

ESTTA Tracking number: **ESTTA269002**

Filing date: **02/26/2009**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Whataburger Partnership
Granted to Date of previous extension	03/04/2009
Address	One Whataburger Way Corpus Christi, TX 78411 UNITED STATES

Attorney information	Christopher Kelly Wiley Rein LLP 1776 K Street, N.W. Washington, DC 20006 UNITED STATES ckelly@wileyrein.com Phone:202-719-7000
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Applicant Information

Application No	77494179	Publication date	11/04/2008
Opposition Filing Date	02/26/2009	Opposition Period Ends	03/04/2009
Applicant	Sarkis Avakian 218 Massachusetts Avenue Arlington, MA 02474 UNITED STATES		

Goods/Services Affected by Opposition

Class 043. First Use: 2007/11/14 First Use In Commerce: 2008/01/12
All goods and services in the class are opposed, namely: restaurant services

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	652137	Application Date	06/07/1954
Registration Date	09/24/1957	Foreign Priority Date	NONE
Word Mark	WHATABURGER		

Design Mark			
Description of Mark	NONE		
Goods/Services	Class U046 (International Class 030). First use: First Use: 1950/01/01 First Use In Commerce: 1953/02/10 HAMBURGER SANDWICH		

U.S. Registration No.	891082	Application Date	02/20/1968
Registration Date	05/12/1970	Foreign Priority Date	NONE
Word Mark	WHATABURGER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U100 (International Class 042). First use: First Use: 1950/01/01 First Use In Commerce: 1953/02/10 RESTAURANT SERVICES AND DRIVE IN RESTAURANT SERVICES		

U.S. Registration No.	1011927	Application Date	11/29/1972
Registration Date	05/27/1975	Foreign Priority Date	NONE
Word Mark	WHATABURGER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class U045 (International Class 032). First use: First Use: 1972/07/18 First Use In Commerce: 1972/07/28 SOFT DRINKS Class U046 (International Class 029, 030). First use: First Use: 1972/07/18 First Use In Commerce: 1972/07/28		

	<p>HAMBURGERS, CHEESEBURGERS, FRENCH FRIED POTATOES, [POTATO CHIPS, CORN CHIPS,] FRIED PIES, ONION RINGS, MALT AND SHAKE BEVERAGES, AND FRANKFURTER SANDWICHES</p> <p>Class U100 (International Class 042). First use: First Use: 1972/07/18 First Use In Commerce: 1972/07/28</p> <p>RESTAURANT AND DRIVE-IN RESTAURANT SERVICES</p>		
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U.S. Registration No.	1011928	Application Date	11/29/1972
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Registration Date	05/27/1975	Foreign Priority Date	NONE
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Word Mark	W WHATABURGER		
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Design Mark			
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Description of Mark	NONE		
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Goods/Services	<p>Class U045 (International Class 032). First use: First Use: 1972/07/18 First Use In Commerce: 1972/07/28</p> <p>SOFT DRINKS</p> <p>Class U046 (International Class 029, 030). First use: First Use: 1972/07/18 First Use In Commerce: 1972/07/28</p> <p>HAMBURGERS, CHEESEBURGERS, FRENCH FRIED POTATOES, [POTATO CHIPS, CORN CHIPS,] FRIED PIES, ONION RINGS, MALT AND SHAKE BEVERAGES, AND FRANKFURTER SANDWICHES</p> <p>Class U100 (International Class 042). First use: First Use: 1972/07/28 First Use In Commerce: 1972/07/28</p> <p>RESTAURANT AND DRIVE-IN RESTAURANT SERVICES</p>		
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U.S. Registration No.	1014196	Application Date	11/26/1973
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Registration Date	06/24/1975	Foreign Priority Date	NONE
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Word Mark	WHATABURGER JR.		
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Design Mark			
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Description of Mark	NONE		
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Goods/Services	<p>Class 029. First use: First Use: 1973/04/01 First Use In Commerce: 1973/08/29</p> <p>PREPARED HAMBURGER SANDWICH FOR CONSUMPTION ON OR OFF THE PREMISES</p>		
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U.S. Registration No.	1116918	Application Date	01/20/1978
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Registration Date	04/24/1979	Foreign Priority	NONE
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		Date	
Word Mark	WHATAMEAL		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1975/07/01 First Use In Commerce: 1975/07/01 PREPARED MEAL CONSISTING OF A HAMBURGER SANDWICH, FRENCH FRIES AND A BEVERAGE FOR CONSUMPTION ON OR OFF THE PREMISES		

U.S. Registration No.	1206344	Application Date	08/10/1979
Registration Date	08/24/1982	Foreign Priority Date	NONE
Word Mark	WHATACATCH		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 029. First use: First Use: 1978/10/14 First Use In Commerce: 1979/04/01 Breaded Fish Fillets Suitable for Fish Sandwiches Class 030. First use: First Use: 1978/10/14 First Use In Commerce: 1979/04/01 Prepared Fish Sandwich for Consumption On or Off the Premises		

U.S. Registration No.	2160285	Application Date	03/24/1997
Registration Date	05/26/1998	Foreign Priority Date	NONE
Word Mark	WHATACHICK'N		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 1984/01/01 First Use In Commerce: 1984/01/01 chicken sandwich		

U.S. Registration No.	2335590	Application Date	04/05/1999
Registration Date	03/28/2000	Foreign Priority Date	NONE
Word Mark	WHATABURGER		
Design Mark	WHATABURGER		
Description of Mark	NONE		
Goods/Services	Class 042. First use: First Use: 1950/01/01 First Use In Commerce: 1953/02/10 restaurant services		

U.S. Registration No.	2418380	Application Date	05/06/1999
Registration Date	01/02/2001	Foreign Priority Date	NONE
Word Mark	WHATAGUY		
Design Mark	WHATAGUY		
Description of Mark	NONE		
Goods/Services	Class 042. First use: First Use: 2000/01/01 First Use In Commerce: 2000/01/01 restaurant services		

U.S. Registration No.	2432191	Application Date	02/22/1999
Registration Date	02/27/2001	Foreign Priority Date	NONE
Word Mark	WHATAKIDS		
Design Mark	WHATAKIDS		
Description of Mark	NONE		
Goods/Services	Class 042. First use: First Use: 1999/04/01 First Use In Commerce: 1999/04/01 restaurant services		

U.S. Registration No.	2519854	Application Date	01/02/2001
Registration Date	12/18/2001	Foreign Priority Date	NONE
Word Mark	WHATACOMIX		

Design Mark	WHATACOMIX		
Description of Mark	NONE		
Goods/Services	Class 016. First use: First Use: 2000/01/01 First Use In Commerce: 2000/01/01 comic books and children's activity books		

U.S. Registration No.	2534527	Application Date	03/10/1999
Registration Date	01/29/2002	Foreign Priority Date	NONE
Word Mark	WHATAPLACE! WHATATASTE!		
Design Mark	WHATAPLACE! WHATATASTE!		
Description of Mark	NONE		
Goods/Services	Class 042. First use: First Use: 1998/10/11 First Use In Commerce: 1998/10/11 restaurant services		

U.S. Registration No.	2757109	Application Date	10/31/2001
Registration Date	08/26/2003	Foreign Priority Date	NONE
Word Mark	WHATABURGER		
Design Mark	WHATABURGER		
Description of Mark	NONE		
Goods/Services	Class 036. First use: First Use: 2001/10/05 First Use In Commerce: 2001/10/05 Charitable fundraising services		

U.S. Registration No.	2846139	Application Date	12/06/2002
Registration Date	05/25/2004	Foreign Priority Date	NONE
Word Mark	WHATABLENDERS		

Design Mark	WHATABLENDERS		
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2002/09/04 First Use In Commerce: 2002/11/04 milk shake drinks, bases for milk shake drinks and candy flavored toppings therefor		

U.S. Registration No.	3185230	Application Date	01/07/2005
Registration Date	12/19/2006	Foreign Priority Date	NONE
Word Mark	WHATASIZE		
Design Mark	WHATASIZE		
Description of Mark	NONE		
Goods/Services	Class 043. First use: First Use: 1998/00/00 First Use In Commerce: 1998/00/00 Restaurant services featuring a prepared meal containing french fries and a soft drink for consumption on or off the premises		

U.S. Registration No.	3188132	Application Date	03/31/2005
Registration Date	12/19/2006	Foreign Priority Date	NONE
Word Mark	WHATABURGER FIELD		
Design Mark	WHATABURGER FIELD		
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2005/04/06 First Use In Commerce: 2005/04/06 providing stadium facilities for sporting events, exhibitions, conventions, community festival events and concerts		

U.S. Registration No.	3188136	Application Date	04/01/2005
Registration Date	12/19/2006	Foreign Priority Date	NONE
Word Mark	WHATABURGER FIELD CORPUS CHRISTI		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2005/04/06 First Use In Commerce: 2005/04/06 providing stadium facilities for sporting events, exhibitions, conventions, community festival events and concerts		

U.S. Registration No.	2372372	Application Date	03/05/1999
Registration Date	08/01/2000	Foreign Priority Date	NONE
Word Mark	WHATAKIDS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 025. First use: First Use: 1998/11/00 First Use In Commerce: 1999/02/15 Clothing for children, namely, shirts, polo shirts, t-shirts, dresses, overalls, onesies, baseball caps and hats		

Attachments	71667794#TMSN.gif (1 page)(bytes) 72291496#TMSN.gif (1 page)(bytes) 72442464#TMSN.gif (1 page)(bytes) 72442465#TMSN.gif (1 page)(bytes) 75674147#TMSN.gif (1 page)(bytes) 75698642#TMSN.gif (1 page)(bytes) 75647561#TMSN.gif (1 page)(bytes) 76188399#TMSN.gif (1 page)(bytes) 75657290#TMSN.gif (1 page)(bytes) 76332382#TMSN.gif (1 page)(bytes) 76473190#TMSN.gif (1 page)(bytes) 76627124#TMSN.gif (1 page)(bytes) 78598999#TMSN.jpeg (1 page)(bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Christopher Kelly/
Name	Christopher Kelly
Date	02/26/2009

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

WHATABURGER PARTNERSHIP)	
)	
Opposer,)	
)	Opposition No.: _____
v.)	Mark: WHATTA WING!
)	Ser. No.: 77/494,179
SARKIS AVAKIAN)	
)	
Applicant.)	

NOTICE OF OPPOSITION

Whataburger Partnership, a general partnership organized under the laws of Texas, with offices located at One Whataburger Way, Corpus Christi, Texas 78411, hereby opposes registration of application Ser. No. 77/494,179 – WHATTA WING! for “restaurant services,” in International Class 43, filed June 9, 2008, by Sarkis Avakian (“Applicant”), and published for purposes of opposition in the Official Gazette dated November 4, 2008. Whataburger Partnership will be damaged should the opposed application mature to registration.

Whataburger Partnership puts forth the following grounds for opposition:

1. Whataburger Partnership is the owner of all right, title and interest in and to the trademarks and service marks pleaded in this Notice of Opposition and licenses said marks for use in connection with the WHATABURGER restaurant system (Whataburger Partnership and its licensees are collectively referred to as “Opposer”).

2. Opposer operates over 700 restaurants in the United States under the WHATABURGER name.

3. Opposer, through its predecessors in interest, adopted and commenced use of the WHATABURGER name as a service mark for restaurant services in 1950 and has used the name continuously and without interruption to the present day.

4. Opposer uses the WHATABURGER name not only to identify its restaurant services, but also as a trademark to identify an array of food products sold at its restaurants and elsewhere.

5. Opposer has developed a family of WHATA marks to identify its food products, and collateral products and services, such as printed materials, clothing and stadium services.

6. Based on Opposer's extensive, exclusive and continuous use of its WHATABURGER and WHATA marks in connection with restaurant services, food products and collateral goods, the name WHATABURGER and Opposer's other WHATA marks have come to be recognized among the consuming public as designators of origin with respect to said services and products.

7. Opposer is the owner of all right, title and interest in and to the following federal service mark and trademark registrations, which presently are valid and subsisting in law (photocopies are attached hereto as Exhibit A):

- (a) Registration No. 652,137 – **WHATABURGER** for “hamburger sandwich,” registered on the Principal Register September 24, 1957.
- (b) Registration No. 891,082 – **WHATABURGER** for “restaurant services and drive in restaurant services,” registered on the Principal Register May 12, 1970.
- (c) Registration No. 1,011,927 – **WHATABURGER** for “hamburgers, cheeseburgers, french fried potatoes, fried pies, onion rings, malt and shake beverages, and frankfurter sandwiches” and “restaurant and drive-in restaurant services,” registered on the Principal Register on May 27, 1975.

- (d) Registration No. 1,011,928 – **WHATABURGER & W Design** for “hamburgers, cheeseburgers, french fried potatoes, fried pies, onion rings, malt and shake beverages, and frankfurter sandwiches” and “restaurant and drive-in restaurant services,” registered on the Principal Register on May 27, 1975.
- (e) Registration No. 1,014,196 – **WHATABURGER JR.** for “prepared hamburger sandwich for consumption on or off premises,” registered on the Principal Register on June 24, 1975.
- (f) Registration No. 1,116,918 – **WHATAMEAL** for “prepared meal consisting of a hamburger sandwich, french fries and a beverage for consumption on or off the premises,” registered on the Principal Register April 24, 1979.
- (g) Registration No. 1,206,344 – **WHATACATCH** for “breaded fish fillets suitable for fish sandwiches” and “prepared fish sandwich for consumption on or off the premises,” registered on the Principal Register August 24, 1982.
- (h) Registration No. 2,160,285 – **WHATACHICK’N** for “chicken sandwich,” registered on the Principal Register May 26, 1998.
- (i) Registration No. 2,335,590 – **WHATABURGER** for “restaurant services,” registered on the Principal Register March 28, 2000.
- (j) Registration No. 2,372,372 – **WHATAKIDS** for “clothing for children, namely, shirts, polo shirts, t-shirts, dresses, overalls, onesies, baseball caps and hats,” registered on the Principal Register August 1, 2000.
- (k) Registration No. 2,418,380 – **WHATAGUY** for “restaurant services,” registered on the Principal Register January 2, 2000.
- (l) Registration No. 2,432,191 – **WHATAKIDS** for “restaurant services,” registered on the Principal Register February 27, 2001.
- (m) Registration No. 2,519,854 – **WHATACOMIX** for “comic books and children’s activity books,” registered on the Principal Register December 18, 2001.
- (n) Registration No. 2,534,527 – **WHATAPLACE! WHATATASTE!** for “restaurant services,” registered on the Principal Register January 29, 2002.
- (o) Registration No. 2,757,109 – **WHATABURGER** for “charitable fundraising services,” registered on the Principal Register August 26, 2003.
- (p) Registration No. 2,846,139 – **WHATABLENDERS** for “milk shake drinks, bases for milk shake drinks and candy flavored toppings,” registered on the Principal Register May 25, 2004.

- (q) Registration No. 3,185,230 – **WHATASIZE** for “restaurant services featuring a prepared meal containing french fries and a soft drink for consumption on or off the premises,” registered on the Principal Register December 19, 2006.
- (r) Registration No. 3,188,132 – **WHATABURGER FIELD** for “providing stadium facilities for sporting events, exhibitions, conventions, community festival events and concerts,” registered on the Principal Register December 19, 2006.
- (s) Registration No. 3,188,136 – **WHATABURGER FIELD & Design** for “providing stadium facilities for sporting events, exhibitions, conventions, community festival events and concerts,” registered on the Principal Register December 19, 2006.

8. Many of Opposer’s pleaded registrations are incontestable as to the products and services listed therein and are conclusive evidence of the validity of the registered marks, Opposer’s ownership thereof, and of Opposer’s exclusive right to use the marks in commerce on or in connection with the products and services identified in the registrations.

9. Opposer has invested substantial sums advertising and promoting sales of its goods and services under its WHATABURGER and WHATA marks. By reason of Opposer’s extensive, exclusive and continuous use of its WHATABURGER and WHATA marks, the relevant consuming public has come to recognize the WHATABURGER and WHATA marks as being used by Opposer and to associate and identify the WHATABURGER and WHATA marks with Opposer. Opposer has obtained and enjoys an exceedingly valuable reputation and goodwill symbolized by the WHATABURGER and WHATA marks.

10. The constructive and actual dates of first use of Opposer’s WHATABURGER and WHATA marks precede the filing date of the opposed application.

11. On information and belief, Applicant has adopted and commenced use of the designation WHATTA WING! in connection with restaurant services.

12. Applicant's services are identical to Opposer's restaurant services and closely related to Opposer's food products. Applicant's services, moreover, are not restricted as to types of customers and channels of trade.

13. The designation WHATTA WING! so resembles Opposer's WHATABURGER and WHATA marks in terms of appearance, sound, connotation and commercial impression as to be likely, when applied to Applicant's services, to cause confusion and mistake and to deceive.

14. The designation WHATTA WING! is confusingly similar to Opposer's WHATABURGER and WHATA marks so that registration of the designation would be inconsistent with and damaging to Opposer's exclusive and prior rights in its registered marks in connection with the products and services with which they are used.

15. Any defect, objection or fault found with any service or food product sold under the designation WHATTA WING! would injure the valuable reputation and goodwill Opposer has established for its products and services sold under its WHATABURGER and WHATA marks.

16. Opposer will be damaged by registration of Applicant's proposed designation.

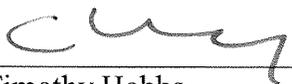
WHEREFORE, Opposer prays that its opposition be sustained and that the opposed mark be denied registration.

Opposer hereby authorizes the filing fee of THREE HUNDRED DOLLARS (\$300.00) and any additional charges necessary to institute this proceeding in two classes to be debited from the deposit account of Wiley Rein, Account No. 501129.

This opposition is being filed by the undersigned attorneys at law, duly authorized to represent Opposer in this proceeding, pursuant to Trademark Rule 2.101(b).

Respectfully submitted,

WHATABURGER PARTNERSHIP

By: 

J. Timothy Hobbs
Christopher Kelly
Jennifer Elgin
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Attorneys for Whataburger Partnership

Dated: February 26, 2009

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