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

Proceeding	91218363
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IN THE UNITED STATES PATENT & TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

NEW WAVE INNOVATIONS, INC.  
Opposer

vs.

MR. FOAMER, INC. (A FLORIDA  
CORPORATION)  
Applicant

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**OPPOSITION NO. 91/218,363**

**RESPONSE IN OPPOSITION TO THE  
MOTION TO DISMISS AMENDED OPPOSITION**

New Wave Innovation, Inc. (NWI) herein responds to the Mr. Foamer, Inc. (MFI) Motion to Dismiss the Amended Opposition as follows:

**SUMMARY OF RESPONSE**

The motion to dismiss the amended opposition is based, *inter alia*, upon the disingenuous assertion that the *Amended Opposition*, fails, in one or more respects, to sufficiently set forth a basis for Opposition MFI application to register the mark MR. FOAMER, in that it does provide adequate notice to MFI of the grounds/predicate for the Opposition.

With respect to allegations relative to likelihood of confusion (**Count I**), the basis for the likelihood of confusion asserted in the *Amended Opposition* is clear, and more than adequately plead to satisfy the notice pleading requirements of the Trademark Trial & Appeal Board *Amended Opposition* @ paragraph 1(A). The *Amended Opposition* explicitly asserts that there is a likelihood of confusion between the Applicants use of the MR. FOAMER (Count I). The confusion is the result of the prior adoption and continuous use of the MR. FOAMER by NWI in

a Christmas Card solicitation (Discount Coupon enclosure in Card) to its commercial car wash customers, (which included the Applicant, MFI), *Amended Opposition* @ paragraphs 9-13. The Christmas Card (**Exhibit “2”**) was sent before Christmas in 2011 (~**December 25, 2011**) to several hundred customers, and potential customers, of commercial car wash products (including MFI’s predecessor company, Car Wash Experts, Inc.); along with a Discount Coupon (**Exhibit “3”**) for NWI products. The Discount Coupon indicated an expiration date in **March 1, 2012**. Accordingly, the NWI has alleged “priority” of adoption and use, with sufficient specificity, to establish a date of adoption and use before MFI (MFI first use in August 2012). The fact a date certain is not alleged is immaterial, and more often than not, the date of first use in commerce is generally expressed in terms on **“not later than”**.

Each of NWI and MFI, thus, promote and sell their products to the same customers (distributors of commercial car wash equipment and commercial car wash businesses), *Amended Opposition* @ paragraphs 14-15. There has been actual confusion in the marketplace between the NWI and MFI products and services, *Amended Opposition* @ paragraphs 17-18.

The MFI reliance upon the trademark examiner preliminary rejection of the NWI pending trademark applications is misplaced. The NWI applications were field without the Discount Coupons, which is annexed to its *Amended Opposition* (Exhibit “3”). Accordingly, upon timely response thereto, NWI will adequately demonstrate a connection between the MR FOAMER mark and the goods and services for which registration is sought. A response to these preliminary rejections, and additional support for registration, shall be filed in due course. In any event, such “evidence” is inappropriate for consideration in the Board’s review of the sufficiency of the *Amended Opposition* upon a *Motion to Dismiss*.

*In summary*, the *Amended Opposition* is sufficient, to allege, within the four (4) corners of the pleading, a basis for opposition and thereby adequately apprise MFI of the nature of the basis therefore under Section 2(d) of the Lanham Act (15 USC 1052(d)).

With respect to allegations relative to MFI fraudulent trademark application (**Count II**), the basis for the allegation of fraud asserted in the *Amended Opposition* is clear, and more than adequately plead to satisfy the notice pleading requirements of the Trademark Trial & Appeal Board, *Amended Opposition @* paragraph 1(B). The Amended Opposition explicitly asserts that the representations made MFI in its application to register the MR FOAMER mark are inconsistent with and irreconcilable with the positions taken and explicit statement, (many of which were under penalty of perjury), in the unfair competition litigation between the parties in the Federal District Court in the Southern District of Florida, *New Wave Innovations, Inc. v. James (Jim) McClimond*, Case No. 2013-CV-22541. (herein “Lanham Act Litigation”).

In plain and simple terms, was MFI lying in its representations to the Federal District Court or is it lying now in its application for registration of the MR FOAMER trademark! The fraudulent statements in the MFI application to register the MR FOAMER trademark are palpable.

NWI need only alleged with sufficient specificity a basis for fraud, to place MFI on notice of the basis of such opposition. Clearly, the *Amended Opposition* asserts that the parties are and continue to be engaged Lanham Act Litigation involving the MR FOAMER, Amended Opposition @ paragraphs 21-23. Thus, the assertions in the MFI trademark application that it is not aware of any conflicting usage of the MR FOAMER mark, or that there is not likelihood of confusion with another’s use of the MR FOAMER mark, is a blatant misrepresentation and fraudulent.

The Lanham Act Litigation between the parties contains numerous additional examples of the MFI inconsistent with and irreconcilable statements with the both explicit and implicit representation in its trademark applications, regarding the first adoption and use of the MR FOAMER mark; MFI taking the position in the pending Federal Litigation, (at the hearing on the NWI Motion for Preliminary Injunction), that is had never used the MR FOAMER mark, *Amended Opposition* @ paragraphs 24-25. The *Amended Opposition* is thus clear that such these MFI statements, (both the explicit and implicit representations in its trademark applications), are not only preclusive of registration, but also require more draconian sanctions, *Amended Opposition* @ paragraphs 33-34.

*In summary*, the misrepresentations contained in the MFI trademark application, which is opposed herein, are preclusive of registration, either under an equitable estoppel rational, or is legally dictated because of the obvious breach of the MFI and its attorney's duty of candor to the Trademark Office.

### **MEMORANDUM**

The TTAB has and continues to measure the sufficiency of an Opposition under the same "notice pleading" standard applied by the Federal Court under Rule 12(b)(6). (Citation of authority unnecessary).

The *Amended Opposition* is clear, and manifestly sufficient on within the four (4) corners of the *Amended Opposition*, to apprise MFI of the basis of the allegations of likelihood of confusion between the NWI and MFI services – both companies use the MR FOAMER mark as a part of their corporate identity (NWI's use of MR FOAMER as the name for a caricature of one of its products) and/or as a "house mark", wherein they promote their branded goods and/or service under both a product specific trademark along with MR FOAMER ("house mark")

The *Amended Opposition* is also clear, and manifestly sufficient on within the four (4) corners of the *Amended Opposition*, to apprise MFI of the basis of the allegations of fraud upon the Trademark Office. More specifically, the representations in the MFI trademark application for the registration of the MR FOAMER mark, are inconsistent with and irreconcilable statements and the representations in the pending Lanham Act Litigation before the Federal Court in Florida. It is also crystal clear that such inconsistent with and irreconcilable statements have been made with the prior knowledge of the pending Lanham Act Litigation before the Federal Court in Florida; and, by the same attorney who both filed the MFI trademark application and represents MFI in defense of the NWI unfair competition claims in the Federal District Court in Florida. Accordingly, such misrepresentations cannot be rationalize and/or explained away that the MFI registration will not conflict with NWI. MFI has never acknowledged a potential conflict with MWI use of the MR FOAMER mark notwithstanding that the parties have been embroiled in litigation over the use of such mark for more than two (2) years. Quite the contrary representation is included in the MFI trademark application.

Moreover, The clear and unmistakable representation by MFI, in the Federal Litigation between the parties, that is does not use the MR FOAMER mark “in connection with the sale of any products” is, (*Amended Opposition @ paragraph @ 25*); is also inconsistent and irreconcilable with its trademark application affirmative representation of the alleged continuous use in commerce since August 2012. The MR FOAMER mark is a “house mark” of the MFI and used with every product and service offered by MFI.

Whether the Board regards the MFI concealment of the conflicting claims between NWI and MFI as to the MR FOAMER mark, or the palpable misrepresentations in the MFI trademark application regarding prior usage, as fraudulent, is only a matter of degree. The Board is

obviously free to choose which conduct (concealment or affirmative misrepresentations) it finds more offensive in striking the MFI trademark application.

Accordingly, it is respectfully requested the MFI *Motion to Dismiss* be denied.

Respectfully,

/John H. Faro/  
Reg. No, 25,859

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading entitled:

**AMENDED OPPOSITION  
(First)**

was forwarded, via email, to Counsel for Plaintiff, as per the attached Distribution List this 9<sup>th</sup> day of December, 2014.

/John H. Faro/

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