

EX AS.

TTAB

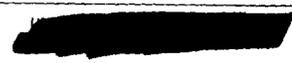
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF APPLICATION SERIAL NO. 76/296,778  
PUBLISHED IN THE OFFICIAL GAZETTE ON

In-N-Out Burger )  
)  
OPPOSER )  
)  
v. )  
)  
REPIN-SKEES, INC. )  
)  
APPLICANT )

OPPOSITION NO. 91150584

TRADEMARK TRIAL AND APPEAL BOARD  
02 JUL 23 AM 8:33



07-17-2002

U.S. Patent & TMO/TM Mail Rpt Dt. #01

Commissioner of Trademarks  
Box: TTAB  
2900 Crystal Dr.  
Arlington, VA 22202-3513

MOTION TO: (1) COMPEL DISCOVERY, INCLUDING RESPONSES TO INTERROGATORIES AND REQUEST FOR THE PRODUCTION OF DOCUMENTS UNDER 37 CFR 2.120 (e)(1); (2) TO POSTPONE THE SCHEDULE OF THIS ACTION IF RESPONSES ARE TIMELY FORTHCOMING; AND (3) TO MOVE FOR JUDGEMENT IF RESPONSES ARE NOT TIMELY FILED

(Including Memorandum in Support, and Declaration of Edward O. Ansell in Support)

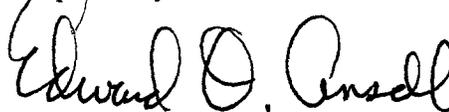
Sir:

The undersigned Petitioner/Opposer hereby moves the TTAB for an order (i) compelling the response of Respondent/Applicant to OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT AND REQUEST FOR PRODUCTION OF DOCUMENTS, (Exhibit D hereto); (ii) extending the time for Opposer to propound additional Interrogatories and Requests For Production Of Documents if APPLICANT's response to said OPPOSER's INTERROGATORIES is timely mailed; and (iii) ordering that, if APPLICANT's response to said OPPOSER's INTERROGATORIES is not timely

mailed by the last day of said original discovery period (August 16, 2002), testimony in the present opposition be suspended, with OPPOSER at liberty to apply to the TTAB for judgment.

Petitioner supports this discovery with the herein memorandum, the herein Declaration of Edward O. Ansell, and all papers on file with the TTAB, including, but not limited to, the TTAB's original schedule mailed January 28, 2002, to the present opposition.

Respectfully Submitted,



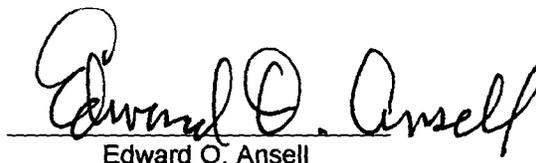
Edward O. Ansell  
Attorney for Petitioner/Opposer

Date: July 12, 2002

Edward O. Ansell  
Attorney-at-Law  
449 W. Willamette Lane  
Claremont, CA 91711-2746  
Phone: (909) 625-1244  
Fax: (909) 624-1664  
E-mail [anselaw@att.net](mailto:anselaw@att.net)

PROOF OF SERVICE

I hereby certify that on July 12, 2002, a copy of the foregoing document is being deposited with the U.S. Postal Service, first class mail, postage prepaid, to: Albert L. Schmeiser, Schmeiser, Olsen & Watts, LLP, 18 E. University Dr., Ste. 101, Mesa, AZ 85201-5946, Attorney for Applicant.



Edward O. Ansell

## MEMORANDUM

Petitioner/Opposer brought forward this Opposition proceeding alleging that:

- a. Applicant's mark so resembles Opposer's previously used and registered marks IN-N-OUT, IN-N-OUT BURGER and IN-N-OUT BURGERS as to be likely, when used in connection with the services set forth in Applicant's application, to cause confusion, mistake, or deception within the meaning of Section 2(d) of the Trademark Act;
- b. Applicant's mark so resembles Opposer's previously used, registered, and famous marks IN-N-OUT, IN-N-OUT BURGER and IN-N-OUT BURGERS as to be likely, when used in connection with the services set forth in Applicant's application, to lessen the capacity of Opposer's said marks to identify and distinguish Opposer's services and goods, regardless of the presence or absence of competition between Opposer and Applicant, or likelihood of confusion, mistake or deception; and
- c. By motion filed June 20, 2002, (Exhibit "F" hereto) Opposer seeks to amend the Notice of Opposition to allege that Applicant's mark is merely descriptive of the services to which it relates because it describes a characteristic, function, feature and purpose of the specified service.

Although the present application was based upon "intent-to-use", on information and belief, the mark has actually been used in connection with the described services. In order to resolve these issues of potential for confusing similarity, dilution, and descriptiveness, Petitioner/Opposer needs to discover, *inter alia*, all various forms of the

mark that have been used by Respondent/Applicant, and needs to discover the extent of such use, including the respective time periods of such use for each particular mark, as well as many other particulars.

On May 24, 2002, Petitioner/Opposer timely served OPPOSER'S FIRST SET OF INTERROGATORIES TO APPLICANT AND REQUEST FOR PRODUCTION OF DOCUMENTS (Exhibit D). No response to these discovery requests has been received by the Petitioner/Opposer (Ansell Declaration).

The reason for this compound motion is straightforward. Petitioner/Opposer's representative has made several telephone contacts with Respondent/Applicant's representative, who stated that he has had difficulty contacting his client Respondent/Applicant, and apparently is unable to secure from his client any concrete proposal for settlement. (see Ansell Declaration).

37 CFR 2.120(a)-(d) provides for Interrogatories and Document requests. The need for the discovery is clear. The issues raised in this proceeding are directed towards Respondent/Applicant's use of its mark. Respondent/Applicant is in a position to provide the requested answers and documents, but none have been forthcoming. Respondent/Applicant's dilatory conduct may require a continuance of the proceedings. Meaningful depositions, if any are to be had, require the advance production of documents and answers, so as to prepare and focus the depositions, and to minimize unnecessary deposition expense. Petitioner/Opposer is unable to fully prosecute this opposition proceeding without the requested documents and answers.

The need for an order compelling production and answers is also clear. The present testimony period closes on August 16, 2002. A request to amend the Notice of

Opposition and extend the discovery and other periods is, as of yet, unapproved by the TTAB. The answers and documents must be produced, analyzed, and presented and responded to by Petitioner/Opposer in its case in chief, if such is to be made. The time for trial is approaching. The present motion should be considered in a timely manner, otherwise continuances and further motions may be necessary.

Petitioner/Opposer filed OPPOSER'S FIRST REQUEST FOR ADMISSIONS on June 11, 2002 (Exhibit "E" hereto) and a MOTION TO AMEND NOTICE OF OPPOSITION AND EXTEND THE DISCOVERY AND OTHER PERIODS (Exhibit "F" hereto) was filed on June 20, 2002. Neither of these items are germane to the instant motion.

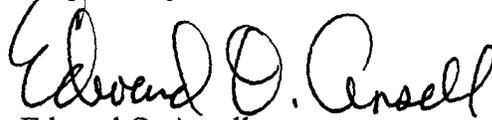
Petitioner/Opposer has not received **any** discovery response. Respondent/Applicant has failed to object to the interrogatories and document production request. As such, Respondent/Applicant has waived its right to object. Petitioner/Opposer, having a clear need for its legitimate reasonably discovery, in combination with Respondent/Applicant's failure to object, warrants an order from the TTAB compelling full and substantive responses to Petitioner/Opposer's discover.

Respondent/Applicant should be ordered to provide and documents, including exemplar documents and complete answers to the Interrogatories. There is no just reason for Respondent/Applicant's failure to respond to Petitioner/Opposer's reasonable and legitimate discovery. The present motion should be granted.

NOW THEREFORE

1. Petitioner/Opposer hereby moves the TTAB for an order compelling the response of Respondent/Applicant to OPPOSER'S INTERROGATORIES TO APPLICANT AND REQUEST FOR PRODUCTION OF DOCUMENTS.
2. Petitioner/Opposer hereby moves the TTAB for an order extending the time for Opposer to propound additional interrogatories and requests for production of documents in response to Applicant's answers to said OPPOSER'S INTERROGATORIES, and ordering that
3. If APPLICANT'S response to said OPPOSER'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS is not timely mailed by the last day of said original discovery period (August 16, 2002), then testimony in the present opposition is suspended (discovery already being closed), with OPPOSER at liberty to apply to the TTAB for judgment.

Respectfully submitted,



Edward O. Ansell  
Attorney for Petitioner/Opposer

Edward O. Ansell, Esq.  
449 W. Willamette Lane  
Claremont, CA 91711-2746  
Phone: (909) 625-1244  
Fax: (9099) 624-1664  
E-mail: anselaw@att.net

Date: July 12, 2002

Attachment 1. Declaration of Edward O. Ansell

Exhibit A. Notice of Opposition

Exhibit B. TTAB schedule, opposition 91150585, MAILED 01/28/02

Exhibit C. Applicant's Answer

Exhibit D. Opposer's First Set of Interrogatories to Applicant and Request for Production of Documents

Exhibit E. Opposer's First Request for Admissions

Exhibit F. Motion to Amend Notice of Opposition and Extend the Discovery and Other Periods

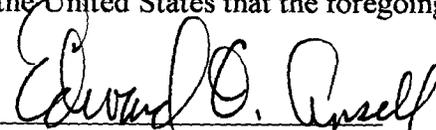
## DECLARATION OF EDWARD O. ANSELL

I, EDWARD O. ANSELL do hereby declare and state:

1. I am a citizen of the United States, a member of the bar of the United States District Court in the Central District of California, and a resident of the County of Los Angeles in the State of California. I am an attorney of record for Petitioner/Opposer in the above entitled action, and my business address for this Opposition is 449 W. Willamette Lane, Claremont, CA 91711-2746.
2. I spoke by telephone on June 19 and June 25 with Mr. Albert L. Schmeiser, attorney for Respondent/Applicant Repin-Skees, Inc. During these conversations, he acknowledged the receipt of the discovery request, and raised the possibility of settlement, which would obviate the need for a response to Petitioner/Opposer's Interrogatories. Nothing in the way of a settlement was agreed upon.
3. On July 1, 2002, I again conferred by telephone with Mr. Albert L. Schmeiser, attorney for Respondent/Applicant Repin-Skees, Inc., in connection with Petitioner/Opposer's discovery requests. I asked him for a specific proposal. He said he would try to contact his client and get back to me that day. I told him I intended to file a motion to compel discovery if I did not hear from him that day.
4. As of July 12, 2002 Petitioner/Opposer has not received any response to Petitioner/Opposer's First set of Interrogatories which was served on May 24, 2002.
5. As of July 12, 2002, Petitioner/Opposer has not received any response to Petitioner/Opposer's document production request which was served on May 24, 2002.
6. As of July 12, 2002, Petitioner/Opposer has not received any telephone or written communication from Respondent/Applicant since the telephone conversation of July 1, 2002..
7. The undersigned Attorney for Petitioner/Opposer has made a good faith effort to resolve the issues presented in this motion and the parties are unable to reach agreement.
8. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date:

July 12, 2002

  
Edward O. Ansell

Edward O. Ansell, Esq.  
449 W. Willamette Lane  
Claremont, Ca 91711-2746  
Phone: (909) 625-1244  
Fax: (909) 624-1664  
E-mail: anselaw@att.net