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Filing date: **07/21/2017**

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

Proceeding	91235296
Party	Defendant CAVE MAN KITCHENS INC.
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Submission	Answer
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Date	07/21/2017
Attachments	Answer Caveman Foods Opposition No. 91235296 [CAVE-2017015].pdf(59864 bytes )

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

CAVEMAN FOODS, LLC,	)	
	)	Opposition No. 91235296
Opposer,	)	
	)	
v.	)	Mark: CAVEMAN KITCHEN
	)	Serial No. 86/955705
CAVE MAN KITCHENS INC.,	)	Filing Date: Mar. 28, 2016
	)	Published: Apr. 11, 2017
Applicant.	)	
	)	Mark: CAVEMAN
	)	Serial No. 86/966805
	)	Filing Date: Apr. 06, 2016
	)	Published: Feb. 28, 2017

**ANSWER**

Applicant, Cave Man Kitchens Inc., answers the CONSOLIDATED NOTICE OF OPPOSITION (“Notice of Opposition”) as follows:

1. Applicant 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. Applicant admits that Opposer is identified as the owner of U.S. Trademark Registration No. 4,565,451 for the mark CAVEMAN FOODS; U.S. Trademark Registration No. 4,515,492 for the mark CAVEMAN (in design); U.S. Trademark Registration No. 3,068,863 for the mark CAVEMAN DIET; U.S. Trademark Registration No. 4,120,331 for the mark CAVEMAN CRUNCH; U.S. Trademark Registration No. 4,841,590 for the mark CAVEMAN JERKY; and U.S. Trademark Registration No. 4,863,604 for the mark CAVEMAN FOODS. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations of Paragraph 2, and therefore denies the same.
3. Applicant admits that Opposer is identified as the owner of pending U.S. Trademark Application Nos. 87166881, 87087186, 86169105, and 86169099. Applicant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of Paragraph 3, and therefore denies the same.
4. Applicant admits it filed U.S. Application Serial No. 86955705 for “Catering services; Food preparation services; Restaurant services; Restaurant services, namely, providing

of food and beverages for consumption on and off the premises,” on March 28, 2016, and U.S. Application Serial No. 86966805 for “Catering services; Food preparation services; Restaurant services; Restaurant services, namely, providing of food and beverages for consumption on and off the premises,” on April 6, 2016.

5. Applicant admits that the filing dates of Serial Nos. 85981476, 85719301, 78081973, 85107869, 85320308, 85983914, 86169105, and 86169099 precede the filing dates of Applicant’s opposed applications. Applicant denies the truth of the remaining allegations set forth in Paragraph 5.

6. Applicant admits Paragraph 6.

7. Applicant admits Paragraph 7.

8. Applicant admits that the opposed applications are cited as a basis for Opposition in Proceeding Number 91234111 and Cancellation in Proceeding Number 92066099. Applicant denies the truth of the remaining allegations set forth in Paragraph 8.

9. Applicant admits that there a likelihood of confusion amongst consumers as to the source, association, sponsorship, or connection of Applicant and Opposer’s respective goods/services resulting from their respective uses of their marks in connection with their respective goods and/or services, as Applicant alleges in its Opposition in Proceeding Number 91234111 and Cancellation in Proceeding Number 92066099. Applicant denies the truth of the remaining allegations set forth in Paragraph 9.

10. Applicant denies the truth of the allegations set forth in Paragraph 10.

11. Applicant denies the truth of the allegations set forth in Paragraph 11.

12. Paragraph 12 of Opposer’s Notice of Opposition constitutes a legal conclusion to which no response is necessary; Applicant nonetheless denies the allegations in Paragraph 12.

13. Applicant denies the truth of the allegations set forth in Paragraph 13.

14. Paragraph 14 of Opposer’s Notice of Opposition constitutes a legal conclusion to which no response is necessary; Applicant nonetheless denies the allegations in Paragraph 14.

15. Applicant admits that, in an effort to demonstrate the longstanding use of Applicant’s “CAVEMAN” mark (U.S. Application Serial No. 86/966805, hereinafter the “805 Application”), one of several specimens submitted with Applicant’s initial application is a photograph showing an early restaurant sign from the 1970s. However, the age of the specimen does not diminish the specimen’s validity, nor does the age of a single specimen diminish the

validity of the additional specimens submitted by Applicant in the '805 Application. Section 904 of the Trademark Manual of Examining Procedure states that “specimens... provide supporting evidence of facts recited in the application”. A specimen is not required to be the first use of the mark or even the most recent use, but does need to show actual use of the mark in commerce prior to the filing of the application. Applicant’s photo clearly shows actual use of Applicant’s “CAVEMAN” mark in commerce prior to the filing of the '805 Application. Applicant denies the truth of the remaining allegations set forth in Paragraph 15.

16. Opposer attempts to take declaration in the '805 Application out of context and attempts to mislead the court by misquoting the declaration as signed in the '805 Application. Applicant’s true declaration states “the applicant is using the mark in commerce on or in connection with the goods/services in the application; the specimen(s) shows the mark as used on or in connection with the goods/services in the application”. Applicant denies the truth of the remaining allegations set forth in Paragraph 16.

17. Paragraph 17 of Opposer’s Notice of Opposition constitutes a legal conclusion to which no response is necessary; Applicant nonetheless denies the allegations in Paragraph 17.

18. Applicant denies the truth of the allegations set forth in Paragraph 18.

19. Paragraph 19 of Opposer’s Notice of Opposition constitutes a legal conclusion to which no response is necessary; Applicant nonetheless denies the allegations in Paragraph 19.

20. Applicant denies the truth of the allegations set forth in Paragraph 20.

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## AFFIRMATIVE AND OTHER DEFENSES

Applicant sets forth its affirmative defenses below. By setting forth these affirmative defenses, Applicant does not assume the burden of proving any fact, issue, or element of a cause of action where such burden properly belongs to Opposer. As separate and distinct affirmative defenses, Applicant alleges as follows:

1. Opposer's Notice of Opposition fails to state a claim upon which relief may be granted.
2. Applicant's use in commerce of the marks set forth in the opposed applications predates Opposer's alleged use of its marks cited as its basis for opposition.
3. Applicant has priority in its applications because the priority date of use for its opposed applications is at least as early as 2006 due to tacking to United States Registration Number 3222887 for CAVE MAN KITCHENS.
4. Opposer lacks standing to oppose Applicant's applications in that Opposer does not have rights, superior or otherwise, sufficient to support Opposer's Notice of Opposition.
5. Applicant expressly denies any and all allegations in Opposer's Notice of Opposition not expressly admitted above; and for such other and further relief as this Board deems appropriate and just.

WHEREFORE, Applicant requests that the CONSOLIDATED NOTICE OF OPPOSITION be dismissed with prejudice.

Respectfully submitted,

Dated: July 21, 2017

By:  \_\_\_\_\_

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Attorneys for Applicant

**Certificate of Service**

I hereby certify that on the 21<sup>st</sup> of July, 2017, I caused the foregoing ANSWER to be served by email on the following party at the following address:

mmizrahi@wrslawyers.com, patentandtrademarks@wrslawyers.com

By:  \_\_\_\_\_  
Attorneys for Applicant