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

Proceeding	91226034
Party	Defendant TITOMIROV VODKA LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

FIFTH GENERATION INC.,

Opposer,

v.

TITOMIROV VODKA LLC,

Applicant.

Opposition No. **91226034**

Application Serial No. 86/504,543

Mark: TITOMIROV VODKA

ANSWER TO NOTICE OF OPPOSITION

Comes now **Titomirov Vodka LLC** (hereinafter referred to as the “Applicant”), through counsel, for the Answer to the Notice of Opposition filed by **Fifth Generation Inc.** (hereinafter referred to as the “Opposer”), against the application for registration of the “TITOMIROV VODKA” mark; U.S. Trademark Application Serial No. 86/504,543 (hereinafter also referred to as the “Applicant’s Mark”), filed on January 15, 2015, published for public opposition in the *Official Gazette* on December 29, 2015, and opposed on January 27, 2016.

Applicant, through counsel, answers, pleads, avers, and alleges as follows:

Except as expressly admitted herein, Applicant denies each and every allegation set forth in Opposer’s Notice of Opposition, and the allegations admitted herein are only admitted to the extent expressly stated.

Answering the introductory paragraph of the Notice of Opposition, Applicant specifically denies Opposer's claim that it will be damaged by the registration of Applicant's Mark. Furthermore, Applicant specifically admits the allegations contained therein regarding Applicant's Mark. Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the remaining allegations contained therein regarding Opposer, and accordingly denies the allegations.

1. Answering Paragraph 1 of the Notice of Opposition, Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the allegations contained therein, and accordingly denies the allegations.

2. Answering Paragraph 2 of the Notice of Opposition, Applicant specifically denies Opposer's claim that TITO'S and TITO'S HANDMADE VODKA marks are famous marks. Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the remaining allegations contained therein, and accordingly denies the allegations.

3. Answering Paragraph 3 of the Notice of Opposition, Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the allegations contained therein, and accordingly denies the allegations.

4. Answering Paragraph 4 of the Notice of Opposition, Applicant specifically admits that it filed Applicant's Mark on January 15, 2015, that Office Actions were issued on April 22, 2015 and August 11, 2015, and that a Letter of Protest was filed on August 10, 2015. Applicant does not have sufficient knowledge and information as to form a belief as to the truth

or accuracy of the remaining allegations contained therein, and accordingly denies the allegations.

5. Answering Paragraph 5 of the Notice of Opposition, Applicant specifically denies that its September 4, 2015 response to the Examiner's Office Action appears to be more focused on personal attacks. Applicant attacked neither the Office nor the assigned Examiner. Instead, Applicant faulted the Examiner's arguments. Applicant, an immigrant, believes strongly that arguments employed by the Examiner *vis a vis* the perceived "exoticism" of his surname were inappropriate. Moreover, Applicant believes that the correctly withdrawn Section 2(d) Refusal was inconsistent with the same Examiner's treatment of Applicant's co-pending application, U.S. Trademark Application Serial No. 86/552,338 for "TITOMIROV VODKA NATURALLY ALKALINE," with a disclaimer of "VODKA NATURALLY ALKALINE," as well as the treatment by different examination law offices of several other co-pending applications filed by Applicant in connection with "TITOMIROV"-formative marks. Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the remaining allegations contained therein, and accordingly denies the allegations.

6. Answering Paragraph 6 of the Notice of Opposition, Applicant specifically denies any personal attacks on the Trademark Deputy Commissioner and the Examiner. As noted previously, Applicant, an immigrant, believes strongly that arguments employed by the Examiner *vis a vis* the perceived "exoticism" of his surname were inappropriate. Moreover, as noted above, Applicant believes that the correctly withdrawn Section 2(d) Refusal was inconsistent with the same Examiner's treatment of Applicant's co-pending application, U.S. Trademark Application Serial No. 86/552,338 for "TITOMIROV VODKA NATURALLY

ALKALINE,” with a disclaimer of “VODKA NATURALLY ALKALINE,” as well as the treatment by different examination law offices of several other co-pending applications filed by Applicant in connection with “TITOMIROV”-formative marks. Furthermore, Applicant specifically admits that a Final Office Action was issued on September 8, 2015. Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the remaining allegations contained therein, and accordingly denies the allegations.

7. Answering Paragraph 7 of the Notice of Opposition, Applicant specifically admits that Applicant’s Mark was published for opposition on December 29, 2015. Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the remaining allegations contained therein, and accordingly denies the allegations.

8. Answering Paragraph 8 of the Notice of Opposition, Applicant denies Opposer’s claims that Applicant’s Mark so resembles Opposer’s TITO’S and TITO’S HANDMADE VODKA marks as to be likely when used on or in connection with Applicant’s goods, namely vodka, to cause confusion, or to cause mistake or to deceive the consuming public as to the source of the goods.

9. Answering Paragraph 9 of the Notice of Opposition, Applicant denies Opposer’s claims that Applicant’s Mark is also likely to diminish and dilute the value of Opposer’s TITO’S and TITO’S HANDMADE VODKA marks to the great detriment of Opposer’s marks, thus significantly damaging Opposer and the goodwill imbued in Opposer’s marks.

10. Answering Paragraph 10 of the Notice of Opposition, Applicant does not have sufficient knowledge and information as to form a belief as to the truth or accuracy of the allegations contained therein, and accordingly denies the allegations.

AFFIRMATIVE DEFENSES

In order not to waive any affirmative defenses, and in order to preserve such defenses, Applicant, through counsel, pleads the following affirmative defenses:

1. Applicant affirmatively alleges that Opposer's Notice of Opposition fails to state a claim upon which relief can be granted.
2. Opposer's claims are barred, in whole or in part, by the equitable doctrine of laches.
3. Opposer's claims are barred, in whole or in part, by the equitable doctrine of acquiescence.
4. Opposer's claims are barred, in whole or in part, by the equitable doctrine of estoppel.
5. Opposer's claims are barred, in whole or in part, by the equitable doctrine of waiver.
6. Applicant affirmatively alleges that Opposer's TITO'S and TITO'S HANDMADE VODKA marks have not become distinctive and famous and, therefore, are not subject to the protections and remedies of Section 43(c) of the Lanham Act (15 USC §1125(c)).
7. Applicant reserves the right to assert other affirmative defenses as this action proceeds, and which may be revealed through discovery.

AMPLIFYING DENIALS

1. Applicant alleges that Applicant's Mark and Opposer's TITO'S and TITO'S HANDMADE VODKA marks are highly distinguishable.
2. Applicant alleges that "TITOMIROV VODKA" is a Ukrainian surname-formative composite mark, and is used exclusively in connection with Applicant's distilled alkaline-water-based and Ukraine-sourced vodka. Opposer's TITO'S and TITO'S HANDMADE

VODKA marks are used exclusively for vodka emblazoned with “Austin, Texas” festooned in the orange and black color scheme of the University of Texas, and featuring the Texas Star. Moreover, Opposer’s advertising and promotional material consistently bills Opposer’s vodka as being sourced from Texas’ oldest vodka distillery. As such, Applicant’s Mark creates a unique expression wildly divergent in sound, sight, and commercial impression from Opposer’s TITO’S and TITO’S HANDMADE VODKA marks.

3. Applicant alleges that Opposer cannot claim that Applicant’s Mark constitutes a likelihood of confusion because Opposer’s TITO’S and TITO’S HANDMADE VODKA marks are famous, because Opposer has not and could have challenged Applicant’s other “TITOMIROV”-formative marks such as:

- a) U.S. Trademark Application Serial No. 86/552,338 for the mark “TITOMIROV VODKA NATURALLY ALKALINE” (Status: Notice of Allowance issued on August 18, 2015).
- b) U.S. Trademark Registration No. 4,807,559 for the mark “LUCKY VODKA BY ALEX TITOMIROV” (Status: Registered on September 8, 2015).
- c) U.S. Trademark Application Serial No. 86/541,550 for the mark “TITOMIROV WATER” (Status: Notice of Allowance issued on November 17, 2015).
- d) U.S. Trademark Application Serial No. 86/541,484 for the mark “TITOMIROV BEER” (Status: Notice of Allowance issued on September 29, 2015).
- e) U.S. Trademark Application Serial No. 86/541,575 for the mark “TITOMIROV MILK” (Status: Notice of Allowance issued on September 15, 2015).

4. Assuming, *arguendo*, as Opposer alleges, that Opposer's TITO'S and TITO'S HANDMADE VODKA marks are "instantly recognizable," Applicant submits that the average consumer would easily discern the marked differences between Opposer's TITO'S and TITO'S HANDMADE VODKA marks and Applicant's Mark.

WHEREFORE, based on the foregoing, by the undersigned attorney, Applicant prays that Opposer's Notice of Opposition be dismissed with prejudice, and that Applicant's Mark be allowed to proceed to registration.

Dated: February 3, 2016

Respectfully submitted,

/rgan/

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CERTIFICATE OF SERVICE

I, Christopher Emond, hereby certify that a true and complete copy of the foregoing Answer to Notice of Opposition has been served on Opposer's attorney of record, W. Scott Brown, Esquire, by mailing said copy on this 3rd day of February 2016, via First Class Mail, postage prepaid to:

W. Scott Brown, Esquire
VINSON & ELKINS, L.L.P.
1001 Fannin Street, Suite 2500
Houston, TX 77002-6760

 /cpe/
Christopher Emond