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Filing date: **10/24/2014**

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

Proceeding	91205483
Party	Defendant BabaSlings Limited
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Date	10/24/2014
Attachments	Babaslings NOTICE OF FILING PER BOARD ORDER.pdf(566138 bytes )

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

BABA SLINGS PTY LTD.	)	
	)	
	)	
Opposer,	)	
	)	Opposition No.: 91205483
v.	)	
	)	
BABASLINGS LIMITED	)	
	)	
Applicant.	)	
	)	

**NOTICE OF FILING PURSUANT TO BOARD ORDER**

Pursuant to pages 2-3, footnote 4 of the Board Order dated October 8, 2014, requiring that the redactions be scaled back on the Reply in Support of Motion for Summary Judgment filed by Applicant on July 22, 2014, a revised set of redactions is attached as Exhibit A. In this regard, Applicant notes that none of the redactions on the original filing, nor on the current filing, were requested by Applicant. Rather, Opposer designated certain pages of deposition testimony as confidential, which necessitated redactions in Applicant's filings to the extent they refer to that testimony. To be clear, Applicant does not believe that any of this testimony was properly designated confidential, and maintains that the entire record should be unsealed. However, until the Board so orders, Applicant is required to abide by the protective order. In this regard, upon review of the Board's order, Applicant requested that Opposer designate the parts of the aforementioned Reply that Opposer deemed confidential, and Opposer responded by redacting that document as set forth in the attached Exhibit A. Accordingly, Applicant submits this newly-redacted document in compliance with the Board's order, but does so notwithstanding its position that no redactions are warranted at all.

Dated: October 24, 2014

Respectfully submitted,

A handwritten signature in blue ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

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Brian A. Coleman  
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*Attorneys for Applicant*

CERTIFICATE OF SERVICE

This is to certify that this 24 day of October 2014, a true copy of the foregoing NOTICE OF FILING PURSUANT TO BOARD ORDER was served, via first-class mail, postage prepaid, on:

Mark Borghese, Esq.  
Borghese Legal, Ltd.  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145

A handwritten signature in black ink, appearing to be 'Mark Borghese', is written over a horizontal line. The signature is stylized and somewhat cursive.

# EXHIBIT A

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

BABA SLINGS PTY LTD.	)	
	)	
	)	
Opposer,	)	
	)	Opposition No.: 91205483
v.	)	<b><u>CONFIDENTIAL</u></b>
	)	
BABASLINGS LIMITED	)	
	)	
Applicant.	)	
	)	

**APPLICANT’S REPLY IN SUPPORT**  
**OF CROSS-MOTION FOR SUMMARY JUDGMENT**

In Applicant’s Cross-Motion for Summary Judgment, filed June 25, 2014 (Dkt. 31) (“Applicant’s Motion”), Applicant argues that Opposer has through its admissions established, as a matter of law, that Opposer’s sales of its products cannot constitute lawful use in commerce as required to establish priority in the USA. In Opposer’s Reply in Support of its Summary Judgment Motion, filed July 2, 2014 (Dkt. 33) (“Opposer’s Reply”), Opposer disputes Applicant’s characterization of Opposer’s testimony, and claims that certain regulations applicable to infant slings have not yet taken effect.

Opposer is mistaken. Laws and regulations governing “children’s products” currently apply to and have long governed Opposer’s goods, notwithstanding the fact that the additional product-specific regulations cited by Opposer will only take effect soon. [REDACTED]

[REDACTED]

[REDACTED] Applicant is therefore entitled to summary judgment as a matter of law.

## ARGUMENT

### A. Baby Slings Are “Children’s Products” Subject to Existing Statutory and Regulatory Requirements.

In Opposer’s Reply, Opposer does not dispute Applicant’s contention that U.S. trademark rights can be acquired only from lawful use of a mark in commerce. Nor does Opposer dispute that if Opposer’s use is shown to be unlawful, Applicant will have priority. Nor does Opposer dispute that Opposer’s goods qualify as “children’s products,” because they are designed or intended primarily for children 12 years of age or younger, namely, infants. *See* Dkt. 31 at \*7, n. 2. Thus, the only disputed issue is whether laws and regulations applicable to “children’s products” apply to Opposer’s goods, namely, infant slings.

In support of its argument that there are no laws or regulations currently in effect for infant slings, Opposer cites to the CPSC proposed rules for infant sling carriers, issued on June 11, 2014. Opposer notes that the proposed rules have not been made final, and that there is no timetable for doing so. Dkt. 33 at \*4. In support of its point, Opposer highlights the following sentences from the proposed rule: “When the sling carrier rule is finalized, sling carriers will be subject to a mandatory children’s product safety rule. Accordingly, sling carriers will also be subject to the third party testing requirements of section 14 of the CPSA and the 1107 rule.” *Id.* at \*6.

While it is true that CPSC proposed rules for infant slings have not yet been made final, the ultimate conclusion Opposer draws from this – that “there is no evidence that Opposer is or has ever been in violation of any current U.S. law or regulation” – is wrong. The proposed rule for infant slings cited by Opposer merely imposes *additional* requirements for a specific subset of children’s product, over and above what is already currently required for *all* products that

qualify as “children’s products” under the CPSA/CPSIA. This is shown in Opposer’s own evidence – the sentences immediately following the portion Opposer highlights read: “Slings are already subject to lead and phthalates testing under the 1107 Rule. This rule adds certain mechanical tests and other requirements to the third party testing requirement.” *Id.*

As suggested by the sentences Opposer omits, there are product safety rules currently in effect that *all children’s products* sold in the U.S.A. are required to meet – so many, in fact, that it would be impossible (and unnecessary) to list and describe them all here. By way of illustration only, here are some examples:

- Lead/lead paint, FHSA/CPSIA, 1500.87-91, 15 USC §1278(a)
- Choking hazard/small parts, FHSA 1500.19
- Sharp points/sharp edges, FHSA 1500.48-49
- Phthalates, CPSA/CPSIA, 15 USC §2057(c)
- Mineral oil, PPPA, 1700.14(a)(31)
- Etc.

*See* CPSC webpage on Regulations, Mandatory Standards and Bans, available at <http://www.cpsc.gov/en/regulations-laws--standards/regulations-mandatory-standards-bans/> (last accessed July 21, 2014).

In addition, and contrary to Opposer’s assertions, federal law does indeed require that every “children’s product” undergo testing by a third-party, CPSC-accepted laboratory for compliance with the applicable federal children’s product safety requirements before the product is sold in the United States. 16 CFR §1107.20; *see also* CPSC FAQ on Initial Certification Testing, available at <http://www.cpsc.gov/Business--Manufacturing/Testing-Certification/Third-Party-Testing/Initial-Testing/> (last accessed July 21, 2014). Again, by way of illustration only,

third-party testing for lead paint was required for all children's products as of December 21, 2008. "Small parts" testing was required as of February 2009, and so on.

Issuance of a children's product certificate is also required. See CPSC FAQ on Children's Product Certificate, available at <http://www.cpsc.gov/en/Business--Manufacturing/Testing-Certification/Childrens-Product-Certificate/> (last accessed July 21, 2014). In other words, Opposer's products are required to be accompanied by a certificate certifying compliance with applicable children's product regulations – lead paint regulations, for instance, since those regulations are currently in effect. Moreover, Opposer's argument that the certificate requirement only applies to U.S. importers of foreign-manufactured goods, see Dkt. 33 at \*7, is inapposite. Even if Opposer is not required to provide the certificates itself, the mere fact that the certificates are not currently being provided in connection with Opposer's goods violates CPSC requirements, and renders Opposer's U.S. sales unlawful.

B. **Opposer's Admission That Opposer is Not Presently in Compliance with Existing Statutes and Regulations is Unambiguous.**

Opposer argues that Applicant's citation of Ms. McIvor's testimony is a "highly edited snippet" which "places her testimony highly out of context in light of the actual state of the baby sling regulations." Dkt. 33 at \*4, 7. For context, below is the relevant dialogue cited by Opposer in its Reply:

[REDACTED]

[REDACTED]

...  
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Opposer points to other testimony concerning formalin and lead testing, but the question is not whether Opposer has complied with some existing existing statutes and regulations regarding “children’s products.” Rather, for Opposer’s use to be lawful it must be fully compliant with *all* of the applicable statutes and regulations regarding children’s products, as discussed above. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

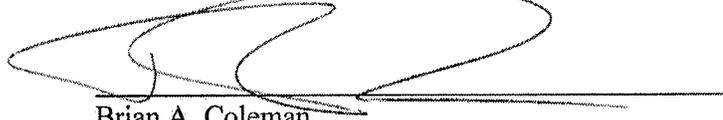
[REDACTED]

**CONCLUSION**

For the foregoing reasons, the undisputed facts and admissions establish Applicant’s priority over Opposer and, thus, Applicant is entitled to summary judgment on Opposer’s Section 2(d) claim.

Dated: July 22, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brian A. Coleman", is written over a horizontal line. The signature is somewhat stylized and loops back to the right.

Brian A. Coleman

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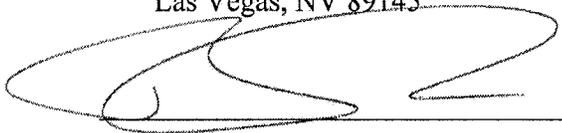
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*Attorneys for Applicant*

CERTIFICATE OF SERVICE

This is to certify that this 22<sup>nd</sup> day of July, 2014, a true copy of the foregoing  
APPLICANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT  
was served, via first-class mail, postage prepaid, on:

Mark Borghese, Esq.  
Borghese Legal, Ltd.  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145

A handwritten signature in black ink, appearing to be 'Mark Borghese', written over a horizontal line.