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

Proceeding	94002699
Party	User Frosty King, Inc.
Correspondence Address	FROSTY KING INC 5190 NIEL RD SUITE 430 RENO, NV 89502 UNITED STATES
Submission	Other Motions/Papers
Filer's Name	James M. Duncan
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Date	11/10/2016
Attachments	Answer.pdf(260507 bytes)

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a belief as to the truth of the allegations of Plaintiff's claim and therefore denies all allegations set forth therein.

4. As to the concurrent use allegation asserted by the Plaintiff, the Defendant herein denies that the geographic exception as claimed by the Plaintiff, in the absence of further exceptions, conditions and limitations as to the mode or place of use of the mark, is sufficient to prevent a likelihood of confusion, mistake, or deception resulting from the use by Plaintiff of the mark and the use by Defendant of its prior adopted and used marks.

AFFIRMATIVE DEFENSES

5. For the reasons set forth below, Defendant asserts it has more rights than are acknowledged in the Application.

6. For the reasons set forth below, Defendant asserts that the geographic restriction recited in the Application is not an effective restriction due to the impossibility of the enforcement of such restriction.

7. On information and belief, Plaintiff has not opened a restaurant, ice cream parlor, or ice cream shop or engaged in any business activity or expansion thereof anywhere in the State of California.

8. San Diego, Los Angeles, Bakersfield, Fresno, San Francisco, Sacramento, etc. are connected by air, multiple rail, bus, automobile, and other transportation links, with thousands of persons traveling daily between these cities.

9. Defendant operates restaurants under the name FROSTY KING, in Kern County, California. Defendant has operated restaurants under the name FROSTY KING since 1979, thus earlier than the Respondent's filing date of March 1, 2011 and claimed date of first use no later than February 1, 2008. Defendant was incorporated in Nevada

under the name FROSTY KING on April 19, 2006. Under the name FROSTY KING, Plaintiff was issued a certificate of qualification by the California Secretary of State to transact intrastate commerce in the State of California on November 3, 2006. Thus Opposer had created public records in both Nevada and California of doing business

5 under the name FROSTY KING before the date the Respondent filed its application and before the Respondent allegedly began use of the Trademark.

10 10. Defendant owns trademark registration number 120146 issued by the California Secretary of State on July 15, 2015 for the mark FROSTY KING for restaurant services, restaurant fast-food services, take-out food services in Class 43.

11. Defendant has developed and enjoys goodwill and recognition in California and elsewhere with respect to the FROSTY KING trademark used in connection with Defendant's restaurant services.

12. The FROSTY KING mark has been used by Defendant for many years prior to any use by the Applicant, and the Defendant continues to use the FROSTY KING trademark to identify its restaurants.

13. In the view of the marks being identical and being used on similar goods and services, it is alleged that Plaintiff's applied-for mark so resembles Defendant's mark previously used in the United States by Plaintiff as to be likely to cause confusion, or to cause mistake or to deceive.

20 14. Defendant's main restaurant is located near the intersection of California State Highway 99 and California State Highway 58, where it has been located for a number of years.

15. The street upon which Defendant's main restaurant is located is a four lane major thoroughfare through Bakersfield.

16. California State Highway 99 is a major State Highway running through Bakersfield, and described as follows:

5 "State Route 99 (SR-99) begins at Interstate 5 (I-5), near the base of the Tehachapi Mountains in Kern County, passes through the counties of Tulare, Fresno, Madera, Merced, Stanislaus, San Joaquin, Sacramento, and Sutter and ends at State Route 36 near Red Bluff in Tehama County. SR-99 serves the primary population centers in the SJV [San Joaquin Valley] as well as much of
10 the rural agricultural areas. It is the major transportation backbone for the movement of agricultural products and other commercial goods, and also serves as a major link for recreation-bound traffic. SR-99 is the primary link that connects the SJV with the Sacramento metropolitan area and, via I-5, with the Southern California area. In its capacity as an interregional thoroughfare for the
15 movement of people and goods, it is critical to the economic vitality of the State." (State Route 99 Corridor System Management Plan San Joaquin County Area, September 2008)

17. California State Highway 58 is described as follows:

20 "State Route 58 (SR 58) is an east-west highway across the California Coast Ranges, the southern San Joaquin Valley, the Tehachapi Mountains, which border the southern Sierra Nevada, and the Mojave Desert. It runs between its western terminus near Santa Margarita (junction U.S. Route 101) and its eastern terminus at Barstow (junction Interstate 15). It has junctions with Interstate 5 near

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