

ESTTA Tracking number: **ESTTA577511**

Filing date: **12/18/2013**

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

## Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

### Opposer Information

Name	Starbuzz Tobacco Inc.		
Entity	Corporation	Citizenship	California
Address	10871 Forbes Ave Garden Grove, CA 92843 UNITED STATES		

Attorney information	Martin Jerisat Starbuzz Tobacco, Inc. 10871 Forbes Ave Garden Grove, CA 92843 UNITED STATES martin@starbuzztobacco.com Phone:7149954119		
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### Applicant Information

Application No	85774314	Publication date	11/19/2013
Opposition Filing Date	12/18/2013	Opposition Period Ends	12/19/2013
Applicant	philip melnick PO Box 131822 Staten Island, NY 10313 USX		

### Goods/Services Affected by Opposition

Class 034. First Use: 2010/01/10 First Use In Commerce: 2012/10/01  
All goods and services in the class are opposed, namely: Electric cigarettes

### Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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### Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	3619407	Application Date	11/20/2008
Registration Date	05/12/2009	Foreign Priority Date	NONE
Word Mark	BLUE MIST		

Design Mark	<h1>Blue Mist</h1>		
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2006/12/01 First Use In Commerce: 2006/12/01 Pipe Tobacco, Tobacco, Smoking Tobacco, Flavored Tobacco, Molasses Tobacco		

U.S. Registration No.	3695500	Application Date	03/25/2009
Registration Date	10/13/2009	Foreign Priority Date	NONE

Word Mark	CITRUS MIST
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Design Mark	<h1>Citrus Mist</h1>		
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2008/03/04 First Use In Commerce: 2008/03/04 Pipe tobacco; molasses tobacco; tobacco; smoking tobacco; flavored tobacco; herbal molasses herbs for smoking, tobacco and tobacco substitutes		

U.S. Registration No.	4287968	Application Date	02/03/2012
Registration Date	02/12/2013	Foreign Priority Date	NONE

Word Mark	PEACH MIST
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Design Mark	<h1>PEACH MIST</h1>		
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2012/01/27 First Use In Commerce: 2012/01/27 PIPE TOBACCO; MOLASSES TOBACCO; TOBACCO; SMOKING TOBACCO; FLAVORED TOBACCO		

U.S. Registration No.	4196957	Application Date	06/29/2011
Registration Date	08/28/2012	Foreign Priority Date	NONE
Word Mark	TROPICAL MIST		
Design Mark	<h1>TROPICAL MIST</h1>		
Description of Mark	NONE		
Goods/Services	Class 034. First use: First Use: 2011/06/22 First Use In Commerce: 2011/06/22 Pipe Tobacco; Molasses Tobacco; Tobacco; Smoking Tobacco; Flavored Tobacco		

Attachments	77619104#TMSN.jpeg( bytes ) 77699076#TMSN.jpeg( bytes ) 85533824#TMSN.jpeg( bytes ) 85360053#TMSN.jpeg( bytes ) MYST Notice of Opposition.pdf(86373 bytes ) Ex. A-D.pdf(615463 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Martin Jerisat/
Name	Martin Jerisat
Date	12/18/2013

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

STARBUZZ TOBACCO, INC.  
Plaintiff,

vs.

Phillip Melnick  
Defendant.

Opposition No. \_\_\_\_\_

**NOTICE OF OPPOSITION**

Starbuzz Tobacco, Inc. (“Opposer” or “Starbuzz”), a corporation organized and existing under the laws of the State of California, believes that it will be damaged by registration of the mark shown in U.S. Application Serial No. 85/774,314 in International Class 034 (the “Application”) and hereby opposes the same.

**As grounds for opposition it is alleged that:**

**Opposer’s Background**

1. Starbuzz is a manufacturer and distributor of various products, including, but not limited to, tobacco, hookahs, electric cigarettes and various other products.

2. For the past several years, Starbuzz has been using, and has registered on the United States Patent and Trademark Office’s (“USPTO”) Principal Register the trademarks “BLUE MIST”, “CITRUS MIST”, “PEACH MIST”, and “TROPICAL MIST” in International Class 034 Nos. 3,619,407, 3,695,500, 4,287,968 and 4,196,957 (the “Registered Marks”), true and correct copies of the registration certificates are attached as **Exhibits A-D**.

### **Applicant's Background**

3. Starbuzz is informed and believes, and on that basis alleges that, Mr. Phillip Melnick is the owner of the pending application and whose place of business is PO. Box 131822, Staten Island, NY 10313.

4. Starbuzz is informed and believes, and on that basis alleges that, Applicant has designated Thomas M. Wilnetz, PLLC, whose address is 75 South Broadway, 4<sup>th</sup> Floor, White Plains, NY 10601, as the correspondent upon whom the opposition may be served.

5. Starbuzz is informed and believes, and on that basis alleges that, on November 8, 2012, Applicant filed U.S. Application Serial No. 85/774314 for the mark "MYST" ("Applicant's Mark") for "electric cigarettes" ("Applicant's Goods").

6. The Application was filed based on Section 1(a) of the Lanham Act in use basis.

7. The USPTO published Applicant's Mark for opposition in the Official Gazette on November 19, 2013.

### **GROUND FOR OPPOSITION**

#### **Standing and Priority**

8. Starbuzz re-alleges and incorporates by this reference prior paragraphs of this Notice of Opposition as if fully set forth herein.

9. Starbuzz is informed and believes, and on that basis alleges that, the date of first use of the Registered Marks in commerce predates the date of first use of Applicant's Mark in commerce. Therefore Starbuzz's rights to its mark have priority over any rights claimed by Applicant in Applicant's Mark.

**Likelihood of Confusion Pursuant to 15 U.S.C. §1052(d)**

10. Starbuzz re-alleges and incorporates by this reference prior paragraphs of this Notice of Opposition as if fully set forth herein.

11. The term “MIST” has no special meaning within the tobacco industry. The Registered Marks are therefore arbitrary or fanciful as applied to Starbuzz’s goods, and should be afforded the highest level of protection.

12. Based on the term “MIST”, Starbuzz is informed and believes, and on that basis alleges that, Applicant’s Mark, when used in conjunction with Applicant’s Goods, so resembles the Registered Marks, as to be likely to cause confusion, to cause mistake, and to deceive within the meaning of 15 U.S.C. §1052(d).

13. Starbuzz is informed and believes, and on that basis alleges that, the type of goods offered in conjunction with Applicant’s Mark is similar or related to the type of goods offered in conjunction with the Registered Marks.

14. Starbuzz is informed and believes, and on that basis alleges that, Applicant’s Goods, and Starbuzz’s goods, are marketed to identical or similar groups of consumers.

15. Starbuzz is informed and believes, and on that basis alleges that, Applicant’s Goods and Starbuzz’s goods, are advertised, promoted, and/or sold through the same or similar channels of trade.

16. Starbuzz is informed and believes, and on that basis alleges that, Applicant’s Goods and Starbuzz’s goods are relatively affordable and subject to impulse purchasing.

17. Starbuzz is informed and believes, and on that basis alleges that, Applicant’s Goods and Starbuzz’s goods, target the same general class of purchasers.

18. Because of this established marketing practice, Applicant's use of the mark "MYST" on Applicant's goods would result in a likelihood of confusion, because consumers might associate Applicant's goods as products created by Starbuzz to promote its tobacco products.

19. Accordingly, Starbuzz is informed and believes, and on that basis alleges that the circumstances surrounding the marketing of Applicant's Goods are such that Applicant's Goods and Starbuzz's goods are likely to be seen by the same persons under circumstances that could give rise to a mistaken belief that they originate from or are in some way associated with the same producer, or that there is an association between the producers of each parties' goods.

20. Starbuzz has no control over the nature and quality of Applicant's Goods that bear Applicant's Mark, and any dissatisfaction with Applicant's Goods would reflect adversely on Starbuzz, thus damaging the goodwill and reputation Starbuzz has established in the Registered Mark.

21. Registration of Applicant's mark will further damage Starbuzz because the trademark sought to be registered, "MYST", is nearly identical to the Registered Marks. Therefore use of Applicant's Mark will cause confusion or mistake, and is likely to deceive purchasers, and the general public, into the erroneous belief that Applicant's Goods and Starbuzz's goods originate from the same source, or are authorized or sponsored by Starbuzz.

22. Starbuzz customers, as well as the general public, are likely to be confused, mistaken, or deceived as to the origin or sponsorship of Applicant's Goods and Starbuzz's goods. Based upon such likelihood of confusion, Applicant's mark should be denied registration under 15 U.S.C. §1052(d).

WHEREFORE, Starbuzz prays that Application Serial No. 85/774,314 be denied registration.

Starbuzz hereby consents and appoint Martin E. Jerisat, who is a member of the Bar of the State of California, as its duly authorized agent and attorney to prosecute this Opposition and to transact all business in the Patent and Trademark Office and in the United States Courts, to sign his name to all papers which may hereinafter be filed in connection therewith, and to receive all official communications for this Opposition.

Respectfully submitted,

/s/Martin Jerisat  
Martin E. Jerisat

# **EXHIBIT A**

**Int. Cl.: 34**

**Prior U.S. Cls.: 2, 8, 9 and 17**

**United States Patent and Trademark Office**

**Reg. No. 3,619,407**

**Registered May 12, 2009**

**TRADEMARK  
PRINCIPAL REGISTER**

**Blue Mist**

STARBUZZ TOBACCO, INC. (CALIFORNIA CORPORATION)  
UNIT #A  
1889 W. COMMONWEALTH STREET  
FULLERTON, CA 92833

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

FOR: PIPE TOBACCO, TOBACCO, SMOKING TOBACCO, FLAVORED TOBACCO, MOLASSES TOBACCO, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

SER. NO. 77-619,104, FILED 11-20-2008.

FIRST USE 12-1-2006; IN COMMERCE 12-1-2006.

REGINA DRUMMOND, EXAMINING ATTORNEY

## **EXHIBIT B**

# United States of America

United States Patent and Trademark Office

## Citrus Mist

**Reg. No. 3,695,500** STARBUZZ TOBACCO, INC. (CALIFORNIA CORPORATION)  
Registered Oct. 13, 2009 2116 W. LINCOLN AVENUE  
ANAHEIM, CA 92801

**Int. Cl.: 34** FOR: PIPE TOBACCO; MOLASSES TOBACCO; TOBACCO; SMOKING TOBACCO;  
FLAVORED TOBACCO; HERBAL MOLASSES HERBS FOR SMOKING, TOBACCO AND  
TOBACCO SUBSTITUTES, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

**TRADEMARK**  
**PRINCIPAL REGISTER** FIRST USE 3-4-2008; IN COMMERCE 3-4-2008.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 3,619,407.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "CITRUS", APART FROM THE MARK AS SHOWN.

SER. NO. 77-699,076, FILED 3-25-2009.

DAVID YONTEF, EXAMINING ATTORNEY



*David J. Kyffers*

Director of the United States Patent and Trademark Office

## **EXHIBIT C**

**United States of America**  
United States Patent and Trademark Office

# PEACH MIST

**Reg. No. 4,287,968**

STARBUZZ TOBACCO, INC. (CALIFORNIA CORPORATION)  
2116 W. LINCOLN AVENUE  
ANAHEIM, CA 92801

**Registered Feb. 12, 2013**

**Int. Cl.: 34**

FOR: PIPE TOBACCO; MOLASSES TOBACCO; TOBACCO; SMOKING TOBACCO;  
FLAVORED TOBACCO, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

**TRADEMARK**

FIRST USE 1-27-2012; IN COMMERCE 1-27-2012.

**PRINCIPAL REGISTER**

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NOS. 3,619,407, 3,671,258, AND 3,695,500.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "PEACH", APART FROM THE MARK AS SHOWN.

SER. NO. 85-533,824, FILED 2-3-2012.

KATHLEEN M. VANSTON, EXAMINING ATTORNEY



*Kathleen M. Vanston*

Acting Director of the United States Patent and Trademark Office

## **EXHIBIT D**

# United States of America

United States Patent and Trademark Office

## TROPICAL MIST

**Reg. No. 4,196,957**

STARBUZZ TOBACCO, INC. (CALIFORNIA CORPORATION)  
2116 W. LINCOLN AVE.

**Registered Aug. 28, 2012**

ANAHEIM, CA 92801

**Int. Cl.: 34**

FOR: PIPE TOBACCO; MOLASSES TOBACCO; TOBACCO; SMOKING TOBACCO;  
FLAVORED TOBACCO, IN CLASS 34 (U.S. CLS. 2, 8, 9 AND 17).

**TRADEMARK**

FIRST USE 6-22-2011; IN COMMERCE 6-22-2011.

**PRINCIPAL REGISTER**

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

SER. NO. 85-360,053, FILED 6-29-2011.

RONALD MCMORROW, EXAMINING ATTORNEY



*David J. Kyffers*

Director of the United States Patent and Trademark Office