

TTAB

September 11, 2008

Brian Quaglia  
151 Airport Road  
Warwick, RI 02886

To: Trademark Trial and Appeal Board  
U. S. Patent and Trademark Office  
P. O. Box 1451  
Alexandria, VA 22313-1451

76/687,302

Dear Sir:

Please find enclosed my answer to Opposition No. 91186018.  
My answer has this day been mailed to Opposer's Attorney  
Ansell.

Sincerely,

Brian Quaglia



09-15-2008

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

**In-N-Out Burgers  
Opposer**

v.                   **OPPOSITION NO. 91186018**

**Brian Quaglia  
Applicant**

**ANSWER TO OPPOSITION**

Brian Quaglia, an individual, applicant in the above-entitled opposition proceedings, in answer to the Notice of Opposition, states as follows:

1. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 1 of the Notice and therefore denies the same and leaves opposer to its proof.

2. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 2 of the Notice and therefore denies the same and leaves opposer to its proof.

3. Referring to Paragraphs 3 of the Notice, applicant admits that opposer is the owner of Registration No. 2,285, 823 for the trademark in-n-out for computer services, but applicant is without information sufficient to form a belief as to the use of the mark in other than such service and therefore denies the same and leaves opposer to its proof.

4. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 4 of the Notice and therefore denies the same and leaves opposer to its proof.

5. Referring to Paragraph 5 of the Notice, applicant admits that opposer is the owner of Registrations 1,514,689 and 1,960,015 for the Mark IN-N-OUT BURGER, but applicant is without information sufficient to form a belief as to the use of the mark and therefore denies the same and leaves opposer to its proof.

6. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 6 of the Notice and therefore denies the same and leaves opposer to its proof.

7. Referring to Paragraph 7 of the Notice, applicant admits that opposer is the owner of Registrations 1,085,163, 1,522,799, and 1,525,982 for the Mark IN-N-OUT, but Applicant is without information sufficient to form a belief as to the use of the mark and therefore denies the same and leaves opposer to its proof.

8. Referring to Paragraph 8 of the Notice, applicant admits that opposer is the owner of Registrations 1,101,628, 1,101,638, 1,522,799 and 1,525,982 for the Mark IN-N-OUT, but applicant is without information sufficient to form a belief as to the use of the mark and therefore denies the same and leaves opposer to its proof.

9. Referring to Paragraph 9 of the Notice, applicant admits that opposer is the owner of Registration 2,217,307 for the Mark IN-N-OUT, but applicant is without information sufficient to form a belief as to the use of the mark and therefore denies the same and leaves opposer to its proof.

10. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 10 of the Notice and therefore denies the same and leaves opposer to its proof.

11. Applicant is without information sufficient to form a belief as to the allegations of Paragraph 11 of the Notice and therefore denies the same and leaves opposer to its proof.

Further answering, applicant affirmatively alleges that:

12. Opposer's trademark "IN-N-OUT" is used in different channels of trade than applicants mark and would be entitled to

protection, if at all, only on specific products manufactured and sold by opposer and are not entitled to protection when used on products that have not been and are not now manufactured and sold by opposer in class 028.

13. Opposer does not state that he manufacture dice games and, therefore, is not in competition with applicants dice game. There being no competition between products, no instances of actual confusion of the buying public between products exists.

14. Applicant has been manufacturing and selling dice games since March 3, 2008. Applicant's product has been commercially successful, and applicant has established an independent good will in the dice game field. With such established good will, little likelihood exists that continued use by applicant of its mark "IN N OUT" for dice games will tarnish opposer's mark.

15. Opposer has alleged in Paragraphs 10 and 11 of the Notice that it will cause confusion, mistake, or deception if registration of applicant mark is granted. However, since no actual competition between specific products exists, the alleged confusion, mistake, or deception is not so probable to entitle opposer relief.

16. If the registration of applicant is not granted, applicant will suffer great immediate harm from having to withdraw its existing inventories of dice games from the market.

17. Applicant asserts that opposer has failed to state a claim upon which relief can be granted.

18. Applicant denies that there is any likelihood of confusion with respect to its mark as set forth in its application.

19. Applicant states that he actually uses it mark only on a specific type of goods, namely, a dice game, covered by the identification in its application; that there is no likelihood of confusion with respect to Applicant's actual goods; and that even if the Board ultimately finds that opposer is entitled to judgment with respect to applicant's goods as identified, applicant would be entitled to a registration with a restricted identification reflecting the actual nature of its goods.

20. In any event, opposer, before or as of the date of applicant's filing had not filed a trademark application to

protect any trademark within international class 028 nor is it clear to applicant that opposer ever intended to do so.

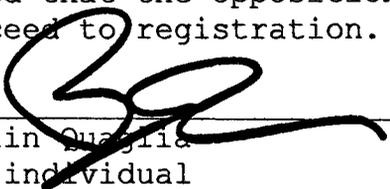
21. As stated in the Notice opposer's marks are registered in classes other than applicant's mark and therefore there cannot be any confusion with applicant's mark.

22. In and for a first separate and special defense, applicant alleges that at the time applicant adopted its trademark, a search was made in the United States Patent and Trademark Office and the search disclosed, as of the date of adoption of the trademark "IN N OUT" by applicant, that there was no existing United States federal registration for a dice game including "IN N OUT".

23. Applicant also alleges that at the time applicant adopted its trademark, a diligent search was made by the United States Patent and Trademark Office and the search disclosed that there was no existing United States federal registration for a dice game including "IN N OUT" in international class 028.

WHEREFORE, it is respectfully requested that the opposition be dismissed and that this application proceed to registration.

Date: 9/11/2008

  
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Brian Quaglia  
An individual

151 Airport Road  
Warwick, RI 02886  
Tel: 1-401-421-7622

#### CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 11, 2008, he personally served a copy of the foregoing answer on Edward O. Ansell, Attorney for opposer by depositing a copy with the U. S. Postal Service, first class mail postage prepaid, return receipt requested, to Attorney Ansell at 427 N. Yale Ave., #204, P.O. Box 1163, Claremont, CA 91711.

  
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Brian Quaglia