

ESTTA Tracking number: **ESTTA584242**

Filing date: **01/28/2014**

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

Proceeding	91214138
Party	Defendant S&D Coffee, Inc.
Correspondence Address	JACK B. HICKS WOMBLE CARLYLE SANDRIDGE & RICE, LLP PO BOX 7037 ATLANTA, GA 30357-0037 ipdocketing@wcsr.com;krwebb@wcsr.com
Submission	Answer
Filer's Name	Jacob S. Wharton
Filer's e-mail	IPdocketing@wcsr.com, JHicks@wcsr.com, JWharton@wcsr.com, CBeaman@wcsr.com, Jan.Morton@wcsr.com
Signature	/Jacob S. Wharton/
Date	01/28/2014
Attachments	Answer.pdf(115332 bytes)

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

In the matter of Trademark Application Serial No. 85/889,463
Mark: MILK SPLASH

CytoSport, Inc.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91214138
)	
S&D Coffee,)	
)	
Applicant.)	

ANSWER

Applicant, S&D Coffee, Inc. (“Applicant”), by and through undersigned counsel, responds to the Notice of Opposition filed by CytoSport, Inc. (“Opposer”). To the extent a response is needed to Opposer’s first unnumbered paragraph, Applicant responds that it is without knowledge or information sufficient to form a belief as to Opposer’s address, state of incorporation, or principal place of business and therefore denies these allegations. Applicant denies the remaining allegations in Opposer’s first unnumbered paragraph. As to each numbered paragraph of the Notice of Opposition, Applicant states as follows:

1. Applicant admits the allegations contained in paragraph 1.
2. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 and therefore denies these allegations.
3. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 and therefore denies these allegations.

4. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 and therefore, denies these allegations.

5. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 and therefore, denies these allegations.

6. Applicant admits that the publicly available records at the United States Patent and Trademark Office (“USPTO”) reflect that Opposer appears to be the record owner of: (1) U.S. Trademark Registration No. 2,714,802 for the mark MUSCLE MILK for “powdered nutritional supplement containing milk derived ingredients for adding to food or drink”; (2) U.S. Trademark Registration No. 2,973,352 for the mark MUSCLE MILK for “meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages”; (3) U.S. Trademark Registration No. 2,809,666 for the mark MUSCLE MILK for “nutritional supplements”; (4) U.S. Trademark Registration No. 3,311,489 for the mark MUSCLE MILK N’ OATS for “dietary and nutritional supplement” and “fortified food, namely, protein based, nutrient-dense oatmeal”; (5) U.S. Trademark Registration No. 3,333,886 for the mark MUSCLE MILK LIGHT for “dietary and nutritional supplements”; and (6) U.S. Trademark Registration No. 3,971,667 for the mark MONSTER MILK for “dietary and nutritional supplements, excluding ready to drink beverages.” Applicant is without knowledge or information sufficient to form a belief as to the validity of, or Opposer’s rights to, such registrations, and therefore denies same. Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6 and therefore denies these allegations. Applicant notes that Opposer incorrectly lists in the Notice of Opposition the goods and services for U.S. Trademark Registration No. 2,973,352 as “meal replacement drinks; meal replacement and dietary

supplement drink mixes, protein based, nutrient-dense meal replacement drinks; meal replacement bars; and pre-mixed nutritionally fortified beverages.”

7. Applicant admits that USPTO records reflect that Opposer appears to be the record owner of U.S. trademark applications for CYTOSPORT MONSTER MILK and MUSCLE MILK PROTEIN; however, Applicant is without knowledge or information sufficient to form a belief as to the validity of, or Opposer’s rights in these applications, and therefore denies the same. Applicant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 7 and denies the same.

8. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 and therefore denies these allegations.

9. Applicant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 and therefore denies these allegations.

10. Applicant denies the allegations of paragraph 10.

11. Applicant denies the allegations of paragraph 11.

12. Applicant denies the allegations of paragraph 12.

13. Applicant denies the allegations of paragraph 13.

14. Applicant denies the allegations of paragraph 14.

Applicant believes that no response is necessary to Opposer’s request for relief. However, to the extent a response is required, Applicant denies that Opposer is entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

1. The Notice of Opposition fails to state a claim upon which relief can be granted.

2. There is no likelihood of confusion among Applicant's mark and the marks cited by Opposer in the Notice of Opposition.

3. Opposer will sustain no damage, injury, or prejudice as a result of the registration of Applicant's trademark application for the mark MILK SPLASH, as set forth in Application Serial No. 85/889,463.

4. Opposer's Opposition is barred by all equitable doctrines available to Applicant, including but not limited to laches, waiver, consent, estoppel, acquiescence, unclean hands, and unjust enrichment.

5. Applicant reserves the right to assert additional defenses as may be warranted by future discovery or investigation in this opposition.

WHEREFORE, Applicant requests that judgment be entered in its favor, that Opposer's Notice of Opposition be dismissed with prejudice, and that Applicant's MILK SPLASH mark be registered. This 28th day of January, 2014.

Respectfully submitted,

/Jacob S. Wharton/

Jack B. Hicks
Jacob S. Wharton
Christine Beaman
WOMBLE CARLYLE SANDRIDGE & RICE, LLP
P.O. Box 7037
Atlanta, GA 30357
Tel: (336)747-6609
Fax: (336)726-6985

Attorneys for Applicant, S&D Coffee, Inc.

CERTIFICATE OF MAILING

I hereby certify that on January 28, 2014, I filed via electronic means (ESTTA) this
ANSWER AND AFFIRMATIVE DEFENSES with the:

U. S. Patent and Trademark Office
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, Virginia 22313-1451

with a copy to Opposer via First Class Mail to:

Jed H. Hensen
Peter M. de Jonge
Thorpe North & Western, LLP
8180 South 700 East Suite 350
Sandy, Utah 84070

/Jan Morton/

Jan Morton, Paralegal