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

In the matter of application Serial No. 76/570,187  
Published in the Official Gazette of October 26, 2004

CONOPCO, INC. d/b/a UNILEVER and BEN  
& JERRY'S HOMEMADE, INC.

Opposition No. 91162832

Opposer,

v.

COLD STONE CREAMERY, INC.,

Applicant.

**ANSWER TO NOTICE OF OPPOSITION**

For its Answer to the Notice of Opposition ("Notice") filed by Conopco, Inc. d/b/a Unilever and Ben & Jerry's Homemade, Inc. ("Opposer"), Cold Stone Creamery, Inc. ("Applicant") denies that Opposer will be damaged in any way by registration of Applicant's Trademark Serial Number 76/570,187 ("Application"), and responds to the allegations contained in Opposer's Notice as follows:

1. Applicant admits the allegations contained in paragraph 1 of Opposer's Notice.
2. Applicant denies the allegations contained in paragraph 2 of Opposer's Notice.

Applicant admits, however, that the term "cake batter" is often used to describe an unbaked mixture of ingredients used in making cakes.

3. Applicant denies the allegations contained in paragraph 3 of Opposer's Notice.
4. Applicant denies the allegations contained in paragraph 4 of Opposer's Notice.
5. Applicant denies the allegations contained in paragraph 5 of Opposer's Notice,

insofar as Opposer's mischaracterizes the content of Applicant's website and takes statements



12-27-2004

from that website out of context. Applicant admits that Exhibit A to Opposer's Notice reflects the content of a portion of Applicant's website, and respectfully submits that Exhibit A speaks for itself and is the best evidence of its own content and legal effect.

6. Applicant denies the allegations contained in paragraph 6 of Opposer's Notice in that Applicant is without sufficient knowledge of how others in the industry use the term "cake batter." Moreover, whether or not others in the industry use the term "cake batter" to describe any feature, function, purpose or characteristic of ice cream, *Applicant's* use of the CAKE BATTER ICE CREAM mark in connection with its goods in the Application is not merely descriptive of those goods, and thus 15 U.S.C. § 1052(e)(1) does not bar registration.

7. Applicant denies the allegations contained in paragraph 7 of Opposer's Notice. Applicant admits, however that it did file an Application for the mark "CAKE BATTER ICE CREAM" for use in connection with ice cream and frozen yogurt, assigned Serial No. 76/570,187 in International Class 30. Applicant also admits that it has disclaimed the exclusive right to use "ICE CREAM" apart from the mark as shown in the Application. Applicant also admits that the mark was published for opposition in the Official Gazette of October 26, 2004.

8. Applicant admits the allegations contained in paragraph 8 of Opposer's Notice.

9. Applicant denies the allegations contained in paragraph 9 of Opposer's Notice except that Applicant admits that registration of the mark CAKE BATTER ICE CREAM by Applicant will give Applicant the right to exclude Opposer from use of Applicant's CAKE BATTER ICE CREAM mark in connection with the goods identified in the Application such as to prevent a likelihood of confusion between Opposer and Applicant.

10. Applicant denies each and every allegation by Opposer not expressly admitted herein.

## AFFIRMATIVE DEFENSES

11. Further answering the Notice of Opposition, Applicant avers that Applicant's CAKE BATTER ICE CREAM mark is suggestive in that the mark evokes a unique commercial impression, comprises a double entendre, and/or requires thought and imagination to arrive at Applicant's goods.

12. Further answering the Notice of Opposition, Applicant avers that Applicant's mark has been prominently promoted and used in connection with Applicant's ice cream and frozen yogurt goods since at least as early as January 14, 2003, has acquired substantial goodwill in connection with Applicant's goods, and thus identifies Applicant as the source of Applicant's goods relied upon by consumers, the purchasing public, and others.

13. Further answering the Notice of Opposition, Applicant avers that due to the acquisition of substantial goodwill, the mark CAKE BATTER ICE CREAM for Applicant's goods has become distinctive and acquired secondary meaning.

14. Further answering the Notice of Opposition, Applicant avers that Opposer lacks standing as Opposer is relying on use of the term "cake batter" by others in the ice cream industry.

15. Further answering the Notice of Opposition, Applicant avers that Opposer is barred by laches, estoppel and/or acquiescence based on the failure of Opposer to previously object to Applicant's prominent and exclusive use of the mark CAKE BATTER ICE CREAM since January 14, 2003.

WHEREFORE, Applicant prays that this Opposition be dismissed and that the trademark Application Serial No. 76/570,187 be passed through to allowance on the Principal Register.

Respectfully submitted,

COLD STONE CREAMERY, INC.

Dated: Dec 20, 2004

By R. Lee Fraley  
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**CERTIFICATE OF MAILING**

I hereby certify that the foregoing Answer is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, Virginia 22313-1451 on:

Date: December 20, 2004

By: She Ann Williams

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Answer was deposited in the United States mail, Certified Mail, Return Receipt Requested, to Opposer's attorneys at the address and on the dated indicated below:

Eric W. McCormick  
Mitchell Frank  
Kenneth C. Leonard  
Unilever Law Department  
700 Sylvan Avenue  
Englewood Cliffs, NJ 07632

Date: December 20, 2004

By: John A. Williams