



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

Dave & Buster's I, L.P.,

Opposer,

v.

American Express Company

Applicant.



03-06-2006

U.S. Patent & TMO/TM Mail Rpt. Dt. #11

Opposition No. _____

Application Serial No. 78/484,065

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NOTICE OF OPPOSITION

In the matter of application Serial No. 78/484,065, for the mark **EAT, DRINK, AND PLAY** (hereinafter "Applicant's Mark"), for "credit card and charge card services" in International Class 36 (hereinafter "Applicant's Services"), filed on September 15, 2004 by American Express Company (hereinafter "Applicant"), and published in the Official Gazette of September 6, 2005; Dave & Buster's I, L.P., a limited partnership organized and existing under the laws of the State of Texas, composed of Dave & Buster's, Inc., a Missouri corporation, having a principal place of business at 2481 Manana Drive, Dallas, Texas 75220 (hereinafter "Opposer"), believes it will be damaged by the registration of the mark in the application and hereby opposes the registration of the mark.

As grounds for this opposition Opposer declares as follows:

Point 1. Opposer, by and through a predecessor in interest, Jillian's Entertainment Corporation, has made continuous use in commerce of the service mark **EAT DRINK PLAY** (hereinafter, "Opposer's Mark") in connection with restaurant and entertainment services (hereinafter, "Opposer's Services") since at least as early as November, 1989.

Point 2. Opposer is the owner of the following United States Patent and Trademark Office registrations:

* Registration No. 2,746,430, for the mark **EAT DRINK PLAY**, for services identified as "billiard facility services" in International Class 41 and "restaurant services" in International Class 43 (registration dated August 5, 2003).

* Registration No. 2,412,190, for the mark **JILLIAN'S EAT DRINK PLAY** (and design), for services identified as "discotheques, bowling alleys, providing facilities for recreational activities, namely, billiards, amusement arcades, and entertainment, namely, live music concerts" in International Class 41 and "restaurants, bar services and night clubs" in International Class 42 (registration dated December 12, 2000).

Point 3. Opposer is currently using the Opposer's Mark in connection with:

* Thirty-four **DAVE & BUSTER'S** branded restaurant and entertainment establishments located in fifteen states; and

* Twenty-nine **JILLIAN'S** branded restaurant and entertainment establishments located in sixteen states.

Point 4. Opposer is currently using Opposer's Mark on and in-connection with a wide variety collateral goods and services marketed by and associated with its restaurant and entertainment services, including pre-paid gift cards. Opposer also markets payment cards and payment card services associated with its restaurant and entertainment services, but has not yet used Opposer's Mark in connection therewith.

Point 5. The date upon Opposer made first use in commerce of Opposer's Mark in connection with Opposer's goods and services precedes the date upon which Applicant made first use of Applicant's Mark in connection with Applicant's Services.

Point 6. Opposer's Mark acquired distinctiveness as an indicator of the source of Opposer's goods and services prior to the date upon which Applicant made first use of Applicant's Mark in connection with Applicant's Services.

Point 7. The date upon Opposer made first use in commerce of Opposer's Mark in connection with Opposer's goods and services precedes the date upon which Applicant filed subject application Serial No. 78/484,065.

Point 8. Opposer's Mark acquired distinctiveness as an indicator of the source of Opposer's goods and services prior to the date upon which Applicant filed subject application Serial No. 78/484,065.

Point 9. On information and belief, Opposer's rights in and to Opposer's Mark are superior to Applicant's rights in Applicant's Mark by virtue of Opposer's prior use in commerce and registration of Opposer's Mark.

Point 10. Applicant's Mark is similar to Opposer's Mark in terms of sound, appearance, meaning and overall commercial impression.

Point 11. Applicant's Services are related to Opposer's goods and services, and the conditions surrounding their marketing are such that they are likely to be encountered by the same purchasers under circumstances that are likely to give rise to the mistaken belief that the respective goods and services of Applicant and Opposer come from a common source.

Point 12. In view of Opposer's prior use of Opposer's Mark, the similarity between Applicant's mark and Opposer's mark, and the proximity between Applicant's Services and Opposer's goods and services, the registration of Applicant's Mark for Applicant's Services will injure Opposer by causing a likelihood of purchaser confusion, mistake or deception as to the source or sponsorship of the respective goods and services of Applicant and Opposer, to Opposer's damage, and in violation of the provisions of Trademark Act Section 2(d) of the Trademark Act of 1946. 15 U.S.C. Section 1052(d).

WHEREOF, Opposer prays that this Notice of Opposition be sustained and registration of application Serial No. 78/484,065 be refused.

Respectfully submitted,

DAVE & BUSTER'S I, L.P.

By: 

Paul F. Kilmer
 Stephen J. Jeffries
 HOLLAND & KNIGHT LLP
 2099 Pennsylvania Avenue, N.W., Suite 100
 Washington, D.C. 20006
 Tel: (202) 955-3000
 Fax: (202) 955-5564
 E-mail: paul.kilmer@hklaw.com
 stephen.jeffries@hklaw.com

Date: March 6, 2006

Counsel for Opposer