



# Canadian Intellectual Property Office

## THE REGISTRAR OF TRADEMARKS

**Citation:** 2023 TMOB 017

**Date of Decision:** 2023-01-31

## IN THE MATTER OF AN OPPOSITION

**Opponent:** Pax Labs, Inc.

**Applicant:** Shenzhen Topgreen Technology Co., Ltd.

**Application:** 1,919,246 for XVAPE & design

### INTRODUCTION

[1] Shenzhen Topgreen Technology Co., Ltd. (the Applicant) has applied to register the trademark XVAPE & Design reproduced below (the Mark) for use in association with the goods “medical vaporizers; vaporizers for medical purposes” (the Goods).

**XVAPE**

[2] The Mark consists of the word XVAPE in a block letter font with stylized lettering, which will be further described below.

[3] Pax Labs, Inc (the Opponent) opposes application no. 1,919,246 for the Mark (the Application), based primarily on an allegation that the Mark is confusing with the

Opponent's trademarks reproduced below (the Opponent's Design Marks), all of which feature an X design made up of four converging rods, and are for use in association with oral vaporizers, including electronic cigarettes, and related accessories.



[4] The first of the Opponent's Design Marks consists of the X design on its own and the rest consist of this design within the words PAX, PAX2, and PAX3, respectively. The particulars of the pleaded registrations and applications for registration of the Opponent's Design Marks are set out at Schedules A and B to this decision.

[5] For the reasons that follow, the opposition is rejected.

#### **THE RECORD**

[6] The Application was filed on September 11, 2018, based on use in Canada since December 1, 2015. It was advertised for opposition purposes on September 4, 2019, and opposed on March 3, 2020, when the Opponent filed a statement of opposition pursuant to section 38 of the *Trademarks Act*, RSC 1985, c T-13 (the Act). The Applicant filed a counter statement denying each of the grounds of opposition.

[7] The grounds of opposition allege that the Mark is not registrable under section 12(1)(d) of the Act; that the Applicant is not entitled to registration under section 16(1)(a) of the Act; that the Mark is not distinctive within the meaning of section 2 of the Act; and that the Application does not comply with the Act's filing requirements pursuant to section 38(2)(e) of the Act. In accordance with section 69.1 of the Act, since the Application was advertised after the Act was amended on June 17, 2019, the grounds of opposition will be assessed based on the Act as amended.

[8] In support of its opposition, the Opponent filed the February 5, 2021 affidavit of its Associate General Counsel, IP & Product, Troy E. Grabow, who describes the Opponent's business and its use and promotion of the Opponent's Design Marks.

[9] In support of the Application, the Applicant filed the May 27, 2021 affidavit of its President, Jia Guo Bin, who describes the Applicant's business and its use and promotion of the Mark.

[10] I note that both parties' affiants also express opinions on the questions of fact and law to be decided in this proceeding. Since the affiants have not been qualified as experts in trademarks or human behaviour and are not independent of the parties, these opinions have been disregarded.

[11] Neither affiant was cross-examined. Both parties filed written representations; no oral hearing was held.

### **EVIDENTIAL BURDEN AND LEGAL ONUS**

[12] In an opposition proceeding, the legal onus is on the applicant to show that its application complies with the provisions of the Act. However, for each ground of opposition, there is an initial evidential burden on the opponent to adduce sufficient admissible evidence from which it could reasonably be concluded that the facts alleged to support that ground of opposition exist. If this initial burden is met, then the applicant must satisfy the Registrar, on a balance of probabilities, that the ground of opposition should not prevent registration of the trademark at issue [*Joseph E Seagram & Sons Ltd v Seagram Real Estate Ltd* (1984), 3 CPR (3d) 325 (TMOB); *John Labatt Ltd v Molson Companies Ltd* (1990), 30 CPR (3d) 293 (FCTD)].

### **REGISTRABILITY UNDER SECTION 12(1)(D) OF THE ACT**

[13] The Opponent pleads that the Mark is not registrable having regard to section 12(1)(d) of the Act because, at the Application's filing date, the Mark was confusing with the registered Opponent's Design Marks.

[14] Although the pleading refers to the Application's filing date, the material date for analysis of a section 12(1)(d) ground of opposition is the date of the Registrar's decision [see *Park Avenue Furniture Corporation v Wickes/Simmons Bedding Ltd* (1991), 37 CPR (3d) 413 (FCA)]. Since this material date is well established by jurisprudence, I do not consider the obvious technical error in the pleading to affect the validity of

the ground. However, I note that the pleading does not indicate which of the Opponent's Design Marks are relied upon, other than by reference to them being "registered". Therefore, arguably, giving the Application's filing date as the reference point restricts the Opponent's Design Marks invoked to those that were registered at that date.

[15] The Opponent's Design Marks that were already registered when the *statement of opposition* was filed, and that are identified as registered in the statement of opposition, are set out at Schedule A, below. Although the Opponent's Design Marks set out at Schedule B have since also matured to registration, they are not identified as registered trademarks in the statement of opposition and, indeed, pending applications cannot be validly pleaded in support of a registrability ground. Since the Opponent did not request leave to amend the statement of opposition to rely on these additional registrations, the trademarks set out in Schedule B will not be considered as additional bases under the registrability ground [per *Ferrero SpA v Cantarella Bros Pty Limited*, 2012 TMOB 45].

[16] Furthermore, although the PAX3 Design is identified in the statement of opposition as being registered, it was not yet registered at the Application's filing date. Accordingly, for the reason mentioned above, it is arguable that this particular registration has also not in fact been asserted. Indeed, both parties' written arguments omit this registration from the list of those pleaded under the registrability ground of opposition. However, it is not necessary for me to decide the issue, since my conclusion for this ground will be the same regardless of whether the PAX3 Design registration is considered. In the circumstances, I will briefly address the PAX3 Design in my reasons.

[17] An opponent's initial burden for this ground of opposition is met if one or more of the registrations relied upon are in good standing on the material date and the Registrar has discretion to check the Register in this respect [per *Quaker Oats of Canada Ltd/La Compagnie Quaker Oats du Canada Ltée v Menu Foods Ltd* (1986), 11 CPR (3d) 410 (TMOB)]. Having exercised this discretion, I confirm that all of the registrations set out at Schedule A to this decision are in good standing. Thus, the onus is now on the

Applicant to satisfy the Registrar, on a balance of probabilities, that the Mark is not likely to cause confusion with any of the trademarks covered by these registrations.

[18] In considering the issue of confusion, I will focus my discussion on the Opponent's X Design trademark, registered under no. TMA964,003, as I consider this trademark to represent the Opponent's best chance of success, owing to the absence of additional distinguishing elements. If the Mark is not confusing with this trademark, it will not be confusing with any of the remaining trademarks relied upon by the Opponent. I will then comment only briefly on the PAX2 Design and PAX3 Design trademarks. For convenience, I will refer to the PAX Design, PAX2 Design, and PAX3 Design trademarks collectively as the "PAX Designs".

[19] I note at the outset that I do not consider use of any of the PAX Designs to constitute use of the X Design, even though each of the PAX Designs incorporates the X Design. Applying the principles from *Canada (Registrar of Trade Marks) v Cie internationale pour l'informatique CII Honeywell Bull SA* (1985), 4 CPR (3d) 523 (FCA) and *Nightingale Interloc Ltd v Prodesign Ltd* (1984), 2 CPR (3d) 535 (TMOB), I am not satisfied that the public, as a matter of first impression, would perceive the X Design trademark *per se* as being used when one of the PAX Designs is displayed. The X Design is integrated within each of the PAX Designs to such an extent that it does not stand out as a separate trademark and, in my view, would not be recognized as such.

### ***The test for confusion***

[20] Two trademarks will be considered confusing if the use of both trademarks in the same area would be likely to lead to the inference that the goods or services associated with those trademarks are manufactured, sold, leased, hired or performed by the same person, whether or not the goods or services are of the same general class or in the same class of the Nice Classification system for trademark registration [section 6(2) of the Act]. Thus, the test for confusion does not concern confusion of the trademarks themselves but rather confusion as to whether the goods and services associated with each party's trademark come from the same source.

[21] The test is to be applied as a matter of first impression in the mind of a casual consumer somewhat in a hurry, who sees the applicant's trademark at a time when he or she has no more than an imperfect recollection of the opponent's trademark and does not pause to give the matter any detailed consideration or scrutiny, nor to examine closely the similarities and differences between the trademarks [*Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23]. Regard must be had to all the surrounding circumstances, including those set out in sections 6(5)(a) to (e) of the Act, but these criteria are not exhaustive and the weight given to each factor will vary in a context-specific analysis [*Mattel USA Inc v 3894207 Canada Inc*, 2006 SCC 22].

***Section 6(5)(e): Degree of resemblance between the trademarks, including in appearance or sound or in the ideas suggested by them***

[22] The degree of resemblance between the trademarks at issue is often the factor likely to have the greatest effect on the confusion analysis and, thus, is an appropriate starting point [*Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27]. Each trademark must be considered as a whole and assessed for its effect on the average consumer as a matter of first impression; it is not the proper approach to set the trademarks side by side and carefully examine them to tease out similarities and differences. However, considering a trademark as a whole does not mean that a dominant component that would affect an average consumer's overall impression of the trademark should be ignored. Indeed, the preferable approach is to begin by determining whether there is an aspect of each trademark that is "particularly striking or unique" [*Masterpiece* at para 64].

[23] I find the striking aspect of the Opponent's X Design trademark to be that it consists of four rods arranged in an X-shaped pattern around an empty centre.

[24] I find the striking aspect of the Mark to be that it consists of the coined word XVAPE with a stylized X and A, the X being formed by the negative space between four inward-pointing triangles—essentially cutting an X out of a solid square—and the A being formed by a solid triangle under a chevron.

[25] Although both trademarks feature the letter X, they do not resemble each other visually. Indeed, the design features of each party's X are very different and the Mark is an entire word rather than a single letter. There is also little resemblance phonetically, as only the first syllable of the Mark is sounded like the X Design trademark. There is some resemblance in ideas suggested, to the extent that the X Design trademark suggests the letter X as a brand while the Mark suggests "X"-brand vaping products. However, taken in their entireties, the trademarks differ conceptually: the idea of individual rods in a basic starburst formation is absent from the Mark, while the ideas of a solid square, a cut-out letter, triangles, chevrons, a coined word, and vaping are absent from the X Design trademark.

[26] It is well established that, when a portion of a trademark is a common descriptive or suggestive word, its importance diminishes [see *Merial LLC v Novartis Animal Health Canada Inc.* (2001), 11 CPR (4th) 191 (FCTD)]. Accordingly, there may be a tendency to discount somewhat the importance of the VAPE element in the Mark and to focus instead on the stylized letter X. Even so, given the difference in stylization between the X Design and the X in the Mark, I do not find that such a tendency would significantly increase the perceived degree of resemblance between the two trademarks as a whole.

[27] Overall, I find that the degree of resemblance between the two trademarks is low. Accordingly, this important factor favours the Applicant.

***Section 6(5)(a): Inherent distinctiveness of the trademarks and extent to which they have become known***

[28] Inherently distinctive trademarks "strike the imagination and become more firmly rooted in the consumer's memory"; as such, they are generally accorded a greater degree of protection [see *G M Pfaff Aktiengesellschaft v Creative Appliance Corp Ltd* (1988), 22 CPR (3d) 340 (FCTD) at para 7].

[29] Trademarks consisting primarily of one or more letters of the alphabet are generally considered to possess a low degree of inherent distinctiveness [see *GSW Ltd v Great West Steel Industries Ltd* (1975), 22 CPR (2d) 154 (FCTD)]. Letter marks generally owe what inherent distinctiveness they have to their design features and, in

the case of single letter marks, differences in the design features may suffice to distinguish one mark from the other [see, for example, *Cerruti 1881 SA v Conte of Florence SPA* (1990), 34 CPR (3d) 452 (TMOB)]. However, decorative trademarks comprising simple line patterns or geometric shapes are generally not considered to be particularly strong [see *e.g. Levi Strauss & Co v Vivant Holdings Ltd* (2003), 34 CPR (4th) 53 (TMOB)]. In the present case, since the X Design trademark consists of a relatively simple geometric pattern, I find that it has only a slight degree of inherent distinctiveness. To the extent that the rods forming the design might suggest the general shape of the Opponent's vaporizers, there is arguably a connection between the design and the associated goods; however, given the subtlety of this suggestion, I do not find that it affects the trademark's inherent distinctiveness to any notable extent.

[30] I find the Mark to be somewhat more inherently distinctive, since it is a coined word with two different stylization features: that of cutting a letter out of a solid square and that of forming a letter from nested angular shapes (a triangle within a chevron). In this case, the designs in question have no readily apparent connection to the parties' goods. That said, the verbal elements of the Mark are merely a single letter added to a word describing the intended use of the associated product, in that to "vape" means to inhale vapour from a device such as an electronic cigarette [see definition at [www.merriam-webster.com/dictionary/vape](http://www.merriam-webster.com/dictionary/vape); see also *Tradall SA v Devil's Martini Inc*, 2011 TMOB 65, regarding the Registrar taking judicial notice of dictionary definitions]. As such, I find that the Mark has only a moderate level of inherent distinctiveness.

[31] A trademark's distinctiveness can be enhanced through use and promotion. Both parties filed evidence in this respect.

#### The Opponent's evidence

[32] Troy Grabow explains that the Opponent is a consumer technology company that produces, markets, and sells vaporizer products for cannabis, other plant-based materials, and oils, directly and through retailers, in stores and online [para 3]. He provides over a thousand addresses of retailers and distributors across Canada who sell such products under the Opponent's Design Marks and the related word marks



PAX, PAX2, PAX 3, PAX LABS, and PAXSMART [para 9, Exhibit C]. The particulars of the Opponent's registrations and applications for registration of the related word marks are set out at Schedule C to this decision.

[33] He states that the Opponent has been selling vaporizers in Canada under the Opponent's Design Marks since as early as October 3, 2013 [para 4]. However, he does not state that sales on that date were under the X Design trademark specifically. Indeed, the claims in the statement of opposition, and in the Opponent's registrations and applications for registration, would suggest that only the PAX Design trademark was in use at that date, with the other Opponent's Design Marks being introduced over time. Furthermore, although he states that the Opponent's gross revenue in Canada exceeded US\$7 million in 2019 and US\$9 million in 2020 [para 14], he does not break these figures down by trademark. Nor does he specify whether they include only sales under the Opponent's Design Marks or also sales under the related word marks or even under unrelated trademarks.

[34] Examples of advertising and promotion provided at Exhibits B–F and I to the Grabow affidavit suggest that the X Design trademark is displayed on vaporizers sold under the Opponent's PAX, PAX2, PAX3, ERA, and ERA PRO brands. However, there is only minimal explanation of these materials in the affidavit and the exhibits are largely left to speak for themselves. Since most of the advertising is undated, and only some of it displays the X Design trademark, it is difficult to determine from these materials when promotion of the X Design trademark began and the extent to which consumers would have come to know it.

[35] With respect to the Opponent's brochures and other marketing materials distributed in Canada—which include newsletters, emails, and display advertising—only “sample” materials are provided, with no information on the manner or extent of their distribution [paras 10–11, Exhibits D–E]. There is also no indication as to whether samples displaying the X Design trademark were singled out from the Opponent's advertising portfolio for inclusion in the exhibit or whether they appear in the exhibit in the same proportion as in the marketplace.

[36] With respect to the Opponent’s online advertising, as of January 5, 2021, the website at *www.pax.com* has received over 51 million unique visitors since January 2016 (not necessarily from Canada) and the website specifically for Canada at *www.ca.pax.com* has received over 1.3 million unique visitors since June 2019 [para 12, Exhibits F–G]. In addition, Troy Grabow states the exhibited social media profiles indicate the number of “followers” and “likes” of posts; however, owing to the poor quality of the printouts, no such statistics can be made out, and the identity of at least one of the platforms is unclear [para 15, Exhibit I]. At best, a YouTube printout shows the number of views for five videos whose titles reference PAX, PAXFinder (software), or PAX3. The PAX3 video indicates 3.5 thousand views while the rest each indicate several hundred views, but without any indication of the number of views specifically from Canada. The website advertising appears similar to the other marketing materials, but I note some additional display of the X Design on the social media pages. For example, it is displayed as an icon for posts and superimposed on a video image.

[37] The exhibited advertising features either the PAX Design trademark (with ERA or ERA PRO as a sub-brand) or the PAX3 Design trademark. Upon reviewing the collection of materials, including the information in fine print that appears in some of the advertisements, I find that the advertising falls into the following general categories:

- Advertising for the launch of the ERA brand on December 17, 2019. The earlier, teaser advertising features a complete or partial X Design as a large decorative motif, accentuating the constituent rods’ rounded ends and emphasizing the empty space in the middle of the design, where various slogans are printed. The subsequent launch advertising adds an image of a vaporizer bearing the X Design trademark. An example of the later advertising is reproduced below:



- Advertising for the launch of the ERA PRO brand on September 1, 2020. Vaporizers are depicted as a glimpse without the X Design in the August teaser advertising and, more fully, with the X Design in the September launch advertising. In both cases, some of the advertising also displays the X Design trademark in the upper left corner. An example of such teaser advertising is reproduced below:



- Advertising in 2020 themed around various product or service features, various holidays (including Canada Day), or various bundled offers. Some of the advertising that promotes product and service features displays the X Design trademark at the top. All but two of the campaigns display vaporizers bearing the X Design. The fine print in some of the online advertising specifically references Canada.
- Advertising promoting PAX3 vaporizers, featuring images of them bearing the X Design trademark. The advertisements are undated, but a web screenshot at Exhibit I, whose footer includes a 2021 copyright notice, advertises such vaporizers as one of three lines offered under the PAX Design house mark: PAX 2, ERA PRO, and PAX 3. (The vaporizer depicted for the PAX 2 line resembles the silver vaporizers bearing the X Design advertised under the PAX Design trademark in some of the other marketing materials.)

[38] Finally, a sample “invoice” from the Opponent issued in Canadian dollars to a customer in Canada is provided at Exhibit H. The document appears to be in the nature of an order and payment confirmation for two “ERA PRO™ ” devices and was issued on September 1, 2020. The PAX Design is displayed at the top of the invoice, but the

X Design is wholly absent. Nevertheless, I am prepared to infer, from the exhibited advertising for the ERA PRO vaporizer launched on September 1, 2020, that the invoiced goods themselves bore the X Design. Furthermore, in light of the X Design in the upper corner of at least some of the advertisements for the ERA PRO launch, I am prepared to accept that at least some consumers will interpret the X Design on purchased ERA PRO vaporizers as a brand logo and not simply as decoration.

[39] In view of the foregoing, I am prepared to accept that the Opponent has sold electric vaporizers under the X Design trademark in Canada since at least September 1, 2020, and possibly as early as December 2019. In the absence of evidence showing any earlier advertising or product branding with the X Design, I am not prepared to find that any PAX brand vaporizers sold prior to that date would have necessarily displayed the X Design trademark or been advertised using the X Design motif. Considering the totality of the evidence, it would appear that the X Design trademark has since then become known in Canada to a certain extent.

[40] However, it is not clear to what extent the aforementioned vaporizers correspond to the goods in the Opponent's registration, which are electric vaporizers for the ingestion and inhalation of tobacco. The only consumable specifically referenced in the exhibited advertising or list of retailers and distributors is cannabis. In the circumstances, and in the absence of any clarifying evidence in this respect, I am not prepared to find that the X Design trademark has become known to any extent in association with the specific goods listed in the pleaded registration. That said, its use and promotion in association with electric vaporizers for products *other* than tobacco may still be relevant as an additional surrounding circumstance [for similar conclusions, see e.g. *Mondo Foods Co Ltd v Saverio Coppola*, 2011 TMOB 228, and *Canadian Broadcasting Corporation/Société Radio-Canada v Big Mountain Coffee House and Roasters Ltd*, 2014 TMOB 240]. This consideration will be further discussed below.

#### The Applicant's evidence

[41] Jia Guo Bin explains that the Applicant is a manufacturer of electronic cigarettes, accessories, and e-liquid, which it develops and produces as an "OEM/ODM service"

(presumably referring to Original Equipment Manufacture and Original Design Manufacture) as well as for its own brands, XVAPE, iVape, and Topgreen [para 3]. References to the Applicant in the affidavit are said to include “its licence holder / authorized user” [see para 8]; however, the only evidence in this vein concerns a pair of exclusive agency agreements providing that distributors may “use” the Applicant’s trademarks for the sale of the Applicant’s XVAPE products under the agreement. Thus, it would appear that any use of the Mark in Canada is by the Applicant.

[42] Jia Guo Bin states that goods bearing the Mark have been sold in boutiques and through official retailers in Canada since 2014 [paras 5, 7]. Promotion and sale of such goods to businesses and consumers has been through “retail outlet / shop window displays, and other B2B and B2C events”, including “different media and modes such as advertisement, distribution of trade literature, trade novelties” and “sales promotional schemes”, with the Applicant spending a “substantial amount of money” on such publicity [paras 11, 15]. Attached to the affidavit as Exhibit B are photographs of such advertisements, displays, and promotional events in Canada, as well as screen shots of promotion and commentary on social media. However, no information is provided on the extent of such advertising’s reach or distribution. Furthermore, although “long, extensive, continuous and voluminous” use of the Mark is asserted [see e.g. paras 8–10, 14, 17], no sales or advertising figures are provided.

[43] I note that the Mark depicted at Exhibit B is a variation wherein the V and not the X is formed by negative space in a solid square, and, in some instances, a reflection appears beneath all of the letters. Some examples are reproduced below:



[44] For the purposes of assessing the extent to which the Mark has become known, I find that these variations constitute an acceptable deviation. The dominant features of the Mark have been preserved, despite the shift of the square background effect to an

adjacent letter. Thus, the Mark has not lost its identity and remains recognizable [per the principles in *Honeywell, supra*, and *Promafil Canada Ltée v Munsingwear Inc* (1992), 44 CPR (3d) 59 (FCA)].

[45] The materials at Exhibit B are not further explained and are, again, largely left to speak for themselves. The exhibited images include what appear to be the following items displaying the Mark:

- Photographs of vaporizers and their boxes and cases branded with the Mark.
- Advertisements for XVAPE, XMax, and X-MAX V2 products from a March 2014 issue of VAPOR VOICE magazine and a September 2017 issue of *HQ Trade Magazine*, as well as an advertisement for an XVAPE® V-ONE 2.0 wax vaporizer pen kit “giveaway” contest in what appears to be an August 2015 issue of the *MG* magazine for cannabis professionals.
- A brochure from XVAPE CANADA regarding the XVAPE VISTA, XVAPE V-ONE 2.0, and XVAPE MUSE vaporizers. (For the purposes of this analysis, I am prepared to infer that XVAPE CANADA would be a distributor under an arrangement comparable to the above-mentioned exclusive agency agreement.)
- Various exhibition booths and tents displaying the Mark on canopies and on signage. I note the signage also displays the brands XMax and VIXEN XLUX.
- Screenshots of videos and posts online regarding XVAPE products, including a January 1, 2016 post from a “Company Rep” regarding the V-One vaporizer pen on an unidentified discussion forum; a February 14, 2016 video regarding an “XVAPE X-Max V2 Pro” accessory on an unidentified website; and an undated video regarding an XVAPE FOG vaporizer posted on *funny-video-online.com* in a foreign language.

[46] Exhibit B also includes what appear to be the following documents:

- An email exchange from October 24, 2013 to March 13, 2014 between the Applicant and a purchaser of product samples in Poland.

- A “proforma invoice” from the Applicant addressed to a smoke shop in British Columbia, dated July 21, 2015, for products including twenty “XVAPE v-one”, one “XVAPE x4”, and one “XVAPE x5”.
- A six-month exclusive agency agreement for Canada covering the XVAPE V-ONE 2.0 vaporizer, signed by the Applicant and an individual whose address is not given, effective from January 18, 2016.
- A six-month exclusive agency agreement for all of Canada covering “XVAPE all models”, and specifically referencing XVAPE V-ONE, XVAPE V-ONE 2.0, XVAPE Vital, and XVAPE X-MAX V2 PRO, signed by the Applicant and a B.C. trading company, effective from May 1, 2016. The agreement is preceded by a November 4, 2015 email exchange regarding these products and a November 24, 2015 “proforma invoice” for dozens of V-ONE and Vital products, including vaporizer kits and accessories.

[47] Considering the totality of the evidence, it would appear that the Mark has been promoted in Canada since approximately 2014. However, I note that the Goods are “medical vaporizers; vaporizers for medical purposes”, whereas there is no indication that any of the depicted or promoted products are specifically for medical as opposed to purely recreational purposes. Nor is there any indication that any of the Applicant’s distributors or retailers sell medical devices. It is therefore again not clear to what extent the promoted products are relevant to the analysis under section 6(5)(a) of the Act, as opposed to being relevant only in the context of additional surrounding circumstances.

[48] In any event, in the absence of circulation figures or visitor data, it is not possible to determine the extent to which the Mark has become known as a result of such promotion. Moreover, there is no indication of the extent to which the Mark may have become known through product sales. Given that a “proforma” invoice may be sent as a quote in advance of a formal order or delivery of goods, I am not prepared to accept such documents, in and of themselves, as evidence of sale or delivery. Likewise, although two exclusive agency agreements were signed, there is no confirmation that

they led to any actual sales. The one email confirming a purchase appears to be from a customer in Poland.

Conclusion with respect to inherent and acquired distinctiveness

[49] In view of the foregoing, and in particular the lack of express correlation between the parties' actual products and the relevant goods, I find that the overall consideration of the section 6(5)(a) factor, which involves a combination of inherent and acquired distinctiveness, slightly favours the Applicant, owing to the greater inherent distinctiveness of the Mark.

**Section 6(5)(b): Length of time the trademarks have been in use**

[50] The Opponent's Registration references a declaration of use filed on February 24, 2017. However, the Federal Court has cautioned against giving even *de minimis* weight to the dates of use claimed in a registration certificate and, in any event, such claims are not evidence that the trademark has been used continuously since the claimed date [see *Tokai of Canada v Kingsford Products Company, LLC*, 2018 FC 951; see also *Entre Computer Centers Inc v Global Upholstery Co* (1991), 40 CPR (3d) 427 (TMOB)].

[51] Based on the evidence, as discussed above, I am only prepared to accept that the Opponent has shown evidence of use of the X Design trademark in association with electric vaporizers as of September 1, 2020. However, it is not clear whether such use has been in association with the specific type of electric vaporizer claimed in the X Design registration. It would have been a simple matter for Troy Grabow to provide confirmation in this respect; yet, besides cannabis, he makes only a broad reference to "other plant-based materials, and oils", and only mentions them as the subject of the Opponent's "vaporization technologies" in general [para 3]. With respect to the X Design trademark specifically, he indicates only that the Opponent's Design Marks have been used in association with "goods and services in various classes" as per the registrations and applications set out at Schedules A and B, below [paras 5 and 9].



[52] As regards the Application, although it includes a claim of use in Canada since December 1, 2015, no evidence has been provided in support. As discussed above, I am not prepared to accept the exhibited “proforma” invoice, in and of itself and without any explanation from Jia Guo Bin, as evidence of a sale or delivery on that date. Although examples of advertising date back to 2014, such advertising does not constitute trademark “use” in association with goods within the definition of the Act [see section 4]. Moreover, as discussed above, it is not clear whether the advertised products correspond to the Goods.

[53] In the circumstances, I am not satisfied that this factor favours either party.

***Sections 6(5)(c) & (d): Nature of the goods and trades***

[54] When considering the nature of the goods and trades under a registrability ground of opposition, it is the statements of goods in the applicant’s application and in the opponent’s registration that must be assessed, having regard to the channels of trade that would normally be associated with such goods [*Mr Submarine Ltd v Amandista Investments Ltd* (1987), 19 CPR (3d) 3 (FCA); *Henkel Kommanditgesellschaft auf Aktien v Super Dragon Import Export* (1986), 12 CPR (3d) 110 (FCA)]. Each statement must be read with a view to determining the probable type of business or trade intended rather than all possible trades that might be encompassed by the wording [*McDonald’s Corp v Coffee Hut Stores Ltd* (1996), 68 CPR (3d) 168 (FCA)].

[55] In the present case, both the Mark and the X Design trademark are for use in association with vaporizers.

[56] The Applicant submits that its vaporizers are for medical use and are therefore fundamentally and materially different from the Opponent’s vaporizers for ingestion and inhalation of tobacco. In the Applicant’s submission, there is no suggestion in the Application that the Goods are for tobacco. The Applicant further submits that, to the extent the channels of trade may overlap, consumers purchasing a medical vaporizer will want to ensure that the product is designed for medical purposes.

[57] Conversely, the Opponent submits that its vaporizers and electronic cigarettes may be used to vaporize cannabis, which may be used both recreationally and medicinally. The Opponent argues that, even though vaporizers for tobacco and vaporizers for medical purposes are not the same product, vaporizers designed for tobacco may also be used to consume medicinal cannabis, and are thus virtually identical products. The Opponent further submits that, since the *Cannabis Act* requires that cannabis accessories such as vaporizers be sold only in certain retail and online environments, both recreational vaporizers for cannabis and the Applicant's medical vaporizers in the legal market in Canada would be sold through the same channels. In the Opponent's submission, nothing in the Application suggests that the Goods will be sold otherwise than through the normal channels.

[58] Upon a review of the evidence discussed above, I agree with the Opponent that both parties' vaporizers appear to be suitable for use with cannabis. Further, in the absence of any evidence from the Applicant as to how medical vaporizers differ from recreational vaporizers, or why medical vaporizers would not also be used recreationally and *vice versa*, I am not prepared to find that the parties' vaporizers are fundamentally or materially different in nature. Although there is no evidence as to whether vaporizers specific to tobacco might also be used for cannabis, I am prepared to accept that there is at least a meaningful connection between vaporizers for tobacco and vaporizers for other plant-derived products, such as cannabis, and that the latter may be seen as a natural extension of a business producing or selling vaporizers for tobacco.

[59] Furthermore, in the absence of evidence from the Applicant contrasting the trade channels for medical vaporizers, including medical cannabis vaporizers, with the trade channels for recreational cannabis vaporizers, I am not prepared to exclude a potential for overlap or similarity in the channels of trade for those two types of products. Although I agree with the Applicant that consumers may exercise extra care or be more particular when purchasing a medical device, I am not satisfied that they would necessarily assume that similarly branded medical and recreational vaporizers come from different sources. That said, in the absence of evidence from the Opponent as to how the regulated trade channels for tobacco products and cannabis products

overlap—or evidence with respect to the potential for tobacco vaporizers to be used for medical purposes—I am not prepared to conclude to any relationship in trade channels in respect of the particular goods covered by the Opponent’s X Design registration.

[60] In view of the foregoing, I find that the section 6(5)(c) factor favours the Opponent while, in this particular case, the section 6(5)(d) factor does not significantly favour either party.

***Additional surrounding circumstances***

[61] Several additional surrounding circumstances arise in this case, as follows.

Use in association with goods outside of the Application and pleaded registration

[62] As noted above, although the X Design registration covers only vaporizers for tobacco and the Application covers only vaporizers for medical purposes, evidence of use of the parties’ respective trademarks in association with related goods—notably vaporizers for cannabis and/or for recreational purposes—may be relevant as an additional surrounding circumstance.

[63] In this respect, for the reasons set out above, I find that the Opponent has demonstrated use of the X Design trademark since at least as early as September 1, 2020 in association recreational vaporizers in general, and promotion of the X Design trademark in association with such vaporizers since at least as early as 2019. Furthermore, Troy Grabow attests to significant total revenues for sales of the Opponent’s products in 2019 and 2020 and to significant traffic to the Opponent’s Canadian website at *www.ca.pax.com*, also since 2019. Given that it appears the Opponent’s vaporizers have displayed the X Design trademark since at least December 2019, and given the depiction of such vaporizers in the Opponent’s online advertising, I am prepared to accept that the X Design trademark has become known to at least a certain extent in Canada in association with recreational vaporizers, including for cannabis. In my view, the X Design trademark as pleaded would benefit from the reputation it has acquired in this regard, and such a reputation might reasonably lead to

the inference that medical vaporizers for cannabis displaying a similar trademark come from the same source as the Opponent's tobacco vaporizers.

[64] Conversely, as discussed above, although the Applicant's advertising of the Mark in Canada in association with recreational vaporizers appears to date back to 2014, there is no evidence of the extent to which the Mark has become known in Canada, as a result of such advertising or otherwise.

[65] I therefore find that this is a relevant additional circumstance that favours the Opponent.

#### Contextual factors

[66] I note that the Opponent's evidence does not include any examples of promotion or sales activity displaying the X Design without also displaying one of the PAX Designs. Although the vaporizers themselves appear to display only the X Design, the exhibited sample invoice for the sale of such vaporizers displays the PAX Design instead and identifies the invoiced vaporizers by the brand ERA PRO. In the circumstances, it is not clear to what extent consumers will interpret the X Design on the Opponent's vaporizers as a brand logo and not simply as an artistic decoration derived from the PAX Design, meant to evoke one or more of the PAX Designs as the trademark. Although some of the exhibited advertisements include copyright notices that identify both "PAX" and "X" as trademarks of the Opponent, such copyright notices are in fine print and, in my view, would not readily come to consumers' attention.

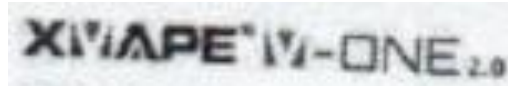
[67] Although I have found the X Design trademark to be known to a certain extent in Canada, I find the foregoing contextual considerations to be a mitigating factor working in favour of the Applicant.

[68] With respect to the Applicant's Mark, I would also note that the evidence includes examples of it being displayed immediately before a second design mark that features a letter cut out of a solid square, namely, the "XMax" design mark, where this motif is

applied to the initial X, and the V-ONE or V-ONE 2.0 design mark, where this motif is applied to the initial V. I reproduce an example of each below:



XVAPE XMAX branding



XVAPE V-ONE 2.0 branding

[69] To the extent that display of the Mark in these contexts draws attention to the square background and cut-out motif, I find that it increases the reputation of the Mark's particular stylization features, which are features from which the Mark's level of inherent distinctiveness derives. However, there is no evidence of the extent to which the Mark has become known in these contexts. On balance, I find that this factor weighs in favour of the Applicant, but only marginally.

#### Family of trademarks

[70] When multiple trademarks having common characteristics are registered and used by the same owner, this series is known as a "family". Owning a family of trademarks increases the likelihood of consumers assuming that a new trademark having the same characteristic is simply another member of the family [*Everex Systems Inc v Everdata Computer Inc* (1992), 44 CPR (3d) 175 (FCTD)]. A party seeking to rely on this concept must establish that it is using more than one or two trademarks within the alleged family and such use must be sufficient to establish that consumers would recognize a family of marks [*Arterra Wines Canada, Inc v Diageo North America Inc*, 2020 FC 508; *McDonald's Corp v Yogi Yogurt Ltd* (1982), 66 CPR (2d) 101 (FCTD)].

[71] In the present case, even if I were to accept from the Opponent's exhibited invoice that both the PAX Design trademark and the X Design trademark have been used in Canada, the use of only two trademarks is insufficient to establish a family. While the Opponent has also demonstrated advertising of vaporizers under the PAX3 Design trademark in Canada, as well as advertising of a PAX2 vaporizer line, PAXSmart vaporizer features, PAXSmart pods, and PAXFinder software, the display of a trademark in advertising goods does not constitute use of that trademark under the Act. It may well be that some of these additional trademarks are associated with the

goods on invoices or otherwise; however, since no such materials are in evidence, and since the revenue figures provided are not broken down by trademark, it is not possible to ascertain whether any such other trademarks have been used sufficiently to create a family.

[72] Moreover, even if I were able to recognize a family comprising all of the Opponent's Design Marks, the common feature defining the family would be the X Design and not merely the letter X. The Opponent's evidence does not provide any indication that consumers would consider the letter X in itself to be a trademark used by the Opponent, in the absence of the starburst stylization. In my view, it is this design feature that would link the X Design to the Opponent in consumers' minds, rather than the letter X in itself, regardless of the copyright notices identifying "X" as a trademark in fine print. Furthermore, since none of the trademarks in the alleged family feature the letter X outside the context of the word PAX, I do not find that consumers familiar with such a family of trademarks would be any more likely to assume the Mark is a member of the family. For these reasons, I find that a family comprising the Opponent's Design Marks (and/or other trademarks containing the word "PAX") would have little bearing on the likelihood of confusion between the Mark and the X Design trademark. [For a similar conclusion, see *Caterpillar Inc v Puma SE*, 2021 FC 974, aff'd 2023 FCA 4.]

#### Registration abroad

[73] The Opponent's Design Marks are the subject of trademark registrations and applications for registration in numerous jurisdictions around the world [Grabow affidavit para 6]. Likewise, the Applicant has registered the Mark (and the aforementioned variation thereof) as well as the corresponding word mark XVAPE, alone and in combination (for example, as XVAPE V-one, XVAPE Vital, XVAPE FOG etc.), in the same and other jurisdictions [Jia affidavit paras 4, 6, 12, Exhibit A].

[74] I find such foreign registrations and applications for registration to be irrelevant in this case, in the absence of evidence regarding the state of the marketplace and the law governing trademark registration in these jurisdictions. While evidence of significant, co-extensive use of two trademarks in another jurisdiction without any actual confusion

arising may sometimes be a relevant consideration, the mere existence of trademarks on foreign registers is not [*Vivat Holdings Ltd v Levi Strauss & Co* (2005), 41 CPR (4th) 8 (FCTD)]. Moreover, neither party provides any evidence to suggest Canadians have become aware of either the X Design trademark or the Mark in view of their registration abroad.

### ***Conclusion with respect to the X Design registration***

[75] Following my analysis of all the relevant factors and surrounding circumstances, I find that the lack of resemblance between the parties' trademarks is sufficient to avoid a likelihood of confusion, despite the parties' vaporizer goods being related in nature and despite the extent to which the X Design has become known in association with vaporizers in general, as a trademark or otherwise.

### ***The PAX2 Design and PAX3 Design registrations***

[76] The Opponent's case is no stronger when the PAX2 Design or PAX3 Design trademark is considered.

[77] I find the PAX2 Design and PAX3 Design trademarks to be more inherently distinctive than the single-letter X Design trademark. The word PAX has no immediate connection to the Opponent's goods, except perhaps to the extent that its connotation of peace might allude to an effect of using such products [see definition of "pax" in the *Concise Canadian Oxford Dictionary*, Oxford University Press, 2005]. Furthermore, each of the PAX2 Design and PAX3 Design trademarks is registered for use in association with electric vaporizers for "herbal" matter, which on its face appears to be a more similar product to the Goods than are electric vaporizers for "tobacco".

[78] However, I do not find that the Mark resembles either the PAX2 Design or PAX3 Design trademark. Although the Mark contains the individual capital letters X, A, and P, it has them in a different arrangement, with a different font or stylization, within a larger word. Moreover, while the PAX2 Design and PAX3 Design trademarks include a smaller numeral at the end of the word, the Mark contains no such numeric feature. When the trademarks are considered as a whole, there is essentially no resemblance in

appearance, sound, or ideas suggested. I find that this important factor strongly favours the Applicant and is more than sufficient to outweigh any assistance to the Opponent's case that may be offered by the remaining factors.

***Conclusion with respect to the registrability ground of opposition***

[79] In view of all the foregoing, I am satisfied that, on a balance of probabilities, the Mark is not reasonably likely to create confusion with any of the trademarks pleaded by the Opponent under the registrability ground of opposition. The Applicant has thus met its legal burden and this ground of opposition is rejected.

**ENTITLEMENT UNDER SECTION 16(1)(A) OF THE ACT**

[80] The Opponent pleads that the Applicant is not entitled to registration having regard to section 16(1)(a) of the Act because, at the alleged date of first use the Mark, namely December 1, 2015, it was confusing with the Opponent's PAX Design trademark that had been previously used in Canada by the Opponent since October 3, 2013.

[81] To meet its initial burden under this ground of opposition, an opponent must evidence use of its trademark prior to the applicant's filing date or date of first use, whichever is earlier [section 16(1) of the Act] and also that its trademark had not been abandoned when the application was advertised [section 16(3) of the Act]. I note that, in the present case, the Opponent has only pleaded that its trademark was used prior to the Applicant's date of first use; however, for the reasons discussed below, the outcome of the ground would be the same even if it had been more fully pleaded.

[82] I find that the Opponent has failed to meet its evidential burden, regardless of which material date is considered, be it the claimed date of first use or the Application's filing date of September 11, 2018. The only evidence demonstrating a transfer of goods in association with the PAX Design trademark is an invoice dated September 1, 2020, which is after both material dates. Although Troy Grabow states that the Opponent has been selling vaporizers in Canada under the Opponent's Design Marks since as early as October 3, 2013, such bald assertions are, in the absence of further supporting evidence, insufficient to meet an opponent's initial burden.



[83] In view of the foregoing, this ground of opposition is dismissed.

### **DISTINCTIVENESS UNDER SECTION 2 OF THE ACT**

[84] The Opponent pleads that, having regard to section 2 of the Act, the Mark is not distinctive of the Applicant's Goods and is confusingly similar to the Opponent's Design Marks. More specifically, the Opponent pleads that it began using or made known in Canada the PAX Design trademark at least as early as October 2013 and has an established and well-known family of trademarks incorporating the X Design trademark and variations thereof.

[85] In the absence of further particulars, this ground must be read in conjunction with the statement of opposition as a whole, and is thus limited to allegations of confusion with the trademarks pleaded in the statement of opposition, namely the Opponent's Design Marks, used in association with the goods set out at Schedules A and B, below.

[86] The material date for this ground of opposition is March 3, 2020, the date the statement of opposition was filed [*Metro-Goldwyn-Mayer Inc v Stargate Connections Inc*, 2004 FC 1185]. To succeed, an opponent relying on its own trademark must establish that, as of this date, its trademark was known in Canada to some extent at least, *i.e.* that its reputation was "substantial, significant or sufficient" to negate the established distinctiveness of another trademark, or else that it was well known in a specific area of Canada [*Motel 6 Inc v No 6 Motel Ltd* (1981), 56 CPR (2d) 44 (FCTD); *Bojangles' International LLC v Bojangles Café Ltd*, 2006 FC 657; *1648074 Ontario Inc v Akbar Brothers (PVT) Ltd*, 2019 FC 1305]. In this respect, the opponent must demonstrate that its trademark had acquired a reputation among consumers as an indicator of source [*Akbar Brothers, supra*; *Scott Paper Ltd v Georgia-Pacific Consumer Products LP*, 2010 FC 478]. Moreover, there must be clear evidence of the extent to which the trademark was known at the material date [*Bojangles, supra*; *Sadhu Singh Hamdard Trust v Navsun Holdings Ltd*, 2019 FCA 10].

[87] It is not necessary to address this ground of opposition in detail. To the extent that the Opponent may have met its initial burden, the Applicant will have met its legal onus, as the Opponent's case for confusion in respect of the X Design, PAX2 Design

and PAX3 Design trademarks would be no stronger at the material date of March 3, 2020, than it is at the material date for assessing confusion under the section 12(1)(d) ground. Furthermore, I would reach the same conclusion in respect of the PAX Design trademark as in respect of the PAX2 Design and PAX3 Design trademarks, for essentially the same reasons, and particularly in light of the important resemblance factor. Although there is greater evidence in support of the PAX Design trademark becoming known in Canada, this circumstance would be insufficient to tip the balance in favour of the Opponent. Finally, for the reasons discussed above, I do not find that the concept of a family of trademarks would assist the Opponent in the present case.

[88] Thus, the outcome of this ground of opposition would be the same as under the registrability ground and, accordingly, the distinctiveness ground of opposition is rejected as well.

#### **GROUND OF OPPOSITION UNDER SECTION 38(2)(E) OF THE ACT**

[89] The Opponent pleads that the Application does not comply with the Act pursuant to section 38(2)(e) because, at the Application's filing date, namely September 11, 2018, the Applicant was not using the Mark in Canada in association with the Goods.

[90] Prior to the Act's amendment on June 17, 2019, an opponent could plead under section 38(2)(a) of the Act (as it then read) that an application fails to conform to the requirements of section 30(b) (as it then read) because the date of first use provided under that section is false. However, the foregoing ground of opposition is no longer available under the Act as amended; instead, an opponent may plead under section 38(2)(e) of the Act that, at the application's filing date, the applicant "was not using and did not propose to use" the trademark. However, the issue under this new ground is not only whether the applicant was using the trademark in Canada but also whether the applicant *proposed* to use it. Indeed, applications advertised after June 17, 2019, need no longer specify whether they are based on use or proposed use and nothing prevents an applicant from simply deleting claims made in that regard [*per* section 35 of the *Trademarks Regulations*, SOR/2018-227].

[91] In view of the foregoing, under section 38(2)(e) of the Act, an opponent must allege not only that the applicant was not using the trademark at issue in Canada but also that the applicant did not *propose* to so use it. To comply with section 38(3)(a) of the Act, the allegation with respect to proposed use must be set out in sufficient detail to enable the applicant to reply. It is not up to the applicant to try to speculate as to why the opponent considers there to have been no intention to use the trademark.

[92] In the present case, the ground of opposition under section 38(2)(e) of the Act is insufficiently pleaded, since it neither alleges a lack of intention to use the Mark nor sets out why there would not have been such an intention. Once evidence is filed, the Registrar must consider it when interpreting the grounds of opposition [*Novopharm Ltd v AstraZeneca AB*, 2002 FCA 387]. However, this is not a case where the evidence would clarify a broad or ambiguous pleading. In any event, none of the evidence suggests a lack of intention to use the Mark.

[93] Consequently, this ground of opposition is rejected.

#### **DISPOSITION**




[94] In view of all the foregoing, pursuant to the authority delegated to me under section 63(3) of the Act, I reject the opposition pursuant to section 38(12) of the Act.

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Oksana Osadchuk  
Member  
Trademarks Opposition Board  
Canadian Intellectual Property Office



## **SCHEDULE A**

### ***Opponent's Pleaded Registrations***


<b>Trademark</b>	<b>Reg. No.</b>	<b>Goods</b>
X (DESIGN) 	TMA964,003	Electric vaporizers for the ingestion and inhalation of tobacco.
PAX2 Design 	TMA990,862	Electric vaporizers for the vaporization of herbal and plant matter for household purposes; electric vaporizers, namely, smokeless vaporizer pipes for the ingestion and inhalation of tobacco and other herbal matter.
PAX3 Design 	TMA1061,452	Class 34: Electric vaporizers, namely, smokeless vaporizer pipes for the ingestion and inhalation of herbal matter.

## **SCHEDULE B**

### ***Opponent's Pleaded Applications***

<b>Trademark</b>	<b>App No.</b>	<b>Goods</b>
X DESIGN 	1,937,405	Class 9: Computer software; downloadable software for mobile devices; <b>software for use with oral vaporizers, electronic cigarettes</b> ; chargers for electric cigarettes and oral vaporizers; battery chargers; electric batteries; AC adaptor.
PAX Design 	1,937,407	Class 9: Computer software; downloadable software for mobile devices; software for use with oral vaporizers, electronic cigarettes; chargers for electric cigarettes and oral vaporizers; battery chargers; electric batteries; AC adaptor.  Class 34: Electronic cigarettes; electronic vaporizers; oral vaporizers for smokers; flavorings for use in electronic cigarettes and electronic vaporizers; liquid solution for use in electronic cigarettes; electronic cigarette and vaporizer refills; electronic cigarette and vaporizer cartridges; and accessories therefor.

**SCHEDULE C****Opponent's Additional Applications and Registrations**

<b>Trademark</b>	<b>App No.</b>	<b>Reg. No.</b>	<b>Goods</b>
X (DESIGN) 	2,056,035	N/A	Pins; Stickers; printed materials; bags; carrying cases; grinders; lanyards; cases for oral vaporizers; decorative skin for oral vaporizers and electronic cigarettes; stands for oral vaporizers cigarettes; stands for oral vaporizers Non-downloadable software; information al and educational website
PAX	1,600,899	TMA918,633	Smokers' articles Electric vaporizers for the vaporization of tobacco and herbs (non-medicinal) Electric vaporizers for the vaporization of herbal plant matter for household purposes
PAX	1,937,404	TMA1,087,052	Computer software, namely, software for remotely adjusting and saving vaporizer temperature settings and updating vaporizer firmware for use with an oral vaporizer for smoking purposes; downloadable computer software for mobile devices for use with an oral vaporizer for smoking purposes, namely, software for remotely adjusting and saving vaporizer temperature settings and updating vaporizer firmware; software for remotely adjusting and saving vaporizer temperature settings for use with oral vaporizers, namely, electric vaporizers for the vaporization of herbal and plant matter for household purposes, electronic cigarettes; battery chargers for electric cigarettes and oral vaporizers for smokers; battery chargers namely USB chargers for electric cigarettes and oral vaporizers for smokers; electric batteries for electric cigarettes and oral vaporizers for smokers; AC adaptor
PAX2	1,715,577	TMA990,868	Electric vaporizers for the vaporization of herbal and plant matter for household purposes; electric vaporizers, namely, smokeless vaporizer pipes for the ingestion and inhalation of tobacco and other herbal matter
PAX 3	1,819,665	TMA1,032,110	Electric vaporizers, namely, smokeless vaporizer pipes for the ingestion and inhalation of herbal matter

PAX LABS	1,740,644	TMA1,014,899	<p>Electric vaporizers, namely, smokeless vaporizer pipes for the ingestion and inhalation of herbal matter</p> <p>Electronic cigarette refill liquids, namely, chemical flavorings in liquid form used to refill electronic cigarettes; cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes; electronic cigarettes; electronic smoking vaporizers, namely, electronic cigarettes; tobacco substitutes in liquid solution form other than for medical purposes for electronic cigarettes; refill cartridges sold empty for electronic cigarettes</p>
PAXSMART	2,026,783	N/A	<p>(1) downloadable software for mobile devices for use with electronic cigarettes and oral vaporizers for smoking purposes, namely, software for remotely adjusting and saving settings and updating vaporizer firmware for electronic cigarettes and oral vaporizers for smoking purposes; chargers for electric cigarettes and oral vaporizers for smokers; battery chargers; electric batteries; AC adaptors</p> <p>(2) Electronic cigarettes; electronic and oral vaporizers for smokers; flavorings, other than essential oils, for use in electronic cigarettes and electronic oral vaporizers for smokers; chemical flavorings in liquid form used to refill electronic cigarette cartridges and oral vaporizer for smokers; cartridges sold filled with chemical flavorings in liquid form for electronic cigarettes and oral vaporizers for smokers; and accessories therefor, namely, electronic cigarette and vaporizer pods, cases for electronic cigarettes and oral vaporizers for smokers, skins for electronic cigarettes and oral vaporizers for smokers, cleaning tools for electronic cigarettes and oral vaporizers for smokers, mouth pieces for electronic cigarettes and oral vaporizers for smokers</p>

# Appearances and Agents of Record

No hearing held

## **AGENTS OF RECORD**

**For the Opponent:** Borden Ladner Gervais LLP

**For the Applicant:** Mark W. Timmis