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

Proceeding	91210747
Party	Defendant Aguilar, Stephani A.
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Attachments	POLLIWOG BABY ANSWER.pdf(38402 bytes)

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Trademark Application Serial No. 85/824165
Published in the *Official Gazette* May 21, 2013

Polliwogs, LLC	)	
d/b/a Polliwogs Children's Boutique	)	
Opposer,	)	
	)	**Opposition No.**: 91210747
v.	)	
	)	
Stephani Aguilar	)	**Mark**: POLLIWOG BABY
d/b/a Polliwog Baby,	)	
	)	
Applicant.	)	

ANSWER TO NOTICE OF OPPOSITION AND AFFIRMATIVE DEFENSES

Stephani Aguilar ("Applicant"), for her answer to the Notice of Opposition filed by Polliwogs, LLC ("Opposer") against application for registration of Applicant's trademark POLLIWOG BABY, Serial No. 85-824,165 filed January 16, 2013, and published in the Official Gazette of May 21, 2013 (the "Mark"), pleads and avers as follows:

1. Answering paragraph 1 of the Notice of Opposition, Applicant admits the allegations thereof.

2. Answering paragraph 2 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 thereof.

3. Answering paragraph 3 of the Notice of Opposition, Applicant admits that Opposer is the owner of U.S. Trademark Application Serial No. 85-881,741 but denies that Opposer has used the mark POLLIWOGS in connection with any services prior to

December 19, 2012, and Applicant does not have sufficient knowledge or information to form a belief as to the remaining allegations contained therein and accordingly denies the remaining allegations thereof.

4. Answering paragraph 4 of the Notice of Opposition, Applicant admits that Opposer is the owner of U.S. Trademark Application Serial No. 85-881,745, but does not have sufficient knowledge or information to form a belief as to the remaining allegations contained therein and accordingly denies the remaining allegations thereof.

5. Answering paragraph 5 of the Notice of Opposition, Applicant denies the allegations thereof.

6. Answering paragraph 6 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.

7. Answering paragraph 7 of the Notice of Opposition, Applicant denies the allegations thereof.

AFFIRMATIVE DEFENSES

First Affirmative Defense

8. Applicant affirmatively alleges that Opposer fails to state a claim upon which legal relief can be granted.

Second Affirmative Defense

9. Applicant further affirmatively alleges, upon information and belief, that Opposer has unclean hands by virtue of having misrepresented Opposer's date of first use of POLLIWOGS, as a trademark or service mark in an attempt to establish itself as a senior

party in this Opposition.

10. Applicant further affirmatively alleges that upon information and belief, Opposer has falsely and fraudulently represented -- through trademark registration filings in both the State of North Carolina and in Ser. No. 85-881741 pending before the U.S. Patent and Trademark Office -- that it has been applying the mark "POLLIWOGS" in connection with "retail store services" since the year 2005, and that such mark has been in in interstate commerce since 2005.

11. Upon information and belief, Applicant further affirmatively alleges that notwithstanding Opposer's claims to the contrary, neither Opposer nor its apparent predecessor (a sole proprietor who was operating a local Greensboro, North Carolina clothing shop known as called "Polliwogs Children's Boutique" until on or about May, 2012), had ever used the mark POLLIWOGS as an independently cognizable service mark or trademark – whether in intrastate *or* intrastate commerce -- prior to Applicant's filing for registration of the Mark.

12. Finally, Applicant further affirmatively alleges that upon information and belief, neither Opposer nor its apparent predecessor had ever even used the name of the store "Polliwog's Children Boutique" as a mark in *interstate* commerce prior to the filing of Applicant's application to register the Mark. As such, Applicant affirmatively alleges that the claims by Opposer to have been using the mark POLLIWOGS in interstate commerce are knowingly and willfully false, and are made with fraudulent intent to deceive the U.S. Patent and Trademark Office.

Third Affirmative Defense

13. Applicant further affirmatively alleges that there is no likelihood of confusion,

mistake or deception because, *inter alia*, the Mark and the alleged trademarks of Opposer are not confusingly similar; there are, upon information and belief, other *intrastate* users of third party marks with the "Polliwog" or "Polliwogs" formative; Applicant did not intend any association with any of Opposer's alleged trademarks; and upon information and belief, ordinary prospective purchaser's of Applicant's products will not associate Applicant's Mark with the Opposer's pleaded marks.

Fourth Affirmative Defense

14. Applicant further affirmatively alleges that under the anti-dissection rule, any secondary meaning Opposer may have in its alleged trademarks -- by virtue of having used "POLLIWOGS CHILDREN'S BOUTIQUE" as the identification, upon information and belief, of a single store location in central North Carolina prior to Applicant's date of filing to register the Mark – is narrowly circumscribed to the exact trademark it alleges to have been using in commerce prior to December 19, 2012. Any secondary meaning, therefore, can not and does not extend to the formative "Polliwog" (or "Polliwogs"), by itself, but must be viewed in its entirety against Applicant's Mark in its entirety.

WHEREFORE, Applicant prays as follows:

(a) this opposition be dismissed; and

(b) a registration for the mark POLLIWOG BABY be issued to the Applicant.

Respectfully submitted this 25th day of June, 2013.

DINICOLA & YOUNG, PC
Attorneys for Applicant

/s/ Brian K. Dinicola
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of June, 2013, a true copy of the foregoing ANSWER AND AFFIRMATIVE DEFENSES was served in the following manner:

VIA FIRST CLASS MAIL

Frank M. Caprio
Angela Holt
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CERTIFICATE OF ELECTRONIC FILING

The undersigned certifies that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent and Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 25th day of June 2013.

By: /s/ Brian K. Dinicola
Brian K. Dinicola

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