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

Proceeding	91215512
Party	Defendant Cox, David
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Submission	Motion to Amend/Amended Answer or Counterclaim
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Date	04/28/2014
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BODY VIBE INTERNATIONAL, LLC	:	
	:	
Opposer	:	Opposition Proceeding
	:	No. 91215512
v.	:	
	:	
DAVID COX	:	Serial No. 85966358
	:	
Applicant	:	

Re: *Trademark Opposition*
Serial. No. 85966352
For: DR. VAPE
By: David Cox
For: Class 011. Electric Vaporizers

AMENDED ANSWER TO OPPOSITION FOR REGISTRATION

COMES NOW, David Cox ("Applicant"), by and through his attorney Mark S. Hubert, and answers the Notice of Opposition filed by Body Vibe International, LLC ("Opposer") in the above-identified proceeding. The numbers of the following first five paragraphs correspond to the paragraph numbers of the Opposer's Notice for Opposition.

1. Admit.

2. Applicant is without knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 2 of Opposer's Notice of Opposition and accordingly, denies such allegations. Applicant has been unable to locate any form of market presence by Opposer. Internet and printed literature (magazine) searches have not revealed a single mention of Opposer's offer to tender for sale any

goods or services in conjunction with "electric vaporizers" and "electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form used to refill electronic cigarette cartridges, atomizers and vaporizers."

3. Applicant is without knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of Opposer's Notice of Opposition and accordingly, denies such allegations. Opposer claims irreparable damage and injury if Applicant's mark is registered, but fails to identify how.

4. Applicant is without knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of Opposer's Notice of Opposition and accordingly, denies such allegations. A "likelihood of confusion" cannot exist if Opposer has no visible goods in commerce. Applicant denies that Opposer is damaged, is being damaged, and will continue to be damaged by Applicant's registration.

5. Applicant is without knowledge and information sufficient to form a belief as to the truth of the allegations in Paragraph 5 of Opposer's Notice of Opposition and accordingly, denies such allegations. Product confusion, mistake or deception cannot occur if Opposer has no visible goods in commerce. Applicant also denies that Opposer is entitled to have said registration cancelled.

6. Applicant denies any allegations in the Opposition that have not been explicitly admitted.

DEFENSES

Applicant asserts that none of the defenses as set forth below (affirmative or otherwise) are to be taken as an admission that Opposer has utilized the trademark

"Dr. Vape" in conjunction with the sale of electric vaporizers in class 011 at least as early as January 12, 2013, or with electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form used to refill electronic cigarette cartridges, atomizers and vaporizers in class 030. In further answer to the Opposition, Applicant asserts that:

FIRST AFFIRMATIVE DEFENSE

7. Opposer has unclean hands. Opposer's claim to a superior mark via an earlier date of first use in interstate commerce is not based on any significant commercial sales of Opposer's claimed goods.

SECOND AFFIRMATIVE DEFENSE

8. Opposer has falsely marked their goods in an attempt to secure a trademark for the identical mark that Applicant filed for. The specimen sent into the USPTO is clearly a cobbled together label, falling below the standard of branding in such consumer goods, as evidenced by the quality branding used by Applicant on his goods.

FIRST DEFENSE

9. Although Opposer purports to have used his mark in commerce before Applicant's mark, there is no evidence that it was indeed used beyond a *de minimis* amount. This is insufficient to establish common law or other trademark rights. Applicant has rights in its mark that are superior to those of Opposer.

SECOND DEFENSE

10. Applicant's mark, when used in connection with Applicant's goods, is not likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection or association of Applicant with Opposer, or as to the origin,

sponsorship, or approval of Applicant's goods by Opposer, because Applicant is informed and believes, and, on that basis, alleges that the Opposer is not marketing and selling goods bearing the trademark in question.

THIRD DEFENSE

11. Opposer has practiced fraud upon the Trademark Office in that it has alleged that it has used the mark "Dr. Vape" as a mark in commerce since January 12, 2013 a mere 139 days before the date of first usage in interstate commerce of the Applicant's mark. Opposer's use of the mark "Dr. Vape" is *de minimis* and is not sufficient to qualify as an actual first sale in commerce.

Applicant's Statements

In addition, Applicant sets forth the following statements in support of its defenses:

12. Opposer claims that Applicant's mark "Dr. Vape" is likely to cause confusion with Opposer's purported mark "Dr. Vape" but cites no acts by any consumer that support this. Applicant, David Cox, has been selling his vaporizer in interstate commerce at least as early as May 31, 2013. Applicant cannot find any trade presence of any "Dr. Vape" trademarked electric vaporizer products other than his own in class 011. This incudes industry searches for marketing, customer surveys etc. via the internet and trade marketing publications.

13. There cannot be any likelihood of confusion if there is no such product of the Opposer in the market.

14. Opposer's trademark registrations 86221601 and 86221890 both show specimens that appear to be "cobbled together." Applicant believes that Opposer

will not be found to have any substantial sales of his purported goods bearing the "Dr. Vape" mark in interstate commerce. Most likely, Opposer's electric vaporizer specimen was fabricated for the explicit purpose of applying for a federal trademark and using this as a basis to challenge Applicant's mark.

15. Applicant hereby appoints Mark S. Hubert, a member of the Oregon State Bar, and registered to practice before the United States Patent and Trademark Office, at the firm of:

Mark S. Hubert P.C.

2300 SW First Avenue – Suite 101

Portland, Oregon 97201

to act as the attorney of record in the matter of the Opposition identified above, to respond to said petition, to transact all business in the Patent and Trademark Office or the Trademark Trial and Appeal Board connected with the Opposition to sign his name to all papers which are hereinafter to be filed in connection therewith, and to receive all communications relating to the same.

RELIEF REQUESTED

16. WHEREFORE, Applicant respectfully requests as follows:

(a) this opposition be dismissed with prejudice and order such other relief as it

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deems appropriate.

(b) a registration for the term Dr. Vape be issued to the Applicant.

Respectfully submitted this 28th day of April, 2014,

By: _____

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Attorney for Applicant, David Cox

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing document was filed electronically via the ESTTA, at the United States Patent and Trademark Office, Trademark Trial and Appeal Board's ESTTA electronic filing system, this 28th day of April, 2014.

By: _____

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Attorney for Applicant, David Cox

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this 28th day of April 2014, a true and correct copy of this Amended Answer to Opposition 91215512 has been served upon the Attorney for Opposer by mailing the same by U.S. Mail, first-class, postage paid, to the Attorney at his address of record, as follows:

Thomas P. Philbrick
Allmark Trademark
2089 Avy Ave.
Menlo Park, CA 94025

By: _____

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