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

Proceeding	91228396
Party	Defendant Marina Vape, LLC
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

JOHN MIDDLETON CO.,)	<i>In re</i> Serial No. 86/771.515
)	Mark: Jazzy Boba
)	Published: May 17, 2016
)	
Opposer,)	
)	
v.)	
)	Opposition No.: 91228396
MARINA VAPE, LLC,)	
)	
)	
Applicant.)	

ANSWER NOTICE OF OPPOSITION

Opposer, John Middleton Co. (hereinafter “Opposer”) purportedly owns the “JAZZ” and “BLACK & MILD JAZZ” trademarks for “tobacco products, namely, cigars” (collectively hereinafter referred to as “Opposer’s Trademarks”).

Applicant Marina Vape, LLC’s (“Applicant”) mark, JAZZY BOBA, is used for neither tobacco products nor cigars. Instead, the trademark describes liquid flavorings for smokeless, tobacco-free electronic-cigarettes. Applicant’s product itself is a high-quality liquid sold in a bottle with a dropper that contains zero tobacco (“Applicant’s Goods”).

Opposer’s insistence that Applicant’s goods are “tobacco products” meant to be purchased by “tobacco consumers” has no basis in reality. Applicant’s description of goods in its trademark registration does not contain the term tobacco or describe any tobacco product. Nor are Applicant’s Goods marketed to tobacco consumers. Applicant’s Goods produce only smokeless vapor, while Opposer’s goods produce tobacco smoke that kills about 500,000

Americans every year. Given the well-known lethal consequences of using Opposer's goods, consumers know the difference.

Furthermore, the marks themselves are not similar. Jazzy Boba is suggestive of a jasmine flavored milk tea beverage containing boba, a common Taiwanese drink. Opposer's mark is identical to a musical genre originating in New Orleans. The marks even share zero similarities as they appear on each parties' goods. Shown below are photographs of the two trademarks on each parties' products. "Black & Mild" is featured much more prominently than "Jazz" on Opposer's goods. The color scheme is different. The trademarks appear in different fonts. One product is a liquid while one is a solid. One comes with a prominent warning from the Surgeon General, one does not. There are simply no similarities and no chance that a consumer might be confused.

Tellingly, both products have been on the market for years, yet there is zero evidence of actual consumer confusion. The products are sold and marketed on different internet websites and in different retail stores. Opposer cannot point to a single retail outlet that sells both Applicant's Goods and Opposer's goods. They aren't sold together because they aren't marketed towards the same types of consumers. Finally, consumers of Applicant's Goods are sophisticated and spend about \$22 per bottle on the Jazzy Boba product. There is no likelihood of consumer confusion between Applicant's Mark and Opposer's Mark.

Applicant hereby replies to the numbered grounds for opposition set for in Opposer's Notice of Opposition as follows:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 and therefore denies those allegations.
2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and therefore denies those allegations.
3. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 3 and therefore denies those allegations.
4. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 4 and therefore denies those allegations.
5. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 regarding Opposer's purported prior rights. Applicant Admits the remaining allegations in paragraph 5.
6. Applicant admits the allegations in paragraph 6.
7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 and therefore denies those allegations.

8. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore denies those allegations.
9. Applicant makes no answer to the allegations in paragraph 9 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 9.
10. Applicant denies the remaining allegations in paragraph 10. Applicant's Goods are not tobacco products.
11. Applicant denies the remaining allegations in paragraph 11. Applicant's Goods are not tobacco products.
12. Applicant denies the remaining allegations in paragraph 12. Applicant's Goods are not intended for use by adult tobacco consumers. Instead, they are specifically marketed and used by people who do not smoke tobacco.
13. Applicant makes no answer to the allegations in paragraph 13 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 13. Applicant's and Opposer's goods are not sold to the same class of consumers. In fact, there is no overlap at all between the two consumers. Specifically, consumers who are non-smokers consume Applicant's vaping products. Non-smokers do not consume Opposer's Black & Mild Jazz products. There is zero overlap of customers.
14. Applicant makes no answer to the allegations in paragraph 14 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 14. Jazzy Boba and Jazz are not identical nor even similar. They are phonetically and alphanumerically different. And the meaning is entirely different as

well. Jazzy Boba refers to a jasmine flavored milk tea beverage containing boba, a Taiwanese drink. Opposer's mark means a musical genre originating in New Orleans. They are not even remotely similar.

15. Applicant makes no answer to the allegations in paragraph 15 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 15.
16. Applicant makes no answer to the allegations in paragraph 16 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 16.
17. Applicant makes no answer to the allegations in paragraph 17 to the extent that those allegations state legal conclusions rather than facts. Applicant denies the remaining allegations in paragraph 17.

AFFIRMATIVE DEFENSES

Applicant hereby gives notice that it may rely on any affirmative defenses that may become available or appear proper during discovery, and hereby reserves its right to amend this Answer to assert any such defenses.

WHEREFORE, Applicant requests that the Trademark Trial and Appeal Board dismiss the Notice of Opposition and grant all other appropriate relief to Applicant as it deems just.

Respectfully Submitted,

July 25, 2016



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PROOF OF SERVICE

I hereby certify that on 7/25/2016 a copy of the foregoing ANSWER TO NOTICE OF OPPOSITION was service by first class mail postage prepaid to Applicant's attorney of record:

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