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

Proceeding	91204122
Party	Defendant Michael Liang
Correspondence Address	DAVID YAN LAW OFFICES OF DAVID YAN 136-20 38TH AVENUE, SUITE 11E FLUSHING, NY 11354-4232 UNITED STATES davidyanlawfirm@yahoo.com
Submission	Answer
Filer's Name	David Yan
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Date	06/12/2012
Attachments	Answer_Empire State Building Company LLC v Michael Liang.pdf (7 pages) (18636 bytes)

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., :
: :
: Opposer, :
: :
: v. : Opposition No.: 91204122
: :
: MICHAEL LIANG, :
: :
: Applicant. :
: :
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Commissioner for Trademarks
Attn: Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

APPLICANT'S ANSWER TO NOTICE OF OPPOSITION

Applicant, MICHAEL LIANG, for his answer to the Notice of Opposition filed by Empire State Building Company L.L.C. against application for registration of the trademark of NYC BEER LAGER and Design mark:, Serial No. 85213453 filed January 8, 2011, and published in the Official Gazette of December 6, 2011, pleads and avers as follows:

1. Answering paragraph 1 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations. For one, Applicant rejects the Opposer's proffer that Opposer, its predecessors, and its affiliated and related entities, and/or licensees have ever used

word mark EMPIRE STATE BUILDING and various marks depicting the visual equivalent of the so called Empire State Building in any “wide variety of goods and services, including, but not limited to, restaurant services and alcoholic beverages.”

2. Answering paragraph 2 of the Notice of Opposition, Applicant admits the allegations thereof, except “which are all incontestable” and otherwise pleaded herein.

3. Answering paragraph 3 of the Notice of Opposition, Applicant repeats Answer No. 1 and does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

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

5. Answering paragraph 5 of the Notice of Opposition, Applicant admits the allegations thereof except otherwise pleaded herein..

6. Answering paragraph 6 of the Notice of Opposition, Applicant admits the allegations thereof except otherwise pleaded herein.

7. Answering paragraph 7 of the Notice of Opposition, Applicant admits the allegations thereof except begging leave to refer to the original filing to the USPTO for an interpretation of their true import and meaning. Applicant rejects the compound opposition No. 7. Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein of “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” and accordingly denies the allegations.

8. Answering paragraph 8 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

9. Answering paragraph 9 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

10. Answering paragraph 10 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

11. Answering paragraph 11 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

12. Answering paragraph 12 of the Notice of Opposition, Applicant does not have sufficient knowledge or information to form a belief as to the allegations contained therein and accordingly denies the allegations.

13. Applicant further affirmatively alleges that there is not any likelihood of confusion, mistake or deception because, *inter alia*, Applicant's mark and the pleaded marks of Opposer are not confusingly similar.

14. Applicant further affirmatively alleges that there is not any likelihood of confusion, mistake or deception because, *inter alia*, Applicant's mark and the pleaded marks of Opposer are not confusingly similar. There is not any similarity of the goods between Applicant and Opposer. The goods bearing the Applicant's marks are presumed to travel in all normal channels and to all prospective purchasers for the relevant goods described in its registration;

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-alcoholished 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;” Alcoholic or non-alcoholic beverage, foods, restaurants, and/or processed food businesses. The goods bearing the pleaded marks of Opposers are presumed to travel in the limited channels to the consumers under its registration of Class 041 for “entertainment services, namely, providing observation decks in a skyscraper for purposes of sightseeing” and Class 036 for “Real Estate Services, namely, the Management and Leasing of Real Estate”.

15. Applicant further affirmatively alleges that there is not any likelihood of confusion, mistake or deception because, *inter alia*, Applicant’s mark and the pleaded marks of Opposer are not confusingly similar. The Applicant’s design mark does not contain any pleaded word marks of Opposer. The Applicant’s design mark does not contain any word of “Empire State Building”. The Applicant’s design mark does contain a drawing of a building in the portion of its design mark. The Applicant’s drawing of the building in its design mark, however, is different from the drawing of the pleaded marks of Opposer. Any similarity, *if at all*, between Applicant’s design mark and the pleaded marks of Opposer is in the portion of the Opposer’s alleged visual equivalent of the Empire State Building which, upon information and belief, has not been used, or registered by Opposer, its predecessors, and its affiliated and related entities, and/or licensees in the “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-alcoholished

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; Alcoholic or non-alcoholic beverage, foods, restaurants, and/or processed food businesses.

15. Applicant further affirmatively alleges that there is not any likelihood of confusion, mistake or deception because, *inter alia*, Applicant's mark and the pleaded marks of Opposer are not confusingly similar because the Opposer's word mark and design drawing mark of the Empire State Building does not have extensive public recognition and renown. Fame for purposes of likelihood of confusion is a matter of degree that varies along a spectrum from very strong to very weak. Opposer has the burden to prove that its mark is famous and has extensive public recognition and renown. It is well-established that fame alone is insufficient to establish likelihood of confusion. When considering the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression, the Applicant's design mark is not similar to the pleaded marks of Opposer. It is improper to dissect a mark. Even when the marks at issue are identical, or nearly identical, differences in connotation can outweigh visual and phonetic similarity.

16. Applicant further affirmatively alleges that the Opposer's word mark "Empire State Building" is or has become generic for inexpensive, convenient or easy but low quality or commercialized versions of items and therefore cannot have meaning as a trademark.

17. Applicant further affirmatively alleges that there is no likelihood of dilution of the Opposer's mark by tarnishment because the Opposer's marks are associated with inexpensive, convenient or easy but low quality or commercialized versions of items.

18. Applicant further affirmatively alleges that there is no likelihood of dilution of the Opposer's mark because dilution fame requires a more stringent showing and widespread recognition by the general public.

19. Applicant further affirmatively alleges that there is not any false association between the Applicant's marks and the pleaded marks of Opposer. The pleaded marks of Opposer do not have widespread recognition by the general population who will unmistakably associate the Applicant's mark with and uniquely point the Applicant's mark to Opposer. The pleaded marks of Opposer have not become a "household name". Opposer will not be able to prove when the general public encounter the Applicant's mark in almost any context, the general public associate the term, *at least initially*, with Opposer. Neither Applicant nor Applicant's predecessors, *if any*, in interest intended any association with Opposer's marks or any of them; and upon information and belief, ordinary prospective purchasers of the Applicant's products bearing the Applicant's mark do not associate the Applicant's mark and the pleaded marks of Opposer.

WHEREFORE, Applicant requests that the Notice of Opposition be dismissed, and for such other and further relief as the Board deems just and proper.

Dated: Flushing, New York
January 12, 2006

Respectively submitted,

MICHAEL LIANG (Applicant)

by: /David Yan/
David Yan
Law Offices of David Yan
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AFFIRMATION OF SERVICE

I hereby certify that, on June 12, 2012, I caused a true and complete copy of the foregoing Applicant's Answer to Notice of Opposition to be sent by the U.S. Post First Class Mail, postage prepared, to the Opposer's Counsel of Record, Maya L. Tarr, Esquire, Cowan Liebowitz, & Latman, P.C., located at 1133 Avenue of the Americas, New York, NY 10278.

/David Yan/

David Yan