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

Proceeding no.	92079014
Party	Defendant Viahart, LLC
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Date	03/21/2022
Attachments	Answer to Petition for Cancellation.pdf(171365 bytes)

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

In the Matter of Trademark Registration No. 5049910
For the BRAIN FLAKES Mark
Registered on September 27, 2016

LALTITUDE LLC,)	
)	
Petitioner)	
)	
v.)	Cancellation No. 92079014
)	
VIAHART, LLC,)	
)	
Registrant.)	
<hr style="width: 40%; margin-left: 0;"/>)	

REGISTRANT’S ANSWER TO PETITION FOR CANCELLATION

Viahart, LLC (“Viahart” or “Registrant”) answers the Petition for Cancellation filed by Laltitude LLC (“Laltitude” or “Petitioner”) against the identified registration as follows:

1. Registrant admits that Petitioner sells interlocking plastic disc toys that can be interconnected to create, among other things, three dimensional objects. Registrant has insufficient knowledge to be able to admit or deny the remaining allegations, and therefore denies such allegations.

2. Registrant admits that its attorneys sent Petitioner a cease and desist letter on February 18, 2021 related, in part, to Petitioner’s use of the term “flakes” in connection with the marketing and sales of children’s toys constituting interlocking discs. Registrant further admits that it alleged that Petitioner infringed its trademark rights. Registrant denies the remaining allegations of paragraph 2.

3. Registrant admits that the cease and desist letter sent by Registrants' counsel on February 18, 2021 related, in part, to Registrant's U.S. Trademark Registration No. 5049910, for the BRAIN FLAKES mark – though the letter does not specifically reference that registration number. Registrant denies the remaining allegations of paragraph 3.

4. Registrant denies the allegations of paragraph 4.

5. Registrant has insufficient knowledge to be able to admit or deny such allegations, and therefore denies such allegations.

6. Registrant has insufficient knowledge to be able to admit or deny such allegations, and therefore denies such allegations.

7. Registrant denies the allegations of paragraph 7.

8. Registrant denies the allegations of paragraph 8.

9. Registrant admits that a generic mark cannot be registered. Registrant denies that the mark at issue is generic. Otherwise, denied.

10. Registrant admits that the TMEP recites that “[a] mark is generic if its primary significance to the relevant public is the class or category of goods or services on or in connection with which it is used.” (See TMEP 1209.01(c)(i), *citing to H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)). Registrant further admits that the same TMEP provision recites a two-part test for determining whether a mark is generic: “(1) What is the genus of goods or services at issue?[,] (2) Does the relevant public understand the designation primarily to refer to that genus of goods or services?” Otherwise, denied.

11. Registrant admits that the TMEP recites that “[a] mark is generic if its primary significance to the relevant public is the class or category of goods or services on or in connection

with which it is used.” (See TMEP 1209.01(c)(i), *citing to H. Marvin Ginn Corp. v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 989-90, 228 USPQ 528, 530 (Fed. Cir. 1986)). Registrant further admits that the same TMEP provision recites a two-part test for determining whether a mark is generic: “(1) What is the genus of goods or services at issue?[,] (2) Does the relevant public understand the designation primarily to refer to that genus of goods or services?” Otherwise, denied.

12. Registrant denies the allegations of paragraph 12.

AFFIRMATIVE DEFENSES

1. Petitioner fails to state a claim upon which relief can be granted.

2. Petitioner made a material omission to the TTAB by filing the petition for cancellation and failing to inform the TTAB of ongoing proceedings before the United States District Court for the Central District of California initiated by Petitioner before filing the instant petition to seek to clarify the rights and obligations of the parties regarding the mark in dispute.

3. Registrant reserves the right to amend its Answer to assert additional defenses that may become applicable as a result of discovery and further investigation.

PRAYER FOR RELIEF

WHEREFORE, Registrant Viahart, LLC prays:

- A. That this action be dismissed in its entirety with prejudice; and
- B. That Registrant Viahart, LLC have such other and further relief as the Board may deem just and proper.

Dated: March 21, 2022

Respectfully Submitted,

By: /s/ Brian S. Tobin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 21, 2022, a copy of Registrant's Answer to Petition for Cancellation was served upon all parties, at their address of record via Email.

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