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

Proceeding	91165753
Party	Plaintiff QMT Associates, Inc. QMT Associates, Inc. QMT Associates, Inc. 8431 Euclid Avenue Manassas Park, VA 20111 UNITED STATES
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Submission	QMT Associates, Inc.'s Brief in Response to Applicant's Motion to Dismiss Opposition for Lack of Standing and Certificate of Mailing
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No. 78/213,865
Filed on February 12, 2003
For the Mark MISCELLANEOUS DESIGN
Published in the Official Gazette on June 14, 2005

QMT ASSOCIATES, INC.,)
)
Opposer,) Opposition No. 91165753
)
v.)
)
SARA NEAL ESKEW,)
)
Applicant.)

**QMT ASSOCIATES, INC.'S BRIEF IN RESPONSE TO APPLICANT'S
MOTION TO DISMISS OPPOSITION FOR LACK OF STANDING**

Opposer QMT Associates, Inc. files this response to Applicant Sara Neal Eskew's motion to dismiss this Opposition for "lack of standing." As set forth in detail below, QMT has more than met the requirement of standing, and Applicant is seeking to procure her registration by fraud, in violation of 15 U.S.C. § 1120. Applicant seeks trademark registration for a product, namely wind chimes. Contrary to her written submission to the PTO and the TTAB, no court has found that her wind chimes are nonfunctional or that they have acquired secondary meaning, and QMI has never acquiesced in or agreed to the registration of her wind chimes.

The facts alleged in QMT's Opposition must be taken as true for purposes of Applicant's motion. Those facts and allegations are based upon the statutory criteria for opposing the registration of a mark upon the principal register, *see* the U.S. Trademark Act, 15 U.S.C. §§

1051, 1063, and are consistent with the form provided by the PTO entitled "Suggested Format For a Notice of Opposition." See <http://www.uspto.gov/web/forms/4-17a.pdf>.

The motion filed by Applicant, in addition to being filed with fraudulent and misleading statements, is procedurally improper as it alleges matters outside of the pleadings. That motion should be denied on its face. If the TTAB considers her motion, QMT respectfully requests that the TTAB deny the motion, grant QMT's Opposition, refuse Applicant's application for registration, and sanction her and her counsel.

FACTS AND PROCEDURAL HISTORY

A. QMT and MOTS Wind Chimes.

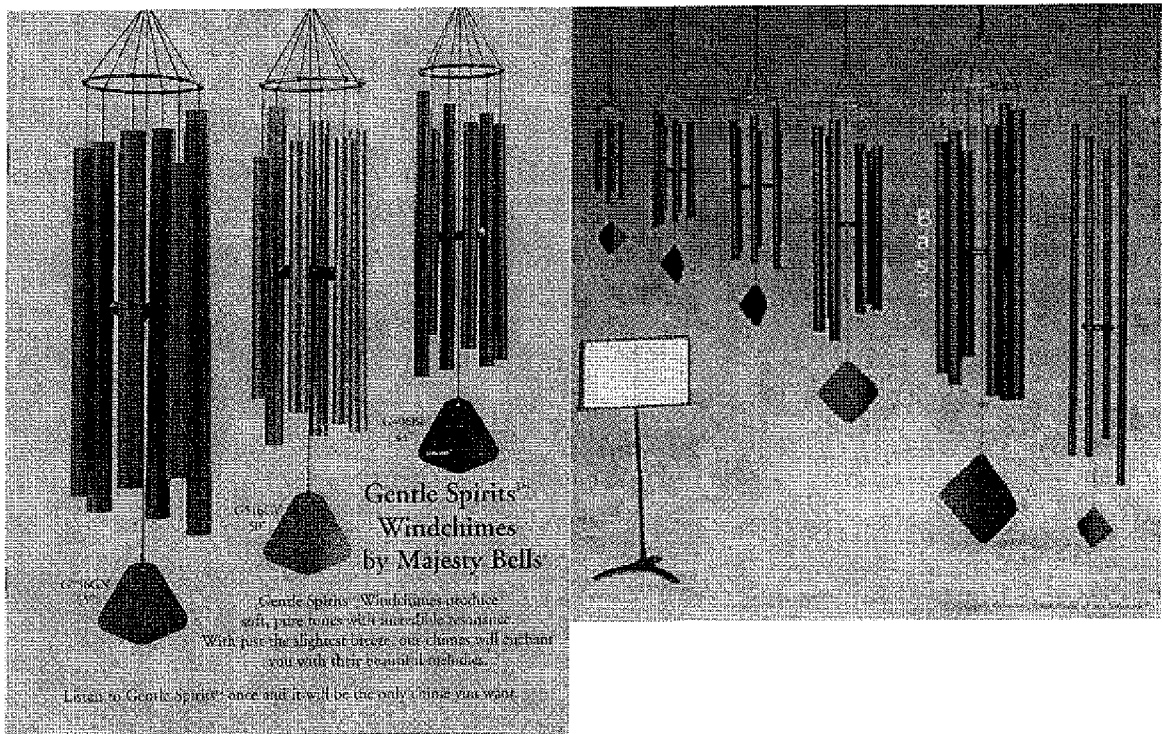
QMT has been designing, manufacturing and selling wind chimes since 1991. It offers several lines of wind chimes with varying visual and sound characteristics. In 1998, QMT began manufacturing and selling a line of "hand-tuned" wind chimes and, in 2001, introduced its GENTLE SPIRITS® line. As set forth in the table, below, the elements of the GENTLE SPIRITS wind chimes (including an open ring suspension, a metallic circular top ring, deburred tubes, a clapper, and a diamond-shaped, curved "sail") reflect considerations of sound quality, manufacturing processes, safety, modern design, and response to market demand:

ELEMENTS OF WIND CHIME	FUNCTION
"Open-ring" suspension system	Improves the quality and duration of the sound created when the clapper hits the tube, and reduces cord abrasion. Instead of drilling holes into the side of the tubes and suspending the tubes by cord strung through the holes, an open ring suspension ties the cord to a pin that runs the diameter of the tube.
Two "dots" visible on the outside of the tube	The dots are not aesthetic "dots" added to the wind chime but result from the pin that runs the diameter of the tube (onto which the cord is tied to suspend the tube) meeting the tube
Silver "ring" at the bottom of the tube	There is no silver ring applied to the tube. After the metal tube is cut to the desired length, the metal edge is smoothed

	(deburred) to avoid cuts from handling rough metal. The “ring” at the bottom of the tube is the emergence of the metal beneath the paint color that has been applied to the tube.
“Clapper”	The clapper hits the suspended tubes and creates the sound.
“Sail”	The sail, attached to the clapper, catches the wind, enabling the clapper to hit the tubes.

Applicant Eskew, d/b/a Music of the Spheres (MOTS), sells a line of hand-tuned wind chimes also generally consisting of an open-ring suspension system, a metallic circular top ring, deburred black tubes, a clapper, and a diamond-shaped curved “sail.” Images of the wind chimes of QMT (under its trade name “Majesty Bells”) and Applicant are set forth in Exhibit A, and below¹:

¹ QMT includes pictures of the parties’ chimes as a point of reference only. If the Board converts Applicant’s motion to dismiss into a motion for summary judgment, these pictures are appropriate evidence of the similarity of the parties’ products.



B. The Prior Federal Trade Dress Litigation.

In April 2001, Applicant sued QMT, alleging that QMT's Gentle Spirits[®] wind chimes infringed her alleged trade dress rights (the "Litigation"). Discovery revealed fatal flaws in plaintiff's case, including that the alleged trade dress changed over time, the elements of the claimed trade dress were functional, the wind chimes lacked secondary meaning, and that other companies manufactured wind chimes identical to or substantially similar to those of Applicant.

For example, Applicant's complaint described the alleged trade dress as the "original and unique look *and tone*" consisting of "black-coated chime tubes, the *black* clapper, the black, generally actuate diamond-shaped wind catcher, the manner of tube suspension *and the use of black cordage*, [and] the open ring support platform." Applicant's Amended Complaint, Exhibit B, ¶¶ 7-8 (emphasis added). In her application for trademark registration of the same product and her recent motion, Applicant offers a different description, claiming "a combination of features consisting of a *metallic silver top ring* with a circular cross section, a central tube

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