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

Proceeding no.	91274163
Party	Defendant Balance Athletica, LLC
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Date	03/07/2022
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

RETAIL ROYALTY COMPANY,

Opposer,

v.

BALANCE ATHLETICA, LLC,

Applicant.

Opposition No. 91274163



Mark:

Serial No.: 90/332,530

Filing Date: November 20, 2020

**APPLICANT'S ANSWER TO NOTICE OF OPPOSITION**

Applicant Balance Athletica, LLC, a Colorado limited liability company (“Applicant”), by and through its undersigned counsel, answers the separately numbered allegations of the Notice of Opposition filed by Opposer Retail Royalty Company, a Nevada corporation (“Opposer”), as follows:

**Opposer and Opposer’s Use of Stitching Designs in Connection with Apparel**

1. Applicant is without sufficient knowledge or information to admit or deny the allegations of Paragraph 1 of the Opposition; therefore, Applicant denies the same.
2. Applicant is without sufficient knowledge or information to admit or deny the allegations of Paragraph 2 of the Opposition; therefore, Applicant denies the same.
3. Applicant is without sufficient knowledge or information to admit or deny the allegations of Paragraph 3 of the Opposition; therefore, Applicant denies the same.

**Third-Party Uses of Stitching Designs in Connection  
with Apparel**

4. Applicant is without sufficient knowledge or information to admit or deny the allegations of Paragraph 4 of the Opposition; therefore, Applicant denies the same.

5. The images presented in Paragraph 5 of the Opposition speak for themselves. Applicant otherwise denies the allegations of Paragraph 5.

**Applicant's Attempt to Register the Y-Stitching Design**

6. Applicant admits the allegations of Paragraph 6 of the Opposition.

7. Applicant admits the allegations of Paragraph 7 of the Opposition.

8. Applicant admits the allegations of Paragraph 8 of the Opposition.

9. Applicant admits in part and denies in part the allegations of Paragraph 9 of the Opposition. The Examining Attorney issued a first Nonfinal Office Action on February 23, 2021, under Sections 1, 2, and 45 of the Lanham Act alleging the applied-for mark as used on the specimen of record “is merely a decorative or ornamental feature of applicant’s clothing and, thus, does not function as a trademark to indicate the source of applicant’s clothing and to identify and distinguish applicant’s clothing from others.” Applicant denies all other allegations of Paragraph 9.

10. Applicant admits in part and denies in part the allegations of Paragraph 10 of the Opposition. Applicant admits that the Examining Attorney found that the applied-for mark “appears incapable of functioning as a source-identifier for applicant’s goods” and that “neither an amendment under Trademark Act Section 2(f) nor an amendment to the Supplemental Register [could] be recommended.” Applicant denies all other allegations of Paragraph 10.

11. Applicant admits the allegations of Paragraph 11 of the Opposition.

12. Applicant admits the allegations of Paragraph 12 of the Opposition.

13. Applicant denies the allegations of Paragraph 13 of the Opposition.

**COUNT ONE**

**Functionality – 15 U.S.C. §§ 1052, 1091, 1064, 1115**

14. Applicant restates and incorporates the above responses as though fully set forth therein.

15. Applicant denies the allegations of Paragraph 15 of the Opposition.

16. Applicant denies the allegations of Paragraph 16 of the Opposition.

17. Applicant denies the allegations of Paragraph 17 of the Opposition.

**COUNT TWO**

**Ornamental – 15 U.S.C. §§ 1051, 1052, 1127**

18. Applicant restates and incorporates the above responses as though fully set forth therein.

19. Applicant denies the allegations of Paragraph 19 of the Opposition.

20. Applicant denies the allegations of Paragraph 20 of the Opposition.

21. Applicant denies the allegations of Paragraph 21 of the Opposition.

**COUNT THREE**

**Nondistinctive – Failure to Prove Acquired Distinctiveness – 15 U.S.C. §§ 1051, 1052, 1127**

22. Applicant restates and incorporates the above responses as though fully set forth therein.

23. Applicant denies the allegations of Paragraph 23 of the Opposition.

24. Applicant denies the allegations of Paragraph 24 of the Opposition.

**COUNT FOUR**

**Nondistinctive – Incapable of Acquiring Distinctiveness – 15 U.S.C. §§ 1051, 1052, 1127**

25. Applicant restates and incorporates the above responses as though fully set forth therein.

26. Applicant denies the allegations of Paragraph 26 of the Opposition.

27. Applicant denies the allegations of Paragraph 27 of the Opposition.

**CLAIM FOR RELIEF**

28. Applicant denies the allegations of Paragraph 28 of the Opposition.

**AFFIRMATIVE DEFENSES**

Applicant denies any allegation not specifically admitted herein. Applicant states the following separate and affirmative defenses without assuming the burden of proof on such defenses that would otherwise rest with Opposer.

1. The Notice of Opposition, on one or more claims set forth therein, fails to state a claim upon which relief can be granted.

2. Applicant has acquired secondary meaning in the above-identified mark such that the mark is entitled to registration.

3. Upon information and belief, Opposer is not currently using a design similar to Applicant's above-identified mark. As such, Opposer will not be damaged by registration of the mark.

4. Applicant reserves the right to assert additional defenses based on information learned or obtained during discovery.

WHEREFORE, Applicant respectfully requests that the present opposition be denied and that the registration sought by Applicant be granted.

Dated: March 7, 2022

Respectfully submitted,

Milgrom & Daskam

By: /Amanda Milgrom/  
Amanda Milgrom

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 7, 2022, a true and correct copy of the foregoing APPLICANT'S ANSWER TO NOTICE OF OPPOSITION was served upon counsel for Opposer by email as follows:

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