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

Proceeding	91253339
Party	Defendant My Habitat Inc.
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Date	02/18/2020
Attachments	Answer to Notice of Opposition FINAL.pdf(224566 bytes)

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

SQUIRE BOONE CAVERNS, INC.)	
)	Opposition No.: 91253339
Opposer,)	
)	Application S/N: 88/202,648
v.)	
)	Mark: GIANT MALLOW POOFY POP
MY HABITAT INC.)	
)	
Applicant.)	
)	
)	
)	

Trademark Trial and Appeal Board
United States Patent and Trademark Office
P.O. Box 1451
Alexandria, VA 22313-1451

For online submission via ESTTA

ANSWER TO NOTICE OF OPPOSITION AND AFFIRMATIVE DEFENSES

This Opposition is being brought in the name of SQUIRE BOONE CAVERNS, Inc. (“Opposer”), which is a corporation of Indiana having its principal place of business at 406 Mount Tabor Road, New Albany, Indiana 47150 and which is the owner of Application Ser. No. 88460608 for the mark POOFY POP.

Applicant, MY HABITAT Inc. (“Applicant”), is a corporation of Michigan having its principal place of business at 23636 Michigan Ave, #417, Dearborn, MI 48124 and which is the owner of the opposed application Ser. No. 88202648 for the mark GIANT MALLOW POOFY POP (“Applicant’s Mark”).

The Notice of Opposition was filed in the U.S. Patent and Trademark Office, at the Trademark Trial and Appeal Board (“Board”) on January 8, 2020 by SQUIRE BOONE

CAVERNS, Inc. Applicant hereby answers the Notice of Opposition filed by Opposer as follows in correspondingly numbered paragraphs:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 1 of the Notice of Opposition, and therefore denies the same.

2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 2 of the Notice of Opposition, and therefore denies the same.

3. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 3 of the Notice of Opposition, and therefore denies the same.

4. With respect to Paragraph 4 of the Notice of Opposition, Applicant admits that Exhibit 1 attached to the Notice of Opposition consists of what appears to be seven (7) invoices, not one as alleged by Opposer, and none identifying Opposer. Therefore, these invoices are not relevant to the present Opposition, and in any event are hearsay and lack authentication.

Accordingly, Applicant denies the truth of any information in each of the seven (7) invoices. Applicant denies any remaining averments in Paragraph 4.

5. With respect to Paragraph 5 of the Notice of Opposition, Applicant admits that Exhibit 2 attached to the Notice of Opposition consists of what appears to be two (2) pages perhaps from a catalog, but the catalog is from someone other than Opposer. Therefore, these pages are not relevant to the present Opposition, and in any event are hearsay and lack authentication. Furthermore, Opposer's mark does not appear on the first page and neither of the pages are "emblazoned POOFY POPS." Accordingly, Applicant denies the truth of any information in the two (2) pages. Applicant denies any remaining averments in Paragraph 5.

6. With respect to Paragraph 6 of the Notice of Opposition, Applicant admits only that Exhibit 2 attached to the Notice of Opposition appears to show a product displaying the words “POOFY ROPE” but, Applicant lacks knowledge or information sufficient to form a belief as to the truth of the other and remaining averments in Paragraph 6 of the Notice of Opposition, and therefore denies the each and every other and remaining averment contained therein.

7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in the first two sentences of Paragraph 7 of the Notice of Opposition, and therefore denies the same. Applicant admits only that Exhibit 3 attached to the Notice of Opposition consists of what appears to be a page perhaps from a catalog of the 2005 All Candy Expo, but Opposer is not listed as appearing at the expo. Therefore, this Exhibit 3 is not relevant and is also hearsay and lacks authentication. Accordingly, Applicant denies the truth of any information in Exhibit 3. Applicant denies any remaining averments in Paragraph 7.

8. With respect to the first sentence of Paragraph 8 of the Notice of Opposition, Applicant admits only that Exhibit 4 attached to the Notice of Opposition appears to include photographs, but the photographs are not intelligible. Therefore, Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments about Exhibit 4 and also lacks knowledge or information sufficient to form a belief as to the truth of the remaining averments in the rest of the first sentence in Paragraph 8 of the Notice of Opposition, and therefore denies the same. Applicant moves to strike the second sentence of Paragraph 8 of the notice of Opposition as improperly attempting to incorporate averments by incorporation. Accordingly, Applicant lacks knowledge or information sufficient to form a belief as to the truth

of the averments in the second sentence of Paragraph 8 of the Notice of Opposition, and therefore denies the same.

9. Applicant admits the averments in Paragraph 9 of the Notice of Opposition.
10. Applicant admits the averments in Paragraph 10 of the Notice of Opposition.
11. With respect to Paragraph 11 of the Notice of Opposition Applicant admits only that it disclaimed the terms “Giant Mallow” and “Pop,” but denies each and every other remaining averment in Paragraph 11.
12. Applicant admits the averments in Paragraph 12 of the Notice of Opposition.
13. Applicant admits only that Opposer filed an application given the Ser. No. 88/460,608 (“the ’608 application”) on June 5, 2019 for the mark POOFY POP claiming use since at least December 31, 2004 for goods identified as confectionaries, namely, candy.
14. With respect to Paragraph 14 of the Notice of Opposition, Applicant admits only that the Trademark Examining Attorney stated in an Office Action in Opposer’s ’608 application that, inter alia, “applicant’s mark may be refused registration under ... Section 2(d) because of a likelihood of confusion between the two marks.” Applicant denies the remaining averments in paragraph 14.
15. With respect to Paragraph 15 of the Notice of Opposition, Applicant admits only that a real and justiciable controversy may exist between Opposer and Applicant. Applicant denies the remaining averments in Paragraph 15.
16. Applicant denies the averments in Paragraph 16 of the Notice of Opposition.
17. Applicant denies the averments in Paragraph 17 of the Notice of Opposition.
18. Applicant denies the averments in Paragraph 18 of the Notice of Opposition.

COUNT I – LIKELIHOOD OF CONFUSION

19. Applicant's answers to paragraphs 1-18 of the Notice of Opposition are incorporated herein by reference.

20. Applicant denies the averments of Paragraph 20 of the Notice of Opposition.

21. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 21 of the Notice of Opposition, and therefore denies the same. But, Applicant denies that Opposer has priority over Applicant's Mark.

22. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 22 of the Notice of Opposition, and therefore denies the same. Further, Applicant expressly denies that Opposer has priority over Applicant's Mark.

23. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 23 of the Notice of Opposition, and therefore denies the same. Further, Applicant denies that Opposer has priority over Applicant's Mark.

24. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 24 of the Notice of Opposition, and therefore denies the same.

25. Applicant admits that the mark GIANT MALLOW POOFY POP of the '648 application is owned by Applicant. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 25 of the Notice of Opposition, and therefore denies the same.

26. With respect to Paragraph 26 of the Notice of Opposition Applicant admits only that Applicant's products identified in its '648 application are identical to Opposer's products identified in its '608 application. Applicant lacks knowledge or information sufficient to form a

belief as to the truth of the other averments in Paragraph 26 of the Notice of Opposition, and therefore denies the same.

27. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 27 of the Notice of Opposition, and therefore denies the same.

28. Applicant admits only to the averments in the first and second sentences of Paragraph 28 of the Notice of Opposition. Applicant is without information or knowledge sufficient to form a belief as to the truth of the remaining averments in Paragraph 28 of Notice of Opposition, and therefore denies each and every other and remaining averments contained therein.

29. Applicant denies the averments in Paragraph 29 of the Notice of Opposition.

30. Applicant denies the averments in Paragraph 30 of the Notice of Opposition.

31. Any averments in the Notice of Opposition that are not expressly admitted to hereinabove are denied.

OPPOSER'S PRAYER FOR RELIEF

Applicant denies that Opposer is entitled to any relief and further requests that this Opposition be dismissed and the registration to Applicant be granted.

AFFIRMATIVE DEFENSES

Applicant pleads the following affirmative defenses to the Notice of Opposition. Applicant reserves the right to raise any additional defenses warranted by the facts disclosed during discovery.

The Notice of Opposition was filed in the name of Squire Boone Caverns, Inc. (“Opposer”). Moreover, Application Ser. No. 88/460,608 was also filed by Opposer. Yet all of the alleged use of the mark POOFY POP pleaded in the Notice of Opposition is by a third party, Squire Boone Village, Inc. (“Third Party”). There is no proof of an assignment to the Opposer. Thus, it appears from the pleadings of the Notice of Opposition that the wrong party brought this Opposition and filed Opposer’s Application.

1. Opposer is not the owner of the mark POOFY POP.
2. Opposer’s Application Ser. No. 88/460,608 is void ab initio because on information and belief, Opposer did not own the mark as of the filing date of the application.
3. Opposer has no first use of the mark POOFY POP.
4. On information and belief, Opposer has no use in commerce of the mark POOFY POP.
5. Opposer is the wrong party to bring this opposition.
6. Exhibit 1 to the Notice of Opposition evidences that the first use of the mark POOFY POP is not by Opposer but by the Third Party.
7. Exhibit 1 to the Notice of Opposition does not evidence use in “commerce” as that term is defined in 15 USC § 1127 (Lanham Act § 45).
8. Exhibit 2 to the Notice of Opposition does not evidence use in “commerce” as that term is defined in 15 USC § 1127 (Lanham Act § 45).

9. Exhibit 3 to the Notice of Opposition does not evidence use in “commerce” as that term is defined in 15 USC § 1127 (Lanham Act § 45).

10. Exhibit 4 to the Notice of Opposition does not evidence use in “commerce” as that term is defined in 15 USC § 1127 (Lanham Act § 45).

11. Applicant has priority in the use of its mark GIANT MALLOW POOFY POP over the use of the mark POOFY POP alleged in the Notice of Opposition.

12. On information and belief, there is no use of the mark POOFY POP that is a bona fide use in the ordinary course of trade.

13. On information and belief, the alleged use of the mark POOFY POP was one made merely to reserve a right in the use of the mark.

14. On information and belief, the mark POOFY POP was abandoned between January 1, 2013, the date of first use by Applicant, and June 5, 2019, the date Opposer’s application was filed.

15. Opposer may not tack its alleged use in commerce of June 5, 2019 to its alleged first use date of December 31, 2004 because on information and belief, Opposer did not continuously use the mark POOFY POP during that time.

16. Applicant has priority over Opposer’s mark POOFY POP, because Applicant used its mark GIANT MALLOW POOFY POP in commerce at least as early as January 1, 2013, which is believed to be before the date of use in commerce by Opposer.

17. Applicant has priority over Opposer’s mark POOFY POP, because Applicant used its mark GIANT MALLOW POOFY POP in commerce at least as early as January 1, 2013, which is believed to be before the date of use in commerce by the Third Party.

Date: February 18, 2020

/Harold L. Novick/

Harold L. Novick

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **ANSWER TO NOTICE OF OPPOSITION AND AFFIRMATIVE DEFENSES** is being served on Opposer Squire Boone Caverns, Inc. through its attorney of record by transmitting a copy on February 18, 2020 via email to the email address specified below:

Joseph W. Berenato, III (uspto.filings@bw-iplaw.com)

Signed: /Angela Y. Dai/
Angela Y. Dai