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

Proceeding	91218363
Party	Defendant Mr. Foamer, Inc.
Correspondence Address	ISABELLE JUNG CAREY RODRIGUEZ GREENBERG & O'KEEFE LLP 7900 GLADES RD STE 520 BOCA RATON, FL 33434-4105 UNITED STATES pto@crgolaw.com;ijung@crgolaw.com
Submission	Reply in Support of Motion
Filer's Name	Isabelle Jung
Filer's e-mail	ijung@crgolaw.com
Signature	/Isabelle Jung/
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

NEW WAVE INNOVATIONS INC.

vs.

MR. FOAMER, INC.

_____ /

Opposition No. 91218363

**MR. FOAMER’S REPLY TO NEW WAVE INNOVATIONS’ RESPONSE IN
OPPOSITION TO MR. FOAMER’S MOTION TO DISMISS THE AMENDED
OPPOSITION**

MR. FOAMER, INC. (“MR. FOAMER” or “Applicant”) submits its Reply to NEW WAVE INNOVATIONS, INC. (“NEW WAVE” or “Opposer”) Response in Opposition to Applicant’s Motion to Dismiss the Amended Opposition filed on December 9, 2014 (the “Response”).

The Applicant would like to bring to the Board’s attention the fact that the Applicant has never been made aware of the filing of the Response by New Wave even though New Wave indicated in the certificate of service of the Response that the Response was forwarded by email to [counsel for Plaintiff] on December 9, 2014 (see Response, p. 7). Indeed, counsel for New Wave never sent a copy of the Response to Applicant’s counsel by email on December 9, 2014. Instead, Applicant’s counsel became aware of the filing of the Response while performing a status check of the records of the Board on December 17, 2014 and Applicant’s counsel was surprised to find that a pleading had been filed by New Wave eight (8) days earlier. Applicant’s counsel immediately sent an email to New Wave’s counsel and asked for a copy of the Response. New Wave’s counsel waited until today December 19, 2014 to email a copy of the Response (effecting service of the Response) to Applicant’s counsel. Yet, Applicant’s counsel personally retrieved a copy of the Response on December 19, 2014 (before service of the Response by New Wave’s counsel) and herein files its reply to address a new argument raised by New Wave in the Response and not previously discussed in the Amended Opposition filed by New Wave on

November 13, 2014. This Reply is timely as the Applicant only became aware of the filing of the Response on December 17, 2014 and only formally served the Applicant today December 19, 2014. Of note, this is now the second time that New Wave fails to serve the Applicant with papers filed with the Board on the day they have been filed with the Board. Indeed, New Wave previously failed to serve the Applicant with a copy of its Response in Opposition to the Motion to Dismiss the original Opposition.

In this Reply, Applicant herein incorporates the grounds of dismissal of the Amended Opposition and discussed in Applicant's Motion to Dismiss the Amended Opposition. Further, Applicant wishes to address a new argument raised by New Wave in its Response for the first time and never addressed by New Wave in its Amended Opposition. In the Response, New Wave argues for the first time that Applicant committed fraud on the United States Patent and Trademark Office ("USPTO") through 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." (See Response, p. 3). This argument was never raised in the Amended Opposition by New Wave. As such this argument should be stricken from the Response for being untimely. In the event the Board wishes to consider this newly raised argument, the Applicant argues that the Applicant did not believe at the time it filed its application that there existed a conflicting use of a similar mark in commerce. Indeed, the Applicant did not consider the use of the term MR FOAMER by New Wave in its Christmas Card to amount to trademark use giving rise to trademark rights in New Wave. To the contrary, the Applicant strongly believed (and still believes) that New Wave's use of the term MR FOAMER was not a trademark use. This belief was confirmed by the Federal Court which previously denied New Wave's request for a preliminary injunction based on New Wave's use of the term MR FOAMER. Indeed, the Federal Court denied New Wave's request seeking to enjoin the Applicant's use of the MR. FOAMER Mark and explained in its denial that New Wave did not have trademark rights in the MR FOAMER Mark. Based on the findings, the Applicant did not

believe there was a likelihood of confusion between its mark and New Wave's use of the term MR FOAMER because New Wave's use of the term MR FOAMER did not amount to trademark use.

As a consequence, the Motion to Dismiss the Amended Opposition should be granted. The Response did not address the deficiencies in the pleadings but only repeated the arguments raised by New Wave in its Amended Opposition.

WHEREFORE, the Applicant respectfully requests that the Board dismiss the Amended Opposition as the Amended Opposition fails to state a claim upon which relief can be granted.

Filed on December 19, 2014,

/Isabelle Jung/
Isabelle Jung
Attorney for Applicant, MR. FOAMER, Inc.
CRGO Law
7900 Glades Road, Suite 520
Boca Raton, FL 33434
Phone: (561) 922-3845
Fax: (561) 244-1062
Email: ijung@crgolaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing Reply has been served on the Opposer New Wave Innovations, Inc. by electronic message sent to counsel for New Wave Innovations, Inc., John Faro, on December 19, 2014.

/Isabelle Jung/
Isabelle Jung
CRGO Law
7900 Glades Road, Suite 520
Boca Raton, FL 33434
Phone: (561) 922-3845
Fax: (561) 244-1062
Email: ijung@crgolaw.com