

ESTTA Tracking number: **ESTTA184183**

Filing date: **01/02/2008**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	The Little Mint, Inc. d/b/a Andy's CheeseSteaks and Cheeseburgers
Granted to Date of previous extension	01/02/2008
Address	102 Commercial Avenue Mount Olive, NC 28365 UNITED STATES

Correspondence information	The Little Mint, Inc. 102 Commercial Avenue Mount Olive, NC 28365 UNITED STATES dmay@nixonpeabody.com
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Applicant Information

Application No	77049551	Publication date	09/04/2007
Opposition Filing Date	01/02/2008	Opposition Period Ends	01/02/2008
Applicant	Andrew Decker 355 East 116th Street - Apartment #3 New York, NY 10029 UNITED STATES		

Goods/Services Affected by Opposition

Class 030. First Use: 2006/06/01 First Use In Commerce: 2006/06/01 All goods and services in the class are opposed, namely: Hamburger sandwiches

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)
Other	Abandonment; Non-use; Trademark Act section 43(a)(1)(A).

Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	77316923	Application Date	10/30/2007
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	ANDY'S		

Design Mark	
Description of Mark	NONE
Goods/Services	<p>Class 029. First use: First Use: 1991/00/00 First Use In Commerce: 1991/00/00 Food, namely, chili, garden salads, chicken, chicken wings, shrimp</p> <p>Class 030. First use: First Use: 1991/00/00 First Use In Commerce: 1991/00/00 Sandwiches, cheesesteaks, hamburgers, and hot dogs</p> <p>Class 035. First use: Restaurant franchising</p> <p>Class 043. First use: First Use: 1991/00/00 First Use In Commerce: 1991/00/00 Restaurant services featuring cheesesteaks, burgers, hot dogs, chicken and chicken wings, shrimp, chili, garden salads and sandwiches</p>

Attachments	<p>77316923#TMSN.jpeg (1 page)(bytes) FIRM_DM-10856948-v1-Notice_of_Opposition__ANDY_S_HAVE_IT_MY_WAY _.pdf (7 pages)(20111 bytes)</p>
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Benjamin T. Hickman/
Name	Benjamin T. Hickman
Date	01/02/2008

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

In re Matter of:

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The Little Mint, Inc.,)	
d/b/a Andy's CheeseSteaks and Cheeseburgers,)	
	Opposer,)	
v.)	
)	Opposition No. _____
Andrew Decker,)	
	Applicant.)	
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Application Serial No.: 77/049,551

Mark: ANDY'S OLDE FASHIONED FINE HAMBURGERS HAVE IT MY WAY

Filed: November 22, 2006

Published: September 9, 2007

NOTICE OF OPPOSITION

The Little Mint, Inc., d/b/a Andy's CheeseSteaks and Cheeseburgers ("Little Mint"), having a principal place of business at 102 Commercial Avenue, Mount Olive, North Carolina 28365, believes that it will be damaged if a registration is granted on the above-captioned trademark application of Andrew Decker, who has an address of record at 355 East 116th Street, Apartment #3, New York, New York 10029, and hereby opposes such registration.

As grounds for its opposition, Opposer alleges that:

1. Opposer is the owner, *inter alia*, U.S. Trademark Application Serial No. 77/316,923, filed on October 30, 2007, for the mark ANDY'S for use in connection with "Sandwiches, cheesesteaks, hamburgers, and hot dogs"; "Restaurant franchising"; "Restaurant services featuring cheesesteaks, burgers, hot dogs, chicken and chicken wings, shrimp, chili, garden salads and sandwiches"; and "Food, namely, chili, garden salads, chicken, chicken wings, shrimp."

2. Opposer has used the mark ANDY'S in U.S. commerce in connection with restaurant services and a wide-variety of food products, including sandwiches, cheesesteaks, hamburgers, and hot dogs, since at least as early as 1991. A representative example of Opposer's web site showing current use of the ANDY'S mark can be viewed at www.andyscheesesteaks.com.

3. On November 22, 2006, Applicant filed U.S. Trademark Application Serial No. 77/049,551 for registration of the mark ANDY'S OLDE FASHIONED FINE HAMBURGERS HAVE IT MY WAY & Design (hereinafter the "Opposed Mark") pursuant to Trademark Act § 1(a) for use in connection with "*Hamburger sandwiches*."

COUNT I – Likelihood of Confusion

4. Opposer repeats and realleges the allegations set forth above as though stated herein.

5. Opposer has used in commerce, and has established prior rights in and to the mark ANDY'S, in connection with at least the goods and services set forth within its aforementioned application, long prior to any date Applicant can rely on for use of the Opposed Mark.

6. Opposer has spent significant revenue and resources in the marketing and sale of goods and services on and/or in connection with the mark ANDY'S and, through these efforts, has established valuable consumer recognition and goodwill in and to the mark ANDY'S.

7. Applicant's registration of the Opposed Mark, as shown in the herein opposed U.S. Trademark Application Serial No. 77/049,551 will create a likelihood of confusion, mistake and/or deception amongst consumers within the meaning of Trademark Act § 2(d), 15 U.S.C. 1052(d), to the detriment of Opposer.

8. Applicant's registration of the mark ANDY'S OLDE FASHIONED FINE HAMBURGERS HAVE IT MY WAY, as shown in the herein opposed U.S. Trademark Application Serial No. 77/049,551, will create a likelihood of confusion, mistake and/or deception amongst consumers within the meaning of Trademark Act § 43(a)(1)(A), 15 U.S.C. § 1125(a)(1)(A), to the detriment of Opposer.

9. In view of the foregoing, Opposer believes that it has been damaged and will continue to be damaged by virtue of Applicant's attempted registration of the Opposed Mark, as set forth in U.S. Trademark Application Serial No. 77/049,551.

COUNT II – Use in Commerce

10. Opposer repeats and realleges the allegations set forth above as though stated herein.

11. Applicant has not, and currently is not, using the Opposed Mark in connection with the goods and/or services listed in the application.

12. In his application for registration of the Opposed Mark, Applicant failed to demonstrate he used the mark in commerce within the meaning of Trademark Act § 45, 15 U.S.C. § 1127. In an Office Action dated March 27, 2007, the Examining Attorney rejected Applicant's submission of a purported hamburger wrapper as a specimen of use. In response to the Office Action, Applicant submitted on May 8, 2007, as a substitute specimen of use that is, upon information and belief, a menu. This menu, however, does not sufficiently show use of the Opposed Mark in commerce at the point of sale as required by the Trademark Act and existing case law.

13. In view of the foregoing, Opposer believes that it has been damaged and will continue to be damaged by virtue of Applicant's attempted registration of the Opposed Mark, as set forth in U.S. Trademark Application Serial No. 77/049,551.

COUNT III - Abandonment

14. Opposer repeats and realleges the allegations set forth above as though stated herein.

15. Assuming *arguendo* that Applicant used the Opposed Mark in connection with the goods and/or services listed in the application as early as the June 1, 2006 dates of first use and first use in commerce listed in the application, Applicant has within the meaning of 15 U.S.C. § 1127 abandoned any rights he may have had in and to the Opposed Mark.

16. Any use of the Opposed Mark as early as June 1, 2006 (if any) occurred at one location, and Applicant ceased using the Opposed Mark at such location.

17. On information and belief, Applicant intended to abandon the Opposed Mark and did abandon the opposed mark through nonuse prior to commencing what Applicant claims to be the current use of the Opposed Mark.

18. On information and belief, the Opposed Mark lost any significance as an indicator of source due to Applicant's non-use.

19. In view of the foregoing, Opposer believes that it has been damaged and will continue to be damaged by virtue of Applicant's attempted registration of the Opposed Mark, as set forth in U.S. Trademark Application Serial No. 77/049,551.

COUNT IV – Fraud on the PTO

20. Opposer repeats and realleges the allegations set forth above as though stated herein.

21. Applicant committed fraud upon the U.S. Patent and Trademark Office when he submitted the application to register the Opposed Mark.

22. On November 22, 2006, Applicant submitted his application for registration and represented therein that the Opposed Mark was in use in commerce as of the filing date and at least as early as June 1, 2006.

23. Applicant, however, has failed to provide a sufficient specimen demonstrating such use within the meaning of 15 U.S.C. § 1127 in any submission before the U.S. Patent & Trademark Office.

24. In his November 22, 2006 application, Applicant claimed the specimen submitted therewith was a hamburger wrapper.

25. On March 27, 2007, the Examining Attorney issued an Office Action stating, among other things, that Applicant's specimen was unacceptable because it appeared to be temporary in nature and did not show use in commerce for the goods specified in the application.

26. On May 8, 2007, Applicant submitted a response to the Office Action.

27. Applicant's May 8, 2007 response to the Office Action submitted a substitute specimen and represented that the substitute specimen was in use in commerce as of the filing date of the application and reiterated Applicant's representation that that mark was first used in commerce as early as June 1, 2006.

28. The substitute specimen, however, is a menu.

29. The menu does not show use of the Opposed Mark in commerce at the time of the May 8, 2007 submission in connection with the goods and/or services listed in the application. On information and belief, Applicant had no specimen showing use of the Opposed Mark in connection with the goods and/or services listed in the application.

30. Furthermore, assuming *arguendo* that Applicant can show a current use of the Opposed Mark in commerce in connection with the goods and/or services listed in the application there is no evidence that the Opposed Mark was used in connection with the goods and/or services listed in the application at least as early as the June 1, 2006 dates of first use and first use in commerce.

31. On information and belief, Applicant has not used the Opposed Mark in connection with the goods and/or services listed in the application since at least as early as the June 1, 2006 dates of first use and first use in commerce listed in the application.

32. On information and belief, Applicant's representation that the substitute specimen was in use in commerce as of the filing date of the application was false.

33. Applicant knew or should have known that the statements in the application were false, and Applicant had no reasonable basis to support such statements.

34. Applicant's omissions and misstatements were material and the information withheld would have constituted grounds for denying the application.

35. In reliance on Applicant's omissions and misstatements, the Examining Attorney, allowed the application.

36. In view of the foregoing, Opposer believes that it has been damaged and will continue to be damaged by virtue of Applicant's attempted registration of the Opposed Mark, as set forth in U.S. Trademark Application Serial No. 77/049,551.

