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

Proceeding	91210643
Party	Plaintiff Tristar Products, Inc.
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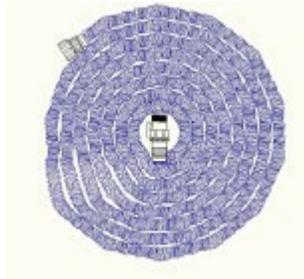
_____)	
Tristar Products, Inc.)	Opposition No. 91210643
Opposer,)	
)	Application S.N.
v.)	85/684,030
)	
Blue Gentian, LLC)	
Applicant)	
_____)	

AMENDED NOTICE OF OPPOSITION

On July 23, 2013, Applicant filed a “Motion To Dismiss Opposition For Failure To State A Claim Upon Which Relief Can Be Granted” pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b). According to TBMP Rule 507.01(1), Amending As a Matter of Course, a party may amend its pleading once as a matter of course within: (B)...21 days after service of a motion under 12(b).

In accordance with TBMP Rule 507.01(1)(B), Opposer hereby files an Amended Notice of Opposition in reply to the Motion to Dismiss as follows:

Opposer, Tristar Products, Inc. a corporation organized under the laws of Pennsylvania and located at 492 Route 46 East, Fairfield, NJ 07004, believes that it will be damaged by registration of the following:



("Mark"), which Mark is the subject of U.S. Fed. Trademark Application Serial No. 85/684,030 ("Application") filed by Blue Gentian, LLC, a corporation organized under the laws of Florida and located at 223 Skylark Point, Jupiter, Florida, 33458, and which Mark was published for opposition in the *Official Gazette* on January 15, 2013. An extension of time was granted by the Trademark Office for Opposer to file an Opposition by May 15, 2013.

Notification of Pending Litigation Between Applicant and Opposer Related to Garden Hoses

The Opposer hereby notifies the Board that Applicant previously filed a complaint for patent infringement on March 21, 2013 (prior to the filing of U.S. Trademark Application No. 85/684,030 on July 23, 2012) against

Opposer's expandable, garden hose called "FLEX~ABLE HOSE" based upon at least U.S. Pat. Nos: 8,291,941 and 8,291,942 and that said proceeding is currently pending. (Civil Action No. 2:13-cv-01758, U.S. Dist. Ct. of NJ).

The grounds for the opposition are as follows:

COUNT I – Section 2(e)(1) of the Trademark Act – Merely Descriptive and/or Generic

1. Applicant submits that the Mark is merely descriptive and/or generic under Section 2(e)(1) of the Trademark Act.
2. The opposed Application was filed on July 23, 2012 under Section 1(b) of the *Trademark Act* on an intent-to-use filing basis.
3. Applicant admits that Applicant's Mark describes or represents a coiled hose as described in the Application.
4. Opposer offers or offered for sale at www.flexablehose.com an expandable, garden hose called "FLEX~ABLE HOSE" (U.S. Trademark Reg. No. 4381183 registered August 6, 2013).
5. Applicant filed a 90 Day extension of time to oppose the "FLEX~ABLE HOSE mark for garden hoses (U.S. Trademark

Reg. No. 4381183) on November 14, 2012.

6. Opposer's expandable, garden hose is the subject of Civil Action No. 2:13-cv-01758, U.S. Dist. Ct. of NJ filed by Applicant against Opposer.
7. Applicant seeks to register the Mark for garden hoses in International Class 017.
8. Opposer submits that the Mark is merely descriptive and/or generic because it describes or represents an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods, namely garden hoses.
9. Opposer submits that Applicant's description of the Mark as a coiled hose for the garden hose represents prima facie evidence that the Mark is considered merely descriptive and/or generic of the goods, garden hoses, offered by the Applicant.
10. Opposer submits it has at least an equal right to use the Mark since Applicant's Mark is merely descriptive and/or generic.
11. Opposer submits that it has a personal interest in the outcome beyond that of the general public. Opposer believes that it will be damaged by registration of Applicant's Mark for garden hoses by preventing the Opposer from competing effectively in

the marketplace.

12. Opposer alleges that Applicant's Mark is merely descriptive and/or generic under Section 2(e)(1) of the Trademark Act and therefore unregistrable and should be refused registration, rendered unenforceable, and/or restricted.

COUNT II – Section 2(e)(5) of the Trademark Act – Functional Refusal

1. Applicant's Mark comprises matter that, as a whole, is functional in accordance with Section 2(e)(5) of the Trademark Act.
2. Opposer offers or offered for sale at www.flexablehose.com an expandable, garden hose called "FLEX~ABLE HOSE" (U.S. Trademark Reg. No. 4381183 registered August 6, 2013).
3. Applicant filed an extension of time to oppose the "FLEX~ABLE HOSE" mark for garden hoses (U.S. Trademark Reg. No.4381183) on November 14, 2012.
4. Opposer's expandable, garden hose is the subject of Civil Action No. 2:13-cv-01758, U.S. Dist. Ct. of NJ filed by Applicant against Opposer.
5. U.S. Pat. No. 8,291,941 entitled "Expandable and Contractible

Hose” lists, on its face, the assignee as the Applicant.

6. U.S. Pat. No. 8,291,942 entitled “Expandable Hose Assembly” lists, on its face, the assignee as the Applicant.
7. Opposer submits that U.S. Pat. No. 8,291,941 discloses the utilitarian advantages of Applicant’s Mark sought to be registered.
8. Opposer submits that U.S. Pat. No. 8,291,942 discloses the utilitarian advantages of Applicant’s Mark sought to be registered.
9. Applicant failed to disclose U.S. Pat. No. 8,291,941 during prosecution of the Applicant’s Application for the Mark.
10. Applicant failed to disclose U.S. Pat. No. 8,291,942 during the prosecution of the Applicant’s Application for the Mark.
11. Applicant failed to disclose that Applicant’s Mark is a product design trade dress mark for a coiled hose.
12. Opposer submits it has at least an equal right to use the Mark since the Applicant’s Mark is functional.
13. Opposer submits that it has a personal interest in the outcome beyond that of the general public. Opposer believes that it will be damaged by registration of Applicant’s Mark for garden

hoses by preventing the Opposer from competing effectively in the marketplace.

14. Opposer submits that Applicant's Application for the Mark should be refused registration, rendered unenforceable, and/or restricted under Section 2(e)(5) of the Trademark Act because Applicant's Mark is functional and further is the subject of U.S. Pat. Nos: 8,291,941 and 8,291,942 that discloses the utilitarian advantages of the Mark.

COUNT III – Trademark Sec. 1, 2, and 45 – Failure to Function as Trademark

1. Opposer submits that Applicant's Mark is a product design trade dress mark for a coiled hose.
2. Opposer offers or offered for sale at www.flexablehose.com an expandable, garden hose called "FLEX~ABLE HOSE" (U.S. Trademark Reg. No. 4381183 registered August 6, 2013).
3. Opposer's expandable, garden hose is the subject of Civil Action No. 2:13-cv-01758, U.S. Dist. Ct. of NJ filed by Applicant against Opposer.
4. Applicant did not submit and/or failed to provide sufficient

Trademark Sec. 2(f) evidence during the prosecution of the Application to establish distinctiveness of Applicant's Mark.

5. Opposer submits it has at least an equal right to use the Mark since the Applicant's Mark lacks distinctiveness and fails to function as a trademark.
6. Opposer submits is has a personal interest in the outcome beyond that of the general public. Opposer believes that it will be damaged by registration of Applicant's Mark for garden hoses by preventing the Opposer from competing effectively in the marketplace.
7. Opposer submits that Applicant's Mark lacks distinctiveness and thereby fails to function as a trademark under Trademark Act Section 1, 2 or 45, and therefore the Application should be refused for registration, rendered unenforceable, and/or restricted.

WHEREFORE, Opposer believes that it will be damaged by registration of said Mark, and prays that this Opposition be sustained in

favor of Opposer, that Application Serial No. 85/684,030 be refused registration, rendered unenforceable, and/or restricted based upon at the least the grounds set forth above. The Applicant reserves the right to add additional counts beyond those recited above.

Opposer hereby appoints Barlow, Josephs & Holmes Ltd., a law firm composed of Daniel J. Holmander, Stephen J. Holmes, David Josephs, Joshua Stockwell, Mark Tetreault, all members of the bar of the State of Rhode Island, to act as attorneys for Opposer herein, with full power to prosecute said Opposition, to transact all relevant business with the Patent and Trademark Office and in the United States Courts and to receive all official communications in connection with this Opposition.

The TTAB is authorized to charge any fees necessary for filing this Amended Notice of Opposition to our Deposit Account 020900.

Respectfully submitted,

Tristar Products, Inc.. (Opposer)

Date: August 13, 2013

/daniel j. holmander/
Daniel J. Holmander, Esq.

Counsel for Opposer

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **AMENDED NOTICE OF OPPOSITION** has been served on Applicant's counsel, Carl

J. Spagnuolo, at the following addresses of record, by first class mail, postage prepaid, this 13th day of August 2013:

Applicant's Counsel

Amy S. Price

Carl J. Spagnuolo

Mchale & Slavin, P.A.

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