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

Proceeding	91213067
Party	Defendant SIMMONS VETERINARY CLINIC, INC.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

MARGARITAVILLE ENTERPRISES, LLC Opposer, v. SIMMONS VETERINARY CLINIC, INC. Applicant.	Opposition No.: 91213067 Application Nos. 85751742, 85920460 Mark: BARKERITAVILLE

APPLICANT'S FIRST AMENDED ANSWER TO CONSOLIDATED NOTICE OF OPPOSITION AND AFFIRMATIVE DEFENSES

Applicant, Simmons Veterinary Clinic, Inc. ("Applicant" and/or "Simmons"), pursuant to the Order of January 10, 2014 hereby submits its First Amended Answer to the Consolidated Notice of Opposition filed by Opposer, Margaritaville Enterprises, LLC ("Opposer" and/or "Margaritaville"), as follows:

1. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 1 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

2. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 2 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

3. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 3 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

4. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 4 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

5. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 5 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

6. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 6 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

7. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 7 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

8. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 8 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

9. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 9 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

10. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 10 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

11. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 11 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

12. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 12 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

13. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates the following:

(a) Registration No. 1,641,613 for THE MARGARITAVILLE STORE in International Class 42 for retail clothing, gift and souvenir store services;

(b) Registration No. 1,642,132 for MARGARITAVILLE in International Class 42, *inter alia*, for retail, clothing, gift and souvenir store services; mail order services in the field of clothing, gifts and souvenirs; and

(c) Registration No. 3,120,801 for JIMMY BUFFETT'S MARGARITAVILLE in International Class 35 for retail stores, on-line stores and mail order catalogs featuring a wide array of merchandise in the nature of novelty items, souvenirs, clothing, headwear, books, recordings, beverageware, and printed materials.

With respect to the remainder of the allegations recited in paragraph 13, Simmons lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

14. Simmons admits that Opposer's registrations in Margaritaville marks provide certain legal benefits, including filing priority where appropriate, and denies the remainder of the allegations contained in paragraph 14 of the Notice of Opposition.

15. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 15 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

16. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates the following:

(a) U.S. Reg. No. 3,002,003 for MARGARITAVILLE in International Class 18 for collars for pets and pet clothing;

(b) U.S. Reg. No. 3,900,887 for MARGARITAVILLE in International Class 18 for golf umbrellas; dog collars; dog leashes and luggage tags;

(c) U.S. Reg. No. 3,007,784 for MARGARITAVILLE in International Class 21 for bottle openers, ice buckets, salt and pepper shakers, coasters not of paper and not being table linen, carafes, flasks and cocktail shakers, cocktail picks and stirs, but **Simmons denies with respect to suncatchers, fitted picnic baskets, lunch boxes, wastebaskets not of metal, canister sets, trivets, and pet food bowls as having been deleted in the Section 8 and 15 Declaration**;

(d) U.S. Reg. No. 3,900,886 for MARGARITAVILLE in International Class 3 for non-medicated lip balm;

(e) U.S. Reg. No. 3,002,008 for MARGARITAVILLE in International Class 4 for candles and scented candles;

(f) U.S. Reg. No. U.S. Reg. No. 2,729,442 for MARGARITAVILLE in International Class 18 for bags, namely travel bags, tote bags and beach bags; in International Class 20 for chairs, namely beach chairs and deck chairs; in International Class 21 for portable food and drink

coolers; bottles, sold empty, namely, water bottles and squeeze bottles; and foam drink holders; in International Class 24 for towels and beach towels; and in International Class 25 for clothing, namely caps, visors, hats, beach cover-ups, t-shirts, tank tops, boxer shorts, and wind resistant jackets;

(g) U.S. Reg. No. 3,002,005 for MARGARITAVILLE in International Class 24 for blanket throws, golf towels, bar towels and fabric flags; **Simmons denies with respect to tablecloths, fabric and plastic placemats as having been deleted in the Section 8 and 15 Declaration**;

(h) U.S. Reg. No. 1,642,132 for MARGARITAVILLE in International Class 25, *inter alia*, for clothing, namely, shirts, sweaters, sun visors and caps;

(i) U.S. Reg. No. 3,117,262 for MARGARITAVILLE in International Class 25, for clothing, namely, pants, sweat shirts, and shorts;

(j) U.S. Reg. No. 3,002,010 for MARGARITAVILLE in International Class 25 for bandanas, cloth bibs, bathrobes, robes, denim jackets, sweatpants, and hooded sweatshirts; Simmons denies with respect to socks; and

(k) U.S. Reg. No. 3,002,006 for MARGARITAVILLE in International Class 28 for Christmas tree ornaments and playing cards.

With respect to the remainder of the allegations recited in paragraph 16, Simmons lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

17. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 17 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

18. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates the following:

(a) U.S. Reg. No. 4,339,177 for MARGARITAVILLE in International Class 3 for non-medicated sun care preparations; sun tan oil; sun tan lotion; sun-tanning preparations; sun screen; sun block; tanning and after-sun gels; after-sun creams; after-sun lotions; non-medicated lip balm;

(b) U.S. Reg. No. 4,175,955 for MARGARITAVILLE in International Class 20 for furniture;

(c) U.S. Reg. No. 2,896,179 for MARGARITAVILLE in International Class 29 for pre-packaged, flavored seafood for human consumption; and

(d) U.S. Reg. No. 4,012,771 for MARGARITAVILLE in International Class 30 for salsa and tortilla chips.

With respect to the remainder of the allegations recited in paragraph 18, Simmons lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

19. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 19 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

20. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 20 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

21. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 21 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

22. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates the following:

(a) U.S. Reg. No. 1,926,809 for MARGARITAVILLE in International Class 42 for restaurant;

(b) U.S. Reg. No. 2,463,238 for JIMMY BUFFETT'S MARGARITAVILLE & Design in International Class 42 for restaurant, bar and nightclub services;

(c) U.S. Reg. No. 3,117,273 for JIMMY BUFFETT'S MARGARITAVILLE in International Class 43 for restaurant and bar services; and

(d) U.S. Reg. No. 3,501,784 for MARGARITAVILLE in International Class 43 for bar services.

With respect to the remainder of the allegations recited in paragraph 22, Simmons lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

23. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 23 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

24. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 24 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs.

25. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates Margaritaville owns U.S. Reg. No. 3,855,017 for MARGARITAVILLE in International Class 43 for hotels and U.S. Reg. No. 4,135,785 for MARGARITAVILLE in International Class 43 for resort hotels; with respect to the remaining allegations recited in paragraph 25, Simmons lacks

knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

26. Simmons admits that the United States Patent and Trademark Office's TSDR database indicates Margaritaville owns U.S. Application Serial No. 85/654,333 for MARGARITAVILLE in International Class 44 for spa services, namely, health spa services for health and wellness of the body and spirit and cosmetic body care services offered at hotels and resort hotels; with respect to the remaining allegations recited in paragraph 26, Simmons lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

27. Simmons admits that Opposer's registrations in Margaritaville marks provide certain legal benefits including filing priority where appropriate, and denies the remainder of the allegations contained in paragraph 27 of the Notice of Opposition.

28. Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 28 of the Notice of Opposition and therefore denies same, leaving Margaritaville to their proofs.

29. As to the facts, Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 29 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs. As to

the legal conclusions, Simmons denies the allegations contained in paragraph 29 of the Notice of Opposition.

30. As to the facts, Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 30 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs. As to the legal conclusions, Simmons denies the allegations contained in paragraph 30 of the Notice of Opposition.

31. As to the facts, Simmons lacks knowledge or information sufficient to form a belief as to the truth of the allegations recited in paragraph 31 of the Notice of Opposition and therefore denies same, leaving Opposer to their proofs. As to the legal conclusions, Simmons denies the allegations contained in paragraph 31 of the Notice of Opposition.

32. Applicant admits the allegations set forth in paragraph 32 of the Notice of Opposition.

33. Applicant admits the allegations set forth in paragraph 33 of the Notice of Opposition.

34. Applicant admits that it filed its BARKERITAVILLE applications on October 11, 2012 and May 1, 2013; however, due to lack of specificity as to which MARGARITAVILLE mark Opposer is referring to, Applicant denies the remaining allegations set forth in paragraph 34 of the Notice of Opposition.

35. Applicant denies the allegations set forth in paragraph 35.

36. Applicant denies the allegations set forth in paragraph 36.

37. Applicant denies the allegations set forth in paragraph 37.

38. Applicant denies the allegations set forth in paragraph 38.

39. Applicant denies the allegations set forth in paragraph 39.

40. Applicant denies the allegations set forth in paragraph 40.

41. Applicant denies the allegations set forth in paragraph 41.

42. Applicant denies the allegations set forth in paragraph 42.

43. Applicant denies the allegations set forth in paragraph 43.

44. Applicant admits that some of Opposer's marks have acquired some degree of distinctiveness or fame, however, due to lack of specificity as to which MARGARITAVILLE mark Opposer is referring to, Applicant denies this allegation; with respect to the remaining allegations recited in paragraph 44, Applicant lacks knowledge or information sufficient to form a belief as to the truth of those allegations and therefore denies same, leaving Opposer to their proofs.

45. Due to lack of specificity as to which MARGARITAVILLE mark Opposer is referring to, Applicant denies the remaining allegations set forth in paragraph 45 of the Notice of Opposition.

46. Applicant denies the allegations set forth in paragraph 46.

47. Applicant denies the allegations set forth in paragraph 47.

48. Applicant denies the allegations set forth in paragraph 48.

49. Applicant denies the allegations set forth in paragraph 49.

50. Applicant denies the allegations set forth in paragraph 50.

51. Paragraph 51 of the Notice of Opposition is a prayer for relief, contains no factual or legal allegations, and requires no response.

AFFIRMATIVE DEFENSES

Further responding to the Notice of Opposition, Simmons provides the following background information and asserts the following defenses and reserves the right to amend its Answer to assert additional defenses as additional information becomes available.

BACKGROUND OF SIMMONS

52. Simmons was established in 1982 by Dr. Kenneth Simmons.

53. Dr. Simmons received his Doctor of Veterinary Medicine in 1981.

54. Simmons expanded to include the Professional Pet Center complex in 1988.

55. Simmons provides veterinary services, pet wellness programs, pet hotel services, pet day care services, pet training services, pet spa services and pet grooming services.

56. Simmons markets and sells an extensive line of pet-related products, including but not limited to: animal clothes, pet shampoo, pet bath soap, blankets, and towels.

57. Simmons has owned and operated The Barkers Hotel & Day Spa since 1993.

58. Simmons adopted the term "Barkers" as a play on words based on The Breakers Palm Beach, a well-known hotel in the area.

59. Simmons hosts many events at The Barkers Hotel & Day Spa including, but not limited to, Pawdi Gras, Christmas parties, Thanksgiving pot lucks, media events and client socials.

60. Simmons serves a non-alcoholic fruit smoothie, called a Barkerita, at all of its events.

61. On or about the spring of 2011, Dr. Simmons conceived the mark "Barkeritaville" in part,as an extension of his hotel name "Barkers", as a play on the fruit smoothie it serves as "Barkerita" and in part as a parody on the term Margaritaville.

62. There is a substantial background of meetings and discussions between Dr. Simmons and representatives of the Margaritaville brand. For example, Jimmy Buffett was invited to come see the Barkeritaville facility in early January 2012, which he accepted. At the time of this visit, Mr. Buffett indicated

how much he enjoyed the concept. Mr. Buffett returned on at least two other occasions to leave his dog for a day of Barkeritaville daycare and a Barkers Spa grooming for his dog. Additionally, Mr. Buffett brought his son and daughter for a visit in early 2012. Mr. Buffett spent a couple of hours meeting with Dr. Simmons for breakfast in February 2012, at the Barkeritaville facility, at which time he discussed the idea with Dr. Simmons of building a Barkeritaville hotel and daycare/Veterinary Hospital in the Florida panhandle on the grounds of the Margaritaville Hotel in Pensacola, Florida. Also in early 2012, Donna Smith, a representative of the Margaritaville brand and partner of Jimmy Buffett, flew to Lantana, Florida on Mr. Buffett's recommendation and visited with Dr. Simmons at his hospital and hotel location to discuss Dr. Simmons' branding concept for a dog spa and vet hospital under the name Barkeritaville. On information and belief, Donna Smith reported back to Mr. Buffett favorably on her visit. Mr. Jimmy Buffett even remarked in mid-2012 that he was "on board" and "always have been for the idea", supporting Dr. Simmons Barkeritaville brand of products and services. Thereafter, on or about September 7, 2012, Dr. Simmons met with Mr. Brad Schwaeble (Vice President of Retail and Brand Management at Margaritaville Management Group) and Mr. Dan Leonard (President/COO at Margaritaville Management Group), as well other executives and representatives of the Margaritaville brand, to discuss, inter alia, his business and marketing plans

for the Barkeritaville branded products and services. Dr. Simmons even provided the Margaritaville executives with a Power Point presentation of the business and marketing plans at that meeting. Soon thereafter, on October 4, 2012 Dr. Simmons travelled to Orlando, Florida to meet with Mr. Leonard and Mr. Jim Wiseman (Head of Business Acquisitions at Margaritaville), to evaluate possible property sites and to further discuss his business vision and plans for the Barkeritaville branded products and services. There were many other communications, emails, telephone calls and meetings in 2012.

63. At no time in any meeting prior to December 24, 2012 did anyone representing Margaritaville voice any objections whatsoever to Dr. Simmons's branding selection, and in fact everyone Dr. Simmons met from Margaritaville who heard his business plans and branding ideas encouraged Dr. Simmons to pursue the Barkeritaville branding selection. At no time in any meeting prior to December 24, 2012 did anyone representing Margaritaville express any concern whatsoever that the products and services to be sold under Barkeritaville trademark might lead to any possible consumer confusion with products and services sold under the Margaritaville trademarks.

64. On or about December 24, 2012, Mr. Cohlan (CEO of Margaritaville Holdings) first expressed his desire on behalf of Margaritaville to own the brand name Barkeritaville. At no time prior to that time did anyone representing

Margaritaville clearly indicate to Dr. Simmons that Margaritaville would oppose his ownership of the Barkeritaville brand.

65. All of Margaritaville's executives' actions demonstrate assent to Dr. Simmons's branding of products and services utilizing the Barkeritaville trademark, as well as to the registration of U.S. Trademark applications, Serial Nos. 85/751742 and 85/920460. Such assent and consent, upon which Dr. Simmons reasonably relied, led to significant marketing, advertising and branding activities, as well as Dr. Simmons's conduct with regards to the pursuit of U.S. Trademark protection. Such actions of Margaritaville's executives also demonstrate Margaritaville's belief in the absence of any possible consumer confusion.

DEFENSES

66. As a first affirmative defense, Opposer will not be damaged by registration of Applicant's Mark BARKERITAVILLE because Applicant's Mark and the pleaded marks of Opposer are not confusingly similar as measured by the DuPont multifactor test, *inter alia*:

(a) In that the pleaded mark of Opposer contains the terms MARGARITA and VILLE, both of which are heavily diluted as it is used in

connection with numerous marks for goods and services which related to those offered by Opposer;

(b) In that the pleaded mark of Opposer contains the common suffix VILLE, which is generic as it is used in connection with both real and fictional places, such as Nashville, Rockville, Jacksonville, Evansville, Unionville, Louisville, and Hoovervilles; or Whoville, Pleasantville, Venusville, Wellsville, Smallville, Hooterville, Danville, Retroville, Ponyville, Townsville, Amityville and FarmVille;

(c) In that the appearance, sound, connotation or commercial impression of the Applicant's mark are distinctive from those of Opposer's marks, including, *inter alia*, in that the "Barkerita" or "Barker" prefix of BARKERITAVILLE is completely different in appearance, sound and commercial impression from "margarita" in MARGARITAVILLE;

(d) In that the respective goods, upon information and belief, are targeted to disparate consumers through different channels of trade; and

(e) In that, upon information and belief, the respective goods are not related.

67. As a separate affirmative defense, cognizable at the TTAB under *Research in Motion Ltd. v. Defining Presence Mktg. Group, Inc. and Axel Ltd. Co.*, 102 U.S.P.Q.2d 1187 (T.T.A.B. 2012), Opposer's claim is barred from recovery

due to the fact that Applicant's use is a proper parody under 15 U.S.C. §1125(c)(3)(A) and *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC,* 507 F.3d 252 (4th Cir. Va. 2007).

68. As a separate affirmative defense, Opposer's request for relief is barred in whole or part by the equitable doctrines of estoppel, laches, acquiescence and unclean hands. Specifically, Opposer's actions establish assent and consent to the Applicant's branding and registration of U.S. Trademark applications, Serial Nos. 85/751742 and 85/920460. Such assent and consent, upon which Dr. Simmons reasonably relied, led to significant branding and advertising activities, as well as Dr. Simmons's conduct with regards to the pursuit of U.S. Trademark protection. Such actions of Margaritaville's executives also demonstrate Margaritaville's belief in the absence of any possible consumer confusion.

CONCLUSION

In view of the foregoing, Applicant's requests that the Opposition be dismissed and that Applicant's mark be allowed to proceed to registration.

WHEREFORE, Simmons requests that the present Notice of Opposition be dismissed with prejudice.

Dated: January 22, 2014

Respectfully submitted,

Michael W. Vary, Esq.
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CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby certifies that on this 22nd day of January 2014, the foregoing *Applicant's First Amended Answer to Consolidated Notice of Opposition and Affirmative Defenses* was deposited with the United States Patent and Trademark Office, Trademark Trial and Appeal Board via electronic filing through their website at http://estta.upsto.gov/.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 22nd day of January 2014, the foregoing *Applicant's First Amended Answer to Consolidated Notice of Opposition and Affirmative Defenses* was served upon Opposer by delivering a true and correct copy of same to counsel for Opposer via email and first class mail, return receipt requested, as follows:

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Date: January 22, 2014

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