorized, licensed, assigned, granted, conveyed or otherwise transferred the right to use any mark comprising or containing Applicant's Mark, and for each such person or entity, identify the date of and material terms under which such authorization, license, assignment, grant, conveyance or other transfer of right to use was made, including, without limitation, the details of the grant of rights to use Applicant's Mark and the financial terms governing such transaction.

**Response No. 9:**

No.

Applicant also lacks knowledge or information sufficient to form a belief as to the fact whether any mark comprises or contains Applicant's Mark in the United States.

**Interrogatory No. 10:**

Identify each website, web auction, web hosting, web listing, web posting, web page or social media page, whether owned by Applicant or third parties, including its Internet address, on or through which Applicant's Mark and/or Applicant's Products/Services have been, are currently being or are intended to be promoted, advertised, displayed, offered for sale, sold or otherwise distributed.

**Response No. 10:**

Applicant lacks knowledge or information sufficient to form a belief as to the fact whether such website, web auction, web hosting, web listing, web posting, web page or social media page alleged by Opposer in the Interrogatory ever exists.

**Interrogatory No. 11:**

(a) Identify each kind of advertising, marketing and other promotional materials, including, without limitation, point-of-sale material, signs, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other advertising material or promotional item that has been used or is intended to be used in connection with Applicant's Products/Services and/or Applicant's Mark.

(b) For each promotional material referred to in subparagraph (a) above, identify where the promotional material is advertised, posted, promoted, published or distributed (e.g. name the publication, the URL for the website, the retail store, etc.);

**Response No. 11:**

(a) Applicant lacks knowledge or information sufficient to form a belief as to the fact whether any kind of advertising, marketing and other promotional materials, including, without

limitation, point-of-sale material, signs, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other adverting material or promotional item that has been used or is intended to be used in the United States in connection with Applicant's Products/Services and/or Applicant's Mark.

(b) Applicant lacks knowledge or information sufficient to form a belief as to the fact whether and where, for each promotional material referred to in Interrogatory No. 11 subparagraph (a) above, the promotional material is advertised, posted, promoted, published or distributed.

**Interrogatory No. 12:**

(a) Describe each instance where any person has by word or deed or otherwise, including, without limitation, by misdirected mail, e-mail, telephone calls, orders or inquiries, suggested or reflected a belief that Applicant is licensed, endorsed or sponsored by or is a sponsor of Opposer, or that the products or services sold, offered for sale, or otherwise distributed or intended to be sold, offered for sale, or otherwise distributed by Applicant under Applicant's Mark are licensed, endorsed or sponsored by or associated with or related in any way to Opposer, and/or Opposer's Empire State Building Marks; and

(b) Identify all persons knowledgeable about any such instances referred to in subparagraph (a) above and describe the nature of their knowledge.

**Response No. 12:**

(a) Applicant lacks knowledge or information sufficient to form a belief as to the fact whether any person has by word or deed or otherwise, including, without limitation, by misdirected mail, e-mail, telephone calls, orders or inquiries, suggested or reflected a belief that

Applicant is licensed, endorsed or sponsored by or is a sponsor of Opposer, or that the products or services sold, offered for sale, or otherwise distributed or intended to be sold, offered for sale, or otherwise distributed by Applicant under Applicant's Mark are licensed, endorsed or sponsored by or associated with or related in any way to Opposer, and/or Opposer's Empire State Building Marks.

(b) Applicant lacks knowledge or information sufficient to form a belief as to the fact whether any person is knowledgeable about any such instances referred to in Interrogatory No. 12 subparagraph (a) above and what is the nature of their knowledge.

**Interrogatory No. 13:**

State whether Applicant has marketed or intends to market Applicant's Products/Services bearing or rendered in connection with Applicant's Mark or is aware that such products will be marketed to consumers of Opposer's goods or services, or to consumers located in or around New York, New York and, if so, describe the means by which Applicant has marketed or intends to market Applicant's Products/Services or how such products will be marketed, to consumers of Opposer's goods or services, or to consumers located in or around New York, New York.

**Response No. 13:**

Applicant has marketed the Applicant's Products/Services bearing or rendered in connection with Applicant's Mark to consumers located in or around China since May 20, 2011. The trademark has been registered in China with the China's Trademark Bureau on May 21, 2013 under the registration number of 9509666.

Applicant has not marketed the Applicant's Products/Services bearing or rendered in connection with Applicant's Mark anywhere in the United States. Applicant, however, intends to market the Applicant's Products/Services bearing or rendered in connection with Applicant's

Mark to consumers located in or around the United States *once the registration of the Applicant's Mark is approved by the United States Trade and Patent Office.* Because the Applicant's goods and services are different from the Opposer's goods and services, Applicant will not market the Applicant's Products/Services bearing or rendered in connection with Applicant's Mark to consumers of Opposer's goods or services that Opposer registered with the United States Trade and Patent Office.

**Interrogatory No. 14:**

State whether Applicant was aware of Opposer, Opposer's Empire State Building Marks, and/or goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer or under license from Opposer in connection with Opposer's Empire State Building Marks prior to:

(a) January 8, 2011, when Applicant filed Application Serial No. 85/213,453.

(b) Any use by Applicant of Applicant's Mark in connection with any goods or services.

**Response No. 14:**

(a) Applicant was not aware of Opposer, Opposer's Empire State Building Marks, and/or goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer or under license from Opposer in connection with Opposer's Empire State Building Marks with respect to beverage, liquor, or food industries prior to January 8, 2011, when Applicant filed Application Serial No. 85/213,453. Applicant lacks knowledge or information sufficient to form a belief as to the existence of Opposer, Opposer's Empire State Building Marks, and/or goods or services marketed, manufactured, distributed, offered for sale, sold, licensed or rendered by Opposer or under license from Opposer in connection with

Opposer's Empire State Building Marks outside the industries of beverage, liquor, or food industries prior to January 8, 2011, when Applicant filed Application Serial No. 85/213,453 that is intended to be used in the beverage, liquor or food industries.

(b) Because the Applicant's goods and services are different from the Opposer's goods and services, Applicant will not use the Applicant's Mark in connection with the Opposer's goods or services that Opposer registered with the United States Trade and Patent Office.

**Interrogatory No. 15:**

State whether Applicant has ever sought a license or other right to use any marks, logos, designs, stylizations or slogans, including without limitation, Opposer's Empire State Building Marks, from Opposer.

**Response No. 15:**

Never.

**Interrogatory No. 16:**

State whether Applicant has any documentation, including without limitation, business plans, marketing plans, memos, correspondence or draft proposals of any kind, reflecting Applicant's bona fide intention, prior to or as of January 8, 2011, to use Applicant's Mark in commerce in connection with each and every good identified in International Class 32 in Application Serial No. 85/213,453.

**Response No. 10:**

Applicant had a business plan, reflecting Applicant's bona fide intention, to use Applicant's Mark in commerce in connection with each and every good identified in International Class 32 in Application Serial No. 85/213,453 prior to or as of January 8, 2011.

**Interrogatory No. 17:**

With respect to each response to Opposer's First Set of Requests for Admissions that is anything other than an unqualified admission, state the basis for the response, including, without limitation, all facts and documents upon which the response is based.

**Response No. 17:**

Trademark search in the website of United States Patent and Trademark Office, <<http://tess2.uspto.gov/bin/gate.exe?f-doc&state=4807:pk2843.2.1>>, for the trademark registration number 1247058. And trademark registration numbers 2411972, 2413667, 2429297, 2430828.

**DOCUMENT REQUESTS**

**SPECIFIC OJECTIONS AND RESPONSES**

**Request No. 1:**

Specimens of each of Applicant's Products/Services bearing or displaying any mark comprising or containing Applicant's Mark including, without limitation, each different color combination and each different product design or stylization of products in which Applicant's Mark is used or intended to be used by Applicant and/or its licensees, sponsors or related or affiliated entities.

**Response No. 1:**

Applicant does not have such specimens for use or intended use in the United States. Applicant will supplement the specimens that have been used in China if Opposer requests them.

**Request No. 2:**

Specimens of each label, hangtag, tag, product package, package insert, sticker, hologram, package material or other device which bears any mark comprising or containing Applicant's Mark, and which has been used or is intended to be used by Applicant and/or its licensees.

**Response No. 2:**

Applicant does not have such specimens for use or intended use in the United States. Applicant will supplement the specimens that have been used in China if Opposer requests them.

**Request No. 3:**

Specimens of each point-of-sale material, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other advertising material or promotional item which bears any mark comprising or containing Applicant's Mark, and which has been used or is intended to be used by Applicant and/or its licensees.

**Response No. 3:**

Applicant does not have such specimens for use or intended use in the United States. Applicant will supplement the specimens that have been used in China if Opposer requests them.

**Response No. 4:**

All documents concerning Applicant's design, clearance, selection, and/or adoption of Applicant's Mark.

**Response No. 4:**

Applicant objects to this Request on the grounds that that it seeks information or documents protected by any privilege or protection from discovery, including but not limited to the attorney-client privilege and the work-product doctrine.

**Request No. 5:**

Specimens of each point-of-sale material, circular, flyer, poster, sticker, sales sheet, leaflet, brochure, catalog, sign, price list, on-line or email advertisement, print advertisement, radio or television advertisement, service order list or other advertising material or promotional

item which bears any mark comprising or containing Applicant's Mark, and which has been used or is intended to be used by Applicant and/or its licensees.

**Response No. 5:**

Applicant does not have such specimens for use or intended use in the United States.

Applicant will supplement the specimens that have been used in China if Opposer requests them.

**Request No. 6:**

Documents sufficient to identify: (a) the date of first use of Applicant's Mark; (b) the date of first use of Applicant's Mark in commerce; (c) the geographic area(s) of use of Applicant's Mark; (d) any and all customers, distributors or other persons or entities to which Applicant's Products/Services offered in connection with Applicant's Mark have been sold or distributed; (e) Applicant's Products/Services bearing, offered for sale, sold or otherwise distributed under Applicant's Mark; (f) all retail, wholesale, commercial, or charitable entities through which goods or services bearing or rendered in connection with Applicant's Mark have been offered for sale, sold or otherwise distributed; (g) the channels of trade through which Applicant's Products/Services offered in connection with Applicant's Mark were or are being distributed or sold to the ultimate purchaser, consumer or user; (h) the annual volume of sales (in dollars and units) made under Applicant's Mark for each year from the date of first use to the present; and (i) the annual amount of revenue, including, without limitation, any licensing or sponsorship revenues that Applicant has received in connection with Applicant's Products/Services offered in connection with Applicant's Mark, for each year from the date of first use to the present.

**Response No. 6:**

Applicant does not have such documents for the Applicant's Mark's use or intended use in the United States.

**Response No. 7:**

Applicant does not have such documents for the Applicant's Mark's use or intended use in the United States.

**Response No. 8:**

Applicant does not have such documents concerning the use or intended use in the United States. Applicant has not expended any money in adverting and promoting Applicant's Mark and/or Applicant's Products/Services in the United States because the Applicant's Mark has not been approved for registration yet.

**Response No. 9:**

Applicant does not have such documents concerning the use or intended use in the United States. Applicant has not engaged in any trade show, convention, exposition or conference in the United States in connection with the Applicant's Mark and/or Applicant's Products/Services in the United States because the Applicant's Mark has not been approved for registration yet.

**Response No. 10:**

Applicant does not have such documents.

**Response No. 11:**

Applicant does not have such documents.

**Response No. 12:**

Applicant does not have such documents.

**Response No. 13:**

Applicant does not have such documents.

**Response No. 14:**

Applicant does not have any document at this time other than Trademark Application (Serial No. 85/213,453).

**Response No. 15:**

Applicant does not have such documents.

**Response No. 16:**

Applicant does not have such documents.

**Response No. 17:**

(a) Trademark search in the website of United States Patent and Trademark Office, <<http://tess2.uspto.gov/bin/gate.exe?f-doc&state=4807:pk2843.2.1>>, for the trademark registration number 1247058. And trademark registration numbers 2411972, 2413667, 2429297, 2430828.

(b) Applicant has not used the Applicant's Mark in the United States yet.

**Response No. 18:**

Applicant does not have such documents.

**Response No. 19:**

Applicant does not have such documents.

**Response No. 20:**

Applicant does not have such documents concerning the actual channels of trade for goods and services sold or rendered in the United States in connection with Applicant's Mark.

Although Applicant intends to sell goods or services in connection with Applicant's Mark in the United States,

**Response No. 21:**

Applicant objects to this Request on the grounds that that it seeks information or documents protected by any privilege or protection from discovery, including but not limited to the attorney-client privilege and the work-product doctrine.

**Response No. 22:**

Applicant objects to this Request on the grounds that that it seeks information or documents protected by any privilege or protection from discovery, including but not limited to the attorney-client privilege and the work-product doctrine.

**Response No. 23:**

If any document, or any information responsive to interrogatories, come to Applicant's attention after Applicant served the response, Applicant will provide such to Plaintiff as soon as the supplemental documents or information are discovered.

Furthermore, there is not any confusion on the part of any member of the public between Opposer and Applicant and/or their respective marks and/or goods or services. For instance, U.S. Registration No. 1247058 with the work mark "NY" and the designed drawing that shows a "fanciful design of the **Empire State Building**" does not confuse any part of the member of the public where the owner of the U.S. Registration No. 1247058 Mark uses the Mark in the industries or areas in Skylines; Gravestones; Leaning Tower of Pisa; Space needle; Tombstones; Totem poles; Envelopes; Rectangles as carriers or rectangles as single or multiple lien borders and where Opposer uses its Empire State Building Marks in their registered areas of providing

observation decks in a skyscraper for purposes of sightseeing and managing and leasing the real estate.

Dated: Flushing, New York  
April 15, 2014

Law Offices of David Yan  
*Attorney for Applicant*

by: /David Yan/  
David Yan

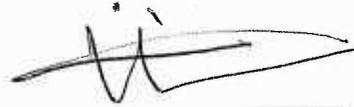
A handwritten signature in black ink, appearing to read 'David Yan', written over a horizontal line.

136-20 38<sup>th</sup> Avenue, Suite 11E  
Flushing, NY 11354  
Tel.: (718) 888-7788

## VERIFICATION

The undersigned Applicant, being duly affirm under the penalty of perjury, states (1) that undersigned, Applicant has read the Applicant's Amended Response to the Opposer's First Set of Interrogatories and Request for Production of Documents and Things; (2) that the contents of the Applicant's Amended Response to the Opposer's First Set of Interrogatories and Request for Production of Documents and Things are true to the undersigned Applicant's own knowledge except as to those matters which are alleged on information and belief and as to them the undersigned Applicant's believes them to true.

Dated: April 15, 2014



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Michael Liang

**AFFIRMATION OF SERVICE**

I hereby certify that, on April 15, 2014, I caused a true and complete copy of the foregoing Applicant's Amended Response to the Opposer's First Set of Interrogatories and Request for Production of Documents and Things to be sent by the U.S. Post First Class Mail, postage prepared, to the Opposer's Counsel of Record, William M. Borchard, Esquire, Cowan Liebowitz, & Latman, P.C., located at 1133 Avenue of the Americas, New York, NY 10278.

Dated: Flushing, New York  
April 15, 2014

\_\_\_\_\_  
David Yan



**EXHIBIT D**

# 商业计划

(会议记录)

2010年10月20日

地址: 中国杭州

参加人员:

Michael Liang, John Wang, Wang Qin

内容: 计划申请一个高标在中国美国同时  
申请(看一下哪一个能批准)  
如果批准, 将计划生产啤酒相关饮料  
在美国, 中国市场销售.

高标(Logo)的框价:

要以国际大都市的也标为设计: 如<sup>发</sup>美国  
曼彻斯特塔, 美国世贸大厦, 帝国大厦, 自由女神  
等标志为参照, 体现勇敢, 向上, 有理想  
和梦想的意义.

市场销售:

在中美两地, 请有经验的销售人员,  
必须在省市地区设代理, 总代理,  
以供管理参考.

生产地区:

可以找当地加工合作, 可降低成本,  
保证货源产品的新的品质保证.

分工负责:

Michael' 负责申请 Logo, 联系律师注册

John Wang, 负责设计网络宣传 和  
广告言语修改.

Wang Qin: 负责市场销售, 生产, 寻找  
中国市场的 相关合作人员.

利润分配

设. 60% 为 我们三人. 其它利润为投  
入股本. 为 40%.

也可以: 留 10% 为公司股. 保留..

高材的文化:

可以中国的娃哈哈, 美国的哈特  
啤酒做参考.

附件:

此次会议. 做为三人的合作记录  
为协议起草而开会. 而确定. 三人同意  
合作. 如有其它事宜. 可以协商..

[handwritten text is indicated in italics]

*Business Plan*

*(Meeting Minutes)*

*October 20, 2010*

*Address: Hangzhou, China*

*Participants: Michael [Liang], John Wong, Wang Qin*

*Content:*

*Plan to apply for a trademark simultaneously in China and the United States (see which one can be approved)*

*If it is approved, will plan to produce beer and related beverages in the United States and sell them in the China market.*

*Framework of the trademark (logo):*

*Needs to use a landmark of an international metropolis as its design: for example, the Eiffel Tower in France, [or] the World Trade Center, the Empire State Building, [or] the Statue of Liberty in the United States. Use these landmarks as reference to show the significance of being brave, aspiring, and having ambitions and dreams.*

[handwritten text is indicated in italics]

*Marketing and sales:*

*Hire experienced salespeople in China and the United States; must set up agencies and general agency in provinces and cities so as to provide reference for management.*

*Production areas:*

*Can search for local processing factories for cooperation so as to reduce costs. Guarantee the freshness [and] quality of source products.*

*Division of labor:*

*Michael is responsible for applying for the logo, and contacting lawyers for registration*

*John Wong is responsible for design, online promotion, and linguistic revision of the ads.*

*Wang Qin is responsible for marketing, sales and production, and seeking relevant people to cooperate in the China market.*

[handwritten text is indicated in italics]

*Profit distribution:*

*Set 60% for the three of us, and the rest of the profit for investing shareholders at 40%.*

*Also possible: reserve 10% as company shares.*

*Logo culture:*

*Can use Wahaha of China and Halin beer of the United States as references.*

*Appendix:*

*This meeting records the cooperation among the three people. It is held for discussing and drafting an agreement. The three people agree to cooperate, and if there are any other matters, they can be negotiated.*



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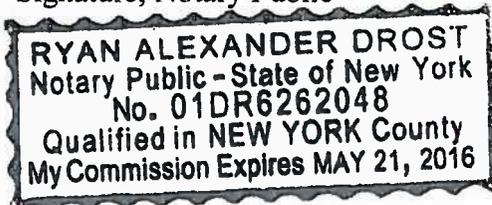
City of New York, State of New York, County of New York

I, Max Staffa, hereby affirm that the document "Meeting Minutes dated 20 October 2010" is, to the best of my knowledge and belief, a true and accurate translation from Chinese into English.

Max Staffa

Sworn to before me this  
7<sup>th</sup> of May, 2014

Signature, Notary Public



Stamp, Notary Public  
State of New York

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