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

Proceeding	91214086
Party	Defendant philip melnick
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Submission	Answer
Filer's Name	philip melnick
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Signature	/Philip Melnick/
Date	02/19/2014
Attachments	Myst USPTO answer to motion.pdf(308896 bytes )

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

Starbuzz Tobacco, Inc.

Petitioner,

Opposition No. 91214086

Vs.

Philip Melnick

Registrant.

**Reply to Motion to Vacate and Motion for Default Judgment**  
**and Cross-motion for Summary Judgment**

Registrant, Philip Melnick, acting pro se, avers that he has in fact obtained the consent of the Petitioner for a 90 day extension to file an answer and requests that the board grants neither the Petitioner's motion to vacate the time extension, nor the motion for a default judgment.

**Relevant Timeline**

1. Registrant spoke to Petitioner via telephone on January 16, 2014. Registrant requested a 90 day extension which was assented to by Petitioner's words that such extension "sounds fine." Petitioner also gave verbal consent to receive service via email.
2. Later in the same conversation, Petitioner requested that an email should be sent requesting the consent to the extension. Petitioner did not make consent to the 90 extension contingent on an affirmative reply to Registrant's email.
3. As a courtesy, Registrant followed up by sending the requested email soon afterwards even though he did not believe that had any bearing on the assent to the 90 day extension.

4. Contrary to Petitioner's "*Factual Background*," Registrant did not call or speak to Petitioner on January 27, 2014.

### **Contingent Motion to File a Late Answer**

Should the board vacate the stipulation for an extension of time to answer, Registrant motions the board to accept a late answer to the opposition. If the Petitioner did not acquiesce to the 90 day extension of time to answer, then Petitioner's words created the belief that such assent was given.

### **Motion for Summary Judgment**

The entire basis of Petitioner's opposition is the similarity of Registrant's mark, "Myst" to the word "Mist" in Petitioner's marks, "Tropical Mist" et al. Registrant's mark is in the electronic cigarettes category, while Petitioner's mark is in the flavored tobacco category. "Mist" is basic quality of all electronic cigarettes, as all electronic cigarettes produce a vapor, or *mist*. It is akin to naming a tobacco cigarette, "*Smoke*," which is patently a generic name that could not be registered. If the word "Mist" alone would be considered a generic name for an electronic cigarette, then Petitioner can not use that part of its Trademark to oppose the mark of another. Petitioner requests judicial notice that a similar conclusion should be made for a mark that is similar to said generic mark, as in the present case.

Wherefore, Registrant asks that the board uphold the stipulated extension of time, or if not then grant an extension of time. Registrant furthermore asks that the opposition is summarily dismissed and the registration be allowed to proceed.

### **CERTIFICATE OF SERVICE**

I certify that a copy of this Motion has been served on Petitioner via email to [martin@starbuzztobacco.com](mailto:martin@starbuzztobacco.com)

/Philip Melnick/ 2/19/2014