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

Proceeding	91215106
Party	Defendant Happy Hour Ninja
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE  
THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 86/042,662: BECAUSE IT'S 4 O'CLOCK  
SOMEWHERE!

Published in the Official Gazette on February 11, 2014

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MARGARITAVILLE )  
ENTERPRISES, LLC, )  
Opposer, )  
v. ) **Opposition No. 91215106**  
HAPPY HOUR NINJA, )  
Applicant. )

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**ANSWER**

**PRIORITY AND LIKELIHOOD OF CONFUSION**

16. The applied-for mark, BECAUSE IT'S 4 O'CLOCK SOMEWHERE!, closely resembles Margaritaville's IT'S 5 O'CLOCK SOMEWHERE mark.

The Applicant supposes this depends on one's subjective definition of the word "closely". The Applicant's proposed mark begins with a part of speech known as a "subordinating conjunction". The Opposer's mark begins with a contraction of the subject and verb. The Applicant's proposed mark indicates a specific time of day indicative of happy hour, whereas the Opposer's mark indicates a time of day indicative of the end of the work day. Further, the Applicant's proposed mark ends with punctuation, whereas the Opposer's does not.

Applicant denies claim.

17. BECAUSE IT'S 4 O'CLOCK SOMEWHERE! and IT'S 5 O'CLOCK SOMEWHERE, which share four words, are similar in appearance.

The Opposer's statement is false. The two phrases do not share four words.

Applicant denies claim.

18. BECAUSE IT'S 4 O'CLOCK SOMEWHERE! and IT'S 5 O'CLOCK SOMEWHERE sound similar.

The Applicant supposes this depends on one's subjective definition of the word "similar". Also, given that it is a written statement, I am unclear as to how the Opposer can suggest that the two phrases "sound" similar. Even if spoken, the Applicant's proposed mark is clearly an exclamatory statement (given the exclamation point), whereas the Opposer's mark is apparently a simple, unexcited statement of fact.

Applicant denies claim.

19. BECAUSE IT'S 4 O'CLOCK SOMEWHERE! and IT'S 5 O'CLOCK SOMEWHERE have a similar commercial impression.

As mentioned above, the Applicant's proposed mark specifically indicates a time of day associated with the commencement of an hours-long happy hour. The Opposer's mark specifically indicates a finite, instantaneous time of day associated with the end of the work shift.

Applicant denies claim.

20. Upon information and belief, Applicant adopted its applied-for mark based, in whole or in part, on its similarity to the IT'S 5 O'CLOCK SOMEWHERE mark.

The Opposer does not present any "information" for the Applicant to rebut. The Opposer's statement on "belief" is most easily rebutted by looking at the definition of "belief": "a feeling of being sure that someone or something exists or that something is true". Note that evidence is not a pre-requisite for a belief.

Furthermore, the Applicant's adoption of the proposed mark is based on the similarity to a phrase found in Elise Sanguinetti's McBee's Station, published in the Applicant's year of birth, 1971, which on page 128, relays a conversation in which "the old judge" is quoted as saying "It must be

five o'clock somewhere in the world.”

The Opposer’s “information and belief” is ill founded.

Applicant denies claim.

21. Applicant’s applied-for Class 9 Goods are closely related to Margaritaville’s IT’S 5 O’CLOCK SOMEWHERE-branded restaurant and bar services.

The Applicant is not interested in “Class 9 Goods are closely related to Margaritaville’s IT’S 5 O’CLOCK SOMEWHERE-branded restaurant and bar services”, only the applied-for “Downloadable mobile applications for locating happy hours at bars and restaurants; Downloadable software in the nature of a mobile application for locating happy hours at bars and restaurants.”

Applicant denies claim.

22. Based on the similarity of the marks and the similarity of the goods and services, the public is likely to be confused, to be deceived, and to assume erroneously that Applicant’s goods are Margaritaville’s goods or that Applicant is in some way connected to, sponsored by, or affiliated with Margaritaville, resulting in irreparable damage to Margaritaville.

The Applicant has not applied for the use of the proposed mark on any goods. The Applicant’s use of the proposed mark will be within specifically downloaded smartphone applications which are quite unlikely to be confused with any of the undefined and unidentified “services” of the Opposer. Upon information and belief, the public will neither be confused or deceived, nor assume erroneously that Applicant’s goods are Margaritaville’s goods or that Applicant is in some way connected to, sponsored by, or affiliated with Margaritaville, resulting in irreparable damage to Margaritaville.

Applicant denies claim.

23. Because the public is likely to be confused, to be deceived, and to erroneously assume a connection between Applicant’s BECAUSE IT’S 4 O’CLOCK SOMEWHERE!- branded goods and Margaritaville, Applicant’s use and registration of its applied-for BECAUSE IT’S 4 O’CLOCK SOMEWHERE! mark will violate 15 U.S.C. §§ 1114 and 1125(a) and will injure and damage Margaritaville and the goodwill and reputation symbolized by Margaritaville’s IT’S 5 O’CLOCK

SOMEWHERE mark within the meaning of 15 U.S.C. § 1063(a).

In accordance with the arguments by Applicant above, the suggested violation of U.S.C. is unfounded.

24. Applicant's applied-for mark is not registrable under 15 U.S.C. § 1052(d), because it resembles a mark previously used in the United States by another and not abandoned and is therefore likely to cause confusion, mistake, or to deceive.

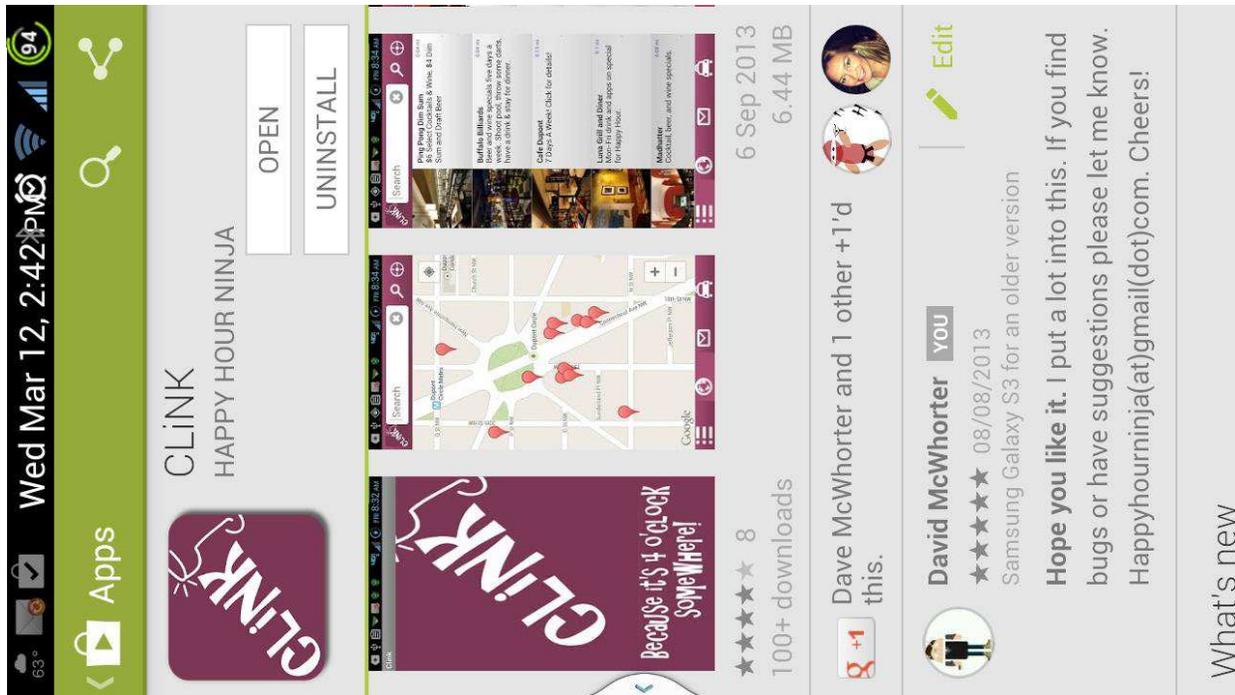
In accordance with the arguments by Applicant above, the suggested violation of U.S.C. is unfounded.

Applicant denies claim.

Note to Opposer: As reported in the Applicant's filing, the town to which correspondence should be addressed is "Potomac", not "Potomoc".

### PROOF OF SERVICE

Below is a screenshot of the Google Play Store listing that shows the proposed mark on the opening splash screen as the app opens:



**CONCLUSION**

Happy Hour Ninja requests that the Board overrule the opposition and grant registration of the Application.

Date: April 2, 2014

Respectfully submitted,

**HAPPY HOUR NINJA, LLC**



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**CERTIFICATE OF ELECTRONIC TRANSMISSION**

Date: April 2, 2014

I certify that this paper is being transmitted electronically to the Trademark Trial and Appeal Board of the United States Patent & Trademark Office, on the date indicated above, through the ESTTA electronic filing system at the web site <http://esta.uspto.gov/>.



David A. McWhorter, PhD

**CERTIFICATE OF SERVICE**

I certify that on April 2, 2014, I served the above Notice of Opposition by first-class mail to:

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David A. McWhorter, PhD