

ESTTA Tracking number: **ESTTA823850**

Filing date: **05/30/2017**

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

Proceeding	91234111
Party	Defendant Caveman Foods, LLC
Correspondence Address	DAVID HOCHMAN WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN 11400 W. OLYMPIC BLVD. 9TH FLOOR LOS ANGELES, CA 90064 dhochman@wrslawyers.com
Submission	Answer and Counterclaim
Filer's Name	Mark B. Mizrahi
Filer's e-mail	patentandtrademarks@wrslawyers.com, dhochman@wrslawyers.com
Signature	/mark b. mizrahi/
Date	05/30/2017
Attachments	Caveman Foods LLC_s answer and counterclaim.pdf(168771 bytes)

Registration Subject to the filing

Registration No	3222887	Registration date	03/27/2007
Registrant	Caveman Kitchens Inc. 807 West Valley Highway Kent, WA 98032 UNITED STATES		

Goods/Services Subject to the filing

Class 043. First Use: 1971/12/21 First Use In Commerce: 1971/12/21
All goods and services in the class are requested, namely: Restaurant services; Carry-out and delivery restaurant services; Catering services; Food preparation services

Grounds for Cancellation

Fraud on the USPTO	Trademark Act Section 14(3); In re Bose Corp., 580 F.3d 1240, 91 USPQ2d 1938 (Fed. Cir. 2009)
--------------------	---

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

CAVE MAN KITCHENS INC.,

Opposition No. 91234111

Opposer-Respondent,

Opposition of Application Nos.
87/166881, 87/087186, 86/169105, and
86/169099

v.

CAVEMAN FOODS, LLC,

Counterclaim to Cancel Registration
No. 3,222,887

Applicant-Petitioner.

/

**APPLICANT'S ANSWER TO NOTICE OF OPPOSITION, AND
COUNTERCLAIM TO CANCEL OPPOSER'S PLEADED
REGISTRATION NO. 3,222,887**

Applicant, CAVEMAN FOODS, LLC (“CFL” or “Applicant”), by and through its undersigned attorneys, hereby responds to the like-numbered paragraphs of the Opposer’s, CAVE MAN KITCHENS, INC. (“Opposer”), Consolidated Notice of Opposition (“Notice of Opposition”) against Application Nos. 87/166881, 87/087186, 86/169105, and 86/169099 (“Opposed Applications”) as follows:

1. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 1, and therefore denies the same.

2. The referenced United States Registration No. 3,222,887 appears on the face of Exhibit A to be an active registration and to have been granted on March 27, 2007 for the service mark CAVE MAN KITCHENS for "restaurant services; carry-out and delivery restaurant services; catering services; food preparation services." CFL denies the remaining allegations of paragraph 2.

3. The marks referenced United States Trademark Application Nos. 86/955705 and 86/966805 appear on the face of Exhibit B to have been applied for in Opposer's name on March 28, 2016 and April 6, 2016, respectively. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 3, and therefore denies the same.

4. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 4, and therefore denies the same.

5. CFL denies that Opposer's Marks have at any time been famous within the meaning ascribed to that term under the Lanham Act and relevant case law relating thereto. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 5, and therefore denies the same.

6. CFL admits that it sells jerky and meat-based snack bars and that it uses or intends to use the marks in the opposed applications in connection with the goods described in each of them. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 6, and therefore denies the same.

7. CFL admits that the filing dates of the opposed applications postdate the registration date for United States Registration No. 3,222,887. CFL denies the remaining allegations of paragraph 7.

8. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 8, and therefore denies the same.

9. CFL denies that Opposer's Marks have at any time been famous such that Opposer may not avail itself of the benefits and protections of 15 U.S.C. §1125(c). CFL denies that the public or Opposer would suffer any damage from the registration of the marks set forth in the Opposed Applications. CFL is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of paragraph 9, and therefore denies the same.

10. CFL denies the allegations of paragraph 10.

11. CFL denies the allegations of paragraph 11.

AFFIRMATIVE DEFENSES

For further answering the Notice of Opposition, CFL alleges the following affirmative defenses, without assuming the burden of proof on such defenses that would otherwise rest with Opposer:

1. Opposer's Consolidated Notice of Opposition fails to state a claim upon which relief may be granted.

2. CFL's use of the marks set forth in the Opposed Applications predates Opposer's alleged use of its CAVE MAN KITCHENS mark in commerce and the filing of the application that matured into United States Trademark Registration

No. 3,222,887, such that CFL has superior rights in its opposed marks vis-à-vis Opposer.

3. Opposer Cave Man Kitchens Inc. lacks standing to assert United States Trademark Registration No. 3,222,887 as a basis of opposition to the Opposed Applications.

4. United States Registration No. 3,222,887 is invalid, void, and/or unenforceable for failure to comply with one or more of the conditions of registerability, as set forth in the Trademark Act.

5. United States Registration No. 3,222,887 is invalid on the grounds that it was procured through fraud on the United States Patent and Trademark Office, as alleged more particularly in CFL's Counterclaim set forth below.

6. The Notice of Opposition is barred, in whole or in part, by the doctrine of laches.

7. The Notice of Opposition is barred, in whole or in part, by the doctrine of waiver.

8. The Notice of Opposition is barred, in whole or in part, by virtue of Opposer's abandonment of its asserted marks.

9. On information and belief, Opposer has failed to make use of the mark set forth in United States Registration No. 3,222,887 in interstate commerce, such that said registration is invalid *ab initio*.

10. CFL reserves the right to assert additional affirmative defenses learned in discovery or otherwise.

CFL expressly denies any and all allegations in the Consolidated Notice of Opposition not expressly admitted above.

In conclusion, CFL respectfully requests that this Opposition Proceeding be dismissed and that its Opposed Applications mature into registrations or pass to Allowance, as appropriate, forthwith.

**COUNTERCLAIM FOR PETITION TO CANCEL OPPOSER'S
REGISTRATION NO. 3,222,887**

Applicant/Petitioner, CFL, with an address at 3595 Mt. Diablo Blvd., Suite 200, Lafayette CA 94549, believes that it is and will continue to be damaged by Opposer's pleaded United States Trademark Registration No. 3,222,887, and hereby petitions to cancel the same.

Opposer filed its Consolidated Notice of Opposition against CFL's U.S. Trademark Serial Nos. Nos. 87/1666881, 87/087186, 86/169105, and 86/169099, based on United States Trademark Registration No. 3,222,887. That registration should be canceled for the following reasons:

1. Caveman Kitchens Inc. filed U.S. Trademark Application Serial No. 78/899778 on June 2, 2006 for the mark CAVE MAN KITCHENS for registration in connection with "restaurant services; carry-out and delivery restaurant services; catering services; food preparation services," in International Class 043. On or about March 27, 2007, U.S. Registration No. 3,222,887 issued in the name of Caveman Kitchens Inc.
2. On or about March 27, 2013, Opposer filed Section 8 & 15 Declarations in connection with U.S. Registration No. 3,222,887.
3. On or about March 27, 2016, Opposer filed Section 8 & 9 Declarations in connection with U.S. Registration No. 3,222,887.

U.S. Registration No. 3,222,887 is Invalid *ab initio*

4. On information and belief, Opposer failed to make use of the mark set forth in United States Registration No. 3,222,887 in interstate commerce, in connection with the services recited therein, prior to the date of registration thereof.

5. On information and belief, Opposer was not making use of the mark set forth in United States Registration No. 3,222,887 in interstate commerce, in connection with the services recited therein, at the time it signed/filed the Section 8 & 15 Declarations and/or continuously for five years preceding the date of registration or publication.

6. On information and belief, Opposer was not making use of the mark set forth in United States Registration No. 3,222,887 in interstate commerce, in connection with the services recited therein, at the time it signed/filed the Section 8 & 9 Declarations in connection therewith.

7. Therefore, United States Registration No. 3,222,887 is invalid *ab initio* and should be cancelled from the USPTO register.

**U.S. Registration No. 3,222,887 is Invalid for Fraud Committed on the
USPTO**

8. CFL incorporates paragraphs 1 through 7 for, hereinabove, as though fully set forth herein.

9. Therefore, the application underlying for Registration No. 3,222,887 and the Section 8 & 15 and Section 8 & 9 declarations filed in connection with the application that matured into Registration No. 3,222,887 contain material false statements of fact.

10. On information and belief, Opposer made these material false statements of fact knowingly and with intent to deceive the United States Patent

and Trademark Office into issuing it Registration No. 3,222,887, although it knew that it was not entitled to said registration.

11. Accordingly, Opposer's U.S. Registration No. 3,222,887 should be rendered invalid *ab initio* and thereby cancelled from the USPTO register.

WHEREFORE, CFL prays that the Opposition be dismissed; that the Counterclaim for cancellation of Registration No. 3,222,887 be granted; and for such other and further relief as this Board deems appropriate and just.

This Answer to Consolidated Notice of Opposition and Counterclaim to Cancel Opposer's Plead Registration No. 3,222,887 is being submitted with the requisite \$400 via Credit Card.

Respectfully submitted,

By: /s/ Mark. B. Mizrahi
Mark B. Mizrahi
Attorneys/Agents for Applicant

Date: May 30, 2017

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
11400 W. Olympic Blvd.
9th Floor
Los Angeles, California 90064
PH: 310-478-4100
FAX: 310-479-1422
E-Mail: mmizrahi@wrslawyers.com

CERTIFICATE OF SERVICE

I certify that I served:

**APPLICANT'S ANSWER TO NOTICE OF OPPOSITION, AND
COUNTERCLAIM TO CANCEL OPPOSER'S PLEADED
REGISTRATION NO. 3,222,887**

on May 30, 2017 by:

_____ delivering
X mailing (via First-Class mail)

a copy to:

Susan L. Stuart
AEON Law, PLLC
506 2nd Avenue, Suite 3000
Seattle, WA 98104

/s/ _____
Mark Mizrahi