

ESTTA Tracking number: **ESTTA832764**

Filing date: **07/12/2017**

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

Proceeding	91234962
Party	Defendant 7522 Restaurant Corp
Correspondence Address	CRYSTAL M. MITCHELL FLANDERS, ELSBERG, HERBER & DUNN, LLC 401 MAIN ST. SUITE 1 LONGMONT, CO 80501 Email: crystal@flanderslaw.com, mark@flanderslaw.com
Submission	Answer
Filer's Name	Crystal M. Mitchell
Filer's email	crystal@flanderslaw.com, mark@flanderslaw.com
Signature	/Crystal M. Mitchell/
Date	07/12/2017
Attachments	Answer.pdf(20494 bytes)

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

FAMOUS DAVE’S OF AMERICA, INC.,)	Opposition No. 91234962
)	
Opposer,)	Trademarks:
)	SMOKIN’ DAVE’S
v.)	(App. No. 87112293)
)	SMOKIN’ DAVE’S BBQ
7522 RESTAURANT CORP,)	(App. No. 87128082)
)	
Applicant.)	

APPLICANT’S ANSWER TO NOTICE OF OPPOSITION

Applicant, 7522 Restaurant Corp (“7522” or “Applicant”), by and through its attorneys at FLANDERS, ELSBERG, HERBER & DUNN, LLC, for its answer to the Notice of Opposition filed by Famous Dave’s of America, Inc. (“Famous Dave’s”) against application for registration of 7522’s trademark SMOKIN’ DAVE’S, Serial No. 87112293 filed July 21, 2017, and published in the Official Gazette of February 7, 2017, and application for registration of 7522’s trademark SMOKIN’ DAVE’S BBQ, Serial Number 87128082 filed August 4, 2016, and published in the Official Gazette of February 7, 2017, (collectively the “Smokin’ Dave’s Marks”) pleads, avers and responds to the *Notice of Opposition* as follows:

1. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 1 and therefore denies those allegations.
2. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 2 and therefore denies those allegations.
3. In response to paragraph 3, the documents referenced in paragraph 4 of Opposer’s Notice of Opposition speak for themselves, and to the extent the allegations in paragraph 3 vary therewith, Applicant denies them. Applicant lacks knowledge or information sufficient to

form a belief as to the truth of the remaining allegations in paragraph 3 and therefore denies those allegations.

4. In response to paragraph 4, the referenced documents speak for themselves, and to the extent the allegations in paragraph 4 vary therewith, Applicant denies them.
5. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 and therefore denies those allegations.
6. Denied.
7. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 and therefore denies those allegations.
8. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore denies those allegations.
9. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 8 and therefore denies those allegations.
10. Applicant admits that on July 21, 2016 it filed a use-based trademark application (Serial No. 87112293) seeking registration of the mark SMOKIN' DAVE'S for use with "Barbeque sauce; Marinades; Seasonings; Spice rubs" in Class 30; and "Bar services; Catering services; Restaurant services; Take-out restaurant services" in Class 43. Applicant denies the remaining allegations in paragraph 10.
11. Admitted.
12. The at issue applications speak for themselves, and to the extent the allegations in paragraph 12 vary therewith, Applicant denies them. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 12 and therefore denies those allegations.

13. Denied.
14. Applicant has been using the Smokin Dave's Marks and developing consumer recognition and good will therein since at least July 15, 2007, such use being open, notorious and known to Opposer and such knowledge, in turn, being known to Applicant and/ or under such other circumstances which constitute consent, permission or acquiescence by Opposer. Applicant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 14 and therefore denies those allegations.
15. Denied.
16. Applicant denies any allegation not specifically admitted herein.

AFFIRMATIVE DEFENSES

17. Opposer fails to state a claim upon which relief can be granted.
18. There is no likelihood of confusion, mistake or deception because, *inter alia*, the Smokin Dave's Marks and the alleged trademarks of Opposer are not confusingly similar.
19. As a result of Applicant's continuous use of the Smokin' Dave's Marks since the time of Applicant's adoption thereof, the Smokin' Dave's Marks have developed significant goodwill among peers, BBQ Associations and communities, the consuming public and consumer acceptance of the services and goods offered by Applicant in conjunction with the Smokin' Dave's Marks. Such goodwill and widespread usage has caused the Smokin' Dave's Marks to acquire distinctiveness with respect to the Applicant, and caused the Smokin' Dave's Marks to become a valuable asset of Applicant.
20. Any similarity between the Smokin' Dave's Marks and Opposer's alleged marks is restricted to that portion of the marks consisting of the word "Dave's" and/ or "BBQ",

neither of which is distinctive. As a result, under the antidissection rule any secondary meaning Opposer may have in its alleged trademarks is narrowly circumscribed to the exact trademark alleged.

21. The mark portion “Dave’s” is common in the restaurant field and/ or sauce, marinades, seasonings and rubs field and cannot be distinctive to the Opposer.
22. The mark portion “BBQ” is common in the restaurant field and/ or sauce, marinades, seasonings and rubs field and cannot be distinctive to the Opposer.
23. Since no other portions of the Smokin’ Dave’s marks are in any way similar to Opposer’s alleged marks, there can be no likelihood of confusion. Many third-party registrations and uses now exist and have existed of “Dave’s” and/ or “BBQ” containing marks in the restaurant field and/ or sauce, marinades, seasonings and rubs field.
24. Opposer’s rights in and to its alleged marks are, at least in part, generic or, in the alternative, merely descriptive of the goods or services offered under the marks.
25. Opposer will not be damaged by registration of the Smokin’ Dave’s Marks.
26. Applicant has been using the Smokin Dave’s Marks and developing consumer recognition and good will therein since at least July 15, 2007, such use being open, notorious and known to Opposer and such knowledge, in turn, being known to Applicant. During this time Opposer failed to take meaningful action to assert the claims on which it bases its opposition, on which inaction Applicant has relied to its detriment. One or more of Opposer’s claims or alleged rights in or to one or more of Opposer’s alleged marks is barred by the equitable defenses of laches, estoppel, acquiescence and/ or waiver.
27. Alternatively, due the nature of Applicant’s established restaurant business and the goods offered in association therewith, there is no likelihood of confusion with respect to one or

more of Applicant's actual goods and/ or services and Applicant is entitled to a registration of its Smokin' Dave's Marks with a restricted identification reflecting the actual nature of its goods and/ or services.

28. Applicant hereby gives notice that it may rely on any other defenses that may become available or appear property during discovery, and hereby reserves its right to amend this answer to assert such defenses.

WHEREFORE, in view of the foregoing, Applicant contends that this opposition is groundless and baseless in fact; that Opposer has not shown wherein it will be, or is likely to be, damaged by the registration of Applicant's trademarks; that Applicant's trademarks are manifestly distinct from any alleged mark of the Opposer or any designation of the Opposer and Applicant prays that the Notice of Opposition be denied and/ or dismissed with prejudice, that registration for the subject applications be granted, and that the Trademark Trial and Appeal Board grant all other appropriate relief to Applicant as it deems just and proper.

Respectfully submitted on July 12, 2017.

FLANDERS, ELSBERG, HERBER & DUNN, LLC

/Crystal M. Mitchell/

Mark A. Herber, CO State Bar #32036

Crystal M. Mitchell, CO State Bar #35579

401 Main St., Suite 1

Longmont, CO 80501

Telephone: (303) 776-5380

Email: mark@flanderslaw.com

crystal@flanderslaw.com

Attorneys for Applicant

CERTIFICATE OF SERVICE

I hereby certified that a true and complete copy of the foregoing **APPLICANT'S ANSWER TO NOTICE OF OPPOSITION** has been served on the below by forwarding said copy on July 12, 2017 via email to:

Ashley M. Bennett Ewald, Esq.
Leah Leyendecker, Esq.
GRAY, PLANT, MOOTY, MOTT & BENNETT, P.A.
500 ISD Center, 80 South 8th Street
Minneapolis, MN 55402
ashley.ewald@gpmlaw.com
leah.leyendecker@gpmlaw.com
trademark@gpmlaw.com
Attorneys for Opposer

/Crystal M. Mitchell/

Crystal M. Mitchell, Esq.
Attorney for Applicant