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

Proceeding	91206921
Party	Plaintiff Rich Products Corporation
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In the Matter of Application Serial No. 85/577,551
For the Mark: BETTER ON TOP!

Rich Products Corporation,)	
)	
Opposer,)	Opposition No. 91206921
)	
v.)	
)	
VegiPro Brands, LLC,)	
)	
Applicant.)	
)	
_____)	

**OPPOSER’S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN
SUPPORT THEREOF**

Opposer, Rich Products Corporation (hereinafter “RPC” or “Opposer”), moves for summary judgment on its Notice of Opposition filed against VegiPro Brands, LLC, (hereinafter “VegiPro” or “Applicant”) under Fed. R. Civ. P. 56 as made applicable to these proceedings and under 37 C.F.R. § 2.116(a). Based on the material facts as to which there are no genuine issues to be tried, as a matter of law, Opposition No. 91206921 should be sustained and registration of Application Serial No. 85/577,551 should be refused.

I. INTRODUCTION

To protect its legal rights in the ON TOP trademark and prevent consumer confusion, RPC filed a Notice of Opposition to VegiPro’s Application Serial No. 85/577,551. The application at issue is an intent-to-use application to register BETTER

ON TOP! reciting goods as “whipped topping.” The opposition should be sustained since 1) RPC has priority of use and registration of the ON TOP mark; 2) the BETTER ON TOP! mark is confusingly similar to ON TOP; and 3) the goods associated with each mark are identical.

Timing is proper for the filing of a motion for summary judgment since RPC’s testimony period has not yet commenced. 37 CFR § 2.127 (e)(1); TBMP § 528.02. This Motion for Summary Judgment is made on the grounds that there is a likelihood of confusion as a matter of law.

As will be conclusively demonstrated below, there is no genuine issue of material fact raised as to the priority of use or to the likelihood of confusion as determined by the pertinent *DuPont* factors. Upon balancing of these factors, RPC is entitled to summary judgment, as a matter of law, on the ultimate issue of refusal of the registration of the BETTER ON TOP! mark.

Petitioner’s motion is supported by:

- I. Declaration of Erica Frank.
- II. Declaration of Diane Jacquinot.
- III. Pleadings herein.

II. STATEMENT OF UNCONTROVERTED FACTS

RPC is a corporation organized and existing under the laws of Delaware, with a principal place of business at One Robert Rich Way, Buffalo, New York 14213. RPC is the owner of the marks ON TOP, ON TOP w/Design and RICH’S ON TOP (the “ON

TOP” marks). RPC has used the ON TOP marks for “non-dairy whipped topping” since at least as early as 1986. *See, e.g.,* Frank Decl. ¶ 4.

RPC owns the following U.S. Trademark Registrations which are listed on the Principal Register:

Mark	Filing Date	Reg. Date	Reg. No.
ON TOP	02/28/94	03/07/99	1882377
RICH’S ON TOP	08/28/87	07/19/88	1496918
ON TOP w/Design	07/26/11	09/25/12	4215194

All of these registrations list “non-dairy whipped topping” in International Class 29. All are valid and in force. The ‘377 and ‘918 registrations are incontestable. *See, e.g.,* Jacquinet Decl. ¶ 2, Ex. A.

RPC has used the mark ON TOP in association with whipped toppings long prior to the filing date of Applicant’s trademark application. RPC has continuously used ON TOP to identify its products since at least as early as 1986 and continues such use to this day. *See, e.g.,* Frank Decl. ¶ 4. Since long prior to the filing date of Applicant’s trademark application for BETTER ON TOP!, RPC has extensively advertised and promoted its products under the ON TOP trademarks and continues to advertise, market, and promote its ON TOP whipped topping to the relevant consuming public and the trade through a variety of ways. For example, RPC promotes its ON TOP whipped topping products on the internet via its website, www.richs.com. *See, e.g.,* Frank Decl. ¶ 6, Ex. B.

III. THIS OPPOSITION IS RIPE FOR SUMMARY JUDGMENT

Summary judgment is appropriate in a trademark opposition proceeding where, as here, there are no genuine issues of material fact to be tried. In *Pure Gold, Inc. v. Syntex (U.S.A.), Inc.*, 222 U.S.P.Q. 741 (Fed. Cir. 1984), the TTAB's grant of summary judgment in an opposition proceeding was affirmed. The Federal Circuit, in citing *Exxon Corp. v. National Foodline Corp.*, 198 U.S.P.Q. 407, 408 (CCPA 1978), explained that the basic purpose of summary judgment is that of judicial economy. It is against the public interest to conduct useless trials. Summary judgment is favored over enduring the time and expense of a full trial.

In Pure Gold v. Syntex (U.S.A.), Inc., 222 U.S.P.Q. at 744, n.2., the Federal Circuit encouraged the disposition of matters before the TTAB by summary judgment:

The practice of the US Claims Court and of the former U.S. Court of Claims in routinely disposing of numerous cases on the basis of cross-motions for summary judgment has much to commend it. The adoption of similar practice is to be encouraged in inter partes cases before the Trademark Trial and Appeal Board, which seem particularly suitable to this type of disposition. Too often we see voluminous records which would be appropriate to an infringement or unfair competition suit but are wholly unnecessary to resolution of the issue of registrability of a mark.

IV. RPC IS ENTITLED TO SUMMARY JUDGMENT

A. Likelihood of Confusion Exists as a Matter of Law

RPC moves for summary judgment on the issue of likelihood of confusion, as will be discussed more fully below, there is no genuine issue of fact that:

1. The ON TOP mark was previously used and registered in the United States by RPC; and
2. There is a likelihood of confusion between the ON TOP mark used by RPC on “non-dairy whipped topping” and the BETTER ON TOP! mark used on “whipped topping.”

Standing to file a complaint requires that the petitioner has a real interest in the proceeding, and a reasonable basis for its belief that it would suffer some kind of damage if the mark is registered. Standing exists, for example, where opposer pleads (and later proves): (1) a claim of likelihood of confusion that is not wholly without merit. See TBMP § 309.03(c) and J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, §§ 20:13 *et seq.* (4th ed. 2001); or (2) opposer has been refused registration of its mark because of the subject application. See *Cerveceria Modelo S.A. de C.V. v. R.B. Marco & Sons, Inc.*, 55 U.S.P.Q.2d 1298, 1300 (TTAB 2000) and *The Hartwell Co. v. Shane*, 17 U.S.P.Q.2d 1569, 1570 (TTAB 1990).

Any person who believes that he, she or it is or will be damaged by a registration may file an opposition, addressed to the Trademark Trial and Appeal Board, for cancellation of the registration in whole or in part. See, *e.g.*, 37 C.F.R. §2.111(b). An opposition may raise any available statutory ground for cancellation that negates the registrant's right to registration. See *Young v. AGB Corp.*, 152 F.3d 1377, 47 U.S.P.Q.2d 1752, 1754 (Fed. Cir. 1998); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185, 189 (CCPA 1982); and *Estate of Biro v. Bic Corp.*, 18 U.S.P.Q.2d 1382, 1386 (TTAB 1991). Section 2 of the Lanham Act provides a cause of action to refuse registration of a trademark on the Principal Register. Refusal is

warranted if (1) the mark consists of or comprises a mark or trade name previously registered or used in the United States by another and (2) is likely to cause confusion when used on or in connection with the goods of the applicant. See, e.g., § 2 Trademark Act of 1946 (15 U.S.C. 1052(d)). See also, e.g., *Opryland USA Inc. v. The Great American Music Show Inc.*, 970 F.2d 847, 23 U.S.P.Q.2d 1471, 1473 (Fed. Cir. 1992) and *Time Warner Entertainment Co. v. Jones*, 65 U.S.P.Q.2d 1650 (TTAB 2002).

B. The ON TOP Mark is Registered and Used in the United States by RPC

1. RPC Owns the ON TOP mark

Ownership rights flow from prior appropriation and use in the marketplace—not registration. See *In re ECCS, Inc.*, 94 F.3d 1578 (Fed. Cir. 1996). RPC has been using the ON TOP mark since at least 1986 and such use has been continuous through the present day. See, e.g., Frank Decl. ¶ 4. By its prior appropriation and use of ON TOP, RPC is the owner of the ON TOP mark.

2. RPC Has Demonstrated Prior Use of ON TOP

Priority of use exists when a petitioner makes a showing of proprietary rights prior to applicant's rights in the challenged mark. See TBMP § 309.03(c). See also *Herbko Int'l Inc. v. Kappa Books, Inc.*, 64 U.S.P.Q.2d 1375, 1378 (Fed. Cir. 2002); and *Cunningham v. Laser Golf Corp.*, 55 U.S.P.Q.2d 1842 (Fed. Cir. 2000). Proprietary rights can arise from, among other things, a prior registration or prior trademark use. See *Herbko Int'l Inc.*, 64 U.S.P.Q.2d at 1378; and *Otto*

Roth & Co. v. Universal Foods Corp., 209 U.S.P.Q. 40, 43 (CCPA 1981). As discussed above, RPC owns three registrations for the ON TOP marks: ON TOP (Reg. No. 1882377), RICH'S ON TOP (Reg. No. 1496918), and ON TOP w/Design (Reg. No. 4215194). These registrations were placed into evidence with the First Amended Notice of Opposition and are further supported by the Jacquinet Decl. ¶ 2, Ex. A. These registrations are prima facie evidence of RPC's ownership of the ON TOP marks and of the exclusive right to use the registered marks in commerce and in connection with the goods specified in the registrations, i.e., non-dairy whipped topping. See Lanham Act, § 33(a), 15 U.S.C. § 1115(a). Moreover, RPC has used ON TOP as a trademark since at least 1986. Frank Decl. ¶ 4.

By virtue of its registrations with filing dates and use as a trademark prior to any date of first use on which applicant can rely, priority is not an issue with respect to the mark ON TOP in association with whipped topping, as covered by RPC's registrations. See *Top Tobacco LP v. North Atlantic Operating Co.*, 101 U.S.P.Q.2d 1163, 1169 (TTAB 2011); *King Candy, Inc. v. Eunice King's Kitchen, Inc.*, 182 USPQ 108 (CCPA 1974). Therefore, RPC has established priority to the ON TOP mark and thus the requisite standing to assert likelihood of confusion.

C. There is a Likelihood of Confusion Between the ON TOP Mark and the BETTER ON TOP! Mark

Pursuant to Section 2 of the Lanham Act, 15 U.S.C.A. § 1052, no trademark by which the goods of an applicant may not be distinguished from the goods of others shall be registered on the principal register on account of its nature if it consists of or

comprises a mark which so resembles a mark registered in the Patent and Trademark Office "...as to be likely, when applied to the good of the applicant to cause confusion, or to cause mistake or to deceive..." 15 U.S.C.A. § 1052. Likelihood of confusion is determined on a case-by-case basis by application of the factors identified in *In re E.I. DuPont DeNemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973).¹ Only those *DuPont* factors that are shown to be material or relevant in the particular cause are properly considered in adjudicating likelihood of confusion. *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 16 U.S.P.Q.2d 1783 (Fed. Cir. 1990) (affirming a final decision by the Board granting Opposer's motion for summary judgment and refusing registration of Applicant's mark "Octocom" for modems because of the likelihood of confusion with Opposer's registered trademark "Octacomm" for computer programs). It is well settled that if the issue of likelihood of confusion is in doubt, the question will be resolved in favor of the *senior user*, in this case RPC. 3 *McCarthy on Trademarks and Unfair Competition* § 23:64 (1999); *J & J Snack Foods Corp. v. McDonald's Corp.*, 18 U.S.P.Q.2d 1889 (Fed. Cir. 1991) ("The newcomer has the clear opportunity, if not the obligation, to avoid confusion with well-known marks of others.").

Time and time again, the Board has held that where, as here, the goods involved are identical, "the sole question to be determined" for establishing likelihood of confusion "is whether the marks...are sufficiently similar so that their use on identical goods would be likely to cause confusion as to source." *Kabushiki Kaisha Hattori*

¹ (1) Similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression; (2) Similarity and nature of the goods and services; (3) Similarity of established, likely to continue channels of trade; (4) Conditions under which and to whom sales are made, i.e. "impulse" vs. careful, considered purchases; (5) Fame of the prior mark (sales, advertising, length of use); (6) number and nature of similar marks in use on similar goods; (7) Nature and extent of any actual confusion; (8) Length of time and conditions under which there has been concurrent use without evidence of actual confusion; (9) Variety of goods on which a mark is used; (10) Market interface between applicant and the owner of a prior mark; (11) Extent to which applicant has a right to exclude others from use of its mark on the goods; (12) Extent of potential confusion; i.e., de minimis or substantial; and (13) Any other established fact probative of the effect of use.

Tokeiten v. Scutto, 228 U.S.P.Q. 461, 462 (T.T.A.B. 1985) (emphasis added) (application to register “Seycos” for watches refused because of similarity in appearance and pronunciation with Opposer’s registered trademark for “Seiko” for identical goods); see also *Bottega Veneta, Inc. v. Volume Shoe Corporation, et al.*, 226 U.S.P.Q. 964 (T.T.A.B. 1985) (application to register “Borsa Veneto” for handbags refused because of the resemblance to Orvis’s trademark “Bottega Veneta” for identical goods); *Jules Berman & Assoc., Inc. v. Consolidated Distilled Products, Inc.*, 202 U.S.P.Q. 67 (T.T.A.B. 1979) (application to register “Chula” for liqueurs refused because of similarity in appearance and sound with Orvis’s trademark “Kahlua” for identical goods).

As detailed below, RPC’s ON TOP trademark and Applicant’s BETTER ON TOP! mark are strikingly similar with respect to appearance, commercial impression, and sound. Accordingly, the Board should enter judgment in RPC’s favor on this basis alone. Nevertheless, RPC’s evidence and discussion with respect to other relevant *DuPont* factors, such as channels of trade, the fame of the ON TOP mark, and RPC’s right to exclude others from using the ON TOP mark, further reinforces the inescapable conclusion that there is a likelihood of confusion between Applicant’s BETTER ON TOP! mark and the ON TOP Trademark.

1. The Marks are Similar with Respect to Appearance and Sound (DuPont Factor 1)

In comparing the similarities of the marks, the Board considers the marks in their entirety in terms of appearance, sound, connotation and commercial

impression. *Brown Shoe Co. v. Robbins*, 90 U.S.P.Q.2d 1752, 1755 (T.T.A.B. 2009). The appropriate test is “not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result.” *Id.*

However, “there is nothing improper in giving more weight to certain features of the mark,” and highly descriptive features are less significant in creating the commercial impression of a mark. *In re Code Consultants*, 60 U.S.P.Q.2d 1699, 1702 (T.T.A.B. 2001). *See also In re National Data Corp.*, 224 U.S.P.Q. 749, 752 (Fed. Cir. 1985) (Giving less weight to a descriptive component of a mark reflects the market place reality that consumers recognize a descriptive portion of a mark when it is being used as ordinary descriptive speech, therefore the “public can be said to rely more on the non-descriptive portion.”). Furthermore, according to the Board “there is a general rule that a subsequent user may not appropriate another’s entire mark and avoid likelihood of confusion therewith by merely adding descriptive or otherwise subordinate matter to it.” *In re Rexel*, 223 U.S.P.Q. 830, 831 (T.T.A.B. 1984). This is such a case.

Applicant’s mark is nearly identical to RPC’s mark, the only difference being the addition of the descriptively laudatory word “BETTER” to “ON TOP”. “Better” is defined as “higher in quality, more skillful, more attractive, appealing, effective, useful, etc.” *See, e.g.,* Jacquinot Decl. ¶ 3, Ex. B. The word “BETTER”

in Applicant's mark describes Applicant's goods by attributing a higher quality to them. As such, BETTER is being used as a descriptive, nondistinctive, laudatory term that should be disclaimed from the mark. *In re Wileswood, Inc.*, 201 U.S.P.Q. 400, 402 (T.T.A.B. 1978) (Laudatory marks are descriptive, and in the absence of secondary meaning, are not capable for trademark protection) (citations omitted).

As such, if a consumer encountered whipped toppings respectively labeled ON TOP and BETTER ON TOP!, the consumer would rely more on the ON TOP portion of the marks and disregard the descriptive BETTER portion. The addition of the word BETTER is simply not enough to diminish the similarity of the overall commercial impression of the marks. Therefore, likelihood of confusion cannot be avoided based on the addition of the word BETTER to RPC's ON TOP Trademark for the identical goods.

Alternatively and to the extent a consumer might rely on the "BETTER" portion of Applicant's mark, the consumer would recognize it as a descriptive term which "merely informs the [consumer] of an alleged quality of the product." *Wileswood* 201 U.S.P.Q. at 402 (quoting McCarthy's on Trademarks and Unfair Competition, § 11:5 Vol. 1 pp. 353-354 (1973)). As such, a consumer encountering whipped toppings respectively labeled "ON TOP" and "BETTER ON TOP!," would get the commercial impression that "the latter is the product of the manufacturer of the former but of better quality..." *In re Electro-Voice, Inc.*, 148 U.S.P.Q. 616, 617 (T.T.A.B. 1966) (applying the same analysis to and finding a likelihood of confusion between the marks AMERICAN and AMERICAN ELITE

for microphones). As previously mentioned, the addition of the word “BETTER” does not provide a sufficient basis for consumers to diminish the similarity of the overall commercial impression of the marks and obviate a likelihood of confusion. Thus, confusion is likely.

Moreover, the Board has held that “when...the products involved are identical in kind...and move in the same trade channels to the same classes of purchasers, the degree of similarity required between the words to sustain a claim of likelihood of confusion is less than otherwise needed in situations involving dissimilar, non-competing products. *Jules Berman & Assoc., Inc. v. Consolidated Distilled Products, Inc.*, 202 U.S.P.Q. 67, 70 (T.T.A.B. 1979). Thus, based on sound and appearance alone – and without regard to connotation or commercial impression – the two marks should be deemed confusingly similar.

2. *The Goods Are Identical (DuPont Factor 2)*

The marks at issue are both utilized in association with the same good, whipped topping. As noted above, RPC registered the ON TOP mark in association with non-dairy whipped topping. Similarly, Applicant’s statement of goods for the BETTER ON TOP! mark consists of whipped topping. Non-dairy whipped topping is included in the breadth of whipped topping. Therefore, the goods are identical and this factor favors a finding of likelihood of confusion.

3. *The Established and Likely to Continue Channels of Trade are Similar (DuPont Factor 3)*

As previously stated, the goods involved—whipped topping—are identical and unrestricted. As such, they would logically appear in close proximity to one another when offered to relevant consumers. Additionally, the goods being legally identical with no limitations in either RPC’s registration or Applicant’s subject application, the Board “must presume that Applicant’s and RPC’s goods will be sold in the same channels of trade and will be bought by the same classes of purchasers.” *Brown Shoe Co.*, 90 U.S.P.Q.2d at 1754-55. Because ON TOP is whipped topping presumed to be sold in the same channels of trade that BETTER ON TOP! whipped topping would be sold in, confusion is likely.

**4. Whipped Topping Purchasers are Impulse Purchasers
(DuPont Factor 4)**

Non-dairy whipped topping and whipped topping are simple consumer foods items. They are inexpensive and may potentially be purchased on impulse by ordinary consumers because “purchasers of low-cost, ordinary consumer items exercise less care in their purchasing decisions.” *General Mills Inc. v. Fage Dairy Processing Industry SA*, 100 U.S.P.Q.2d 1584, 1600 (T.T.A.B. 2011). Therefore, these purchasers “are more likely to be confused as to the source of the goods.” *Id.* Even if the purchasers of both RPC’s and Applicant’s whipped toppings could be considered sophisticated, discerning customers, “where the parties share the same source identifying word [e.g., ON TOP,]” such purchasers are still “likely to view the marks as indicating a single source when they are used on identical...goods.” *Hunter Indus., Inc. v. Toro Co.*, 110

U.S.P.Q.2d 1651, 1662-63 (T.T.A.B. 2014). Accordingly, this factor weighs in favor of confusion.

5. *Because of Its Longstanding Use, the ON TOP Trademark Should be Considered Famous Trademarks (DuPont Factor 5)*

The fame of the senior user's mark is evidenced by such factors as sales, advertising and length of use. *DuPont*, 177 U.S.P.Q. at 567. With respect to length of use, ON TOP was used in the United States for 28 years (since 1986). See, e.g., Frank Decl. ¶¶ 4-7. Since that time, RPC has used the ON TOP trademark in commerce in the United States in connection with whipped topping. See, *Id.* at 4. As a result of this longstanding use, the ON TOP mark has become well-known and sought after by whipped topping consumers in at least the foodservice, in-store bakery, and cash-and-carry retail marketplaces. See, e.g., Frank Decl. ¶¶ 5-6, Exs. A and B. Hence, this factor weighs heavily in favor of likelihood of confusion.

6. *ON TOP is Used as a Trademark for Whipped Topping Only by RPC (DuPont Factor 6)*

ON TOP is used exclusively by RPC as a trademark for non-dairy whipped topping. See, e.g., Frank Decl. ¶¶ 4-17. Other marks used with whipped topping are easily distinguished from ON TOP. Thus, the relevant consumers are

accustomed to seeing ON TOP products from RPC and only RPC. This factor weighs in favor of a likelihood of confusion.

7. *The Absence of Actual Confusion is Irrelevant (DuPont Factor 7)*

RPC is unaware of any instances of actual confusion between ON TOP and BETTER ON TOP!. This factor does not weigh against a likelihood of confusion, however, because the Board has held that “evidence of actual confusion is often hard to come by and need not be proved to find likelihood of confusion under Section 2(d).” *MSI Data Corp. v. Microprocessor Systems, Inc.*, 220 U.S.P.Q. 655, 659 (T.T.A.B. 1983). This is particularly true in light of Applicant’s admission in its Answer that prior to March 22, 2012, Applicant did not make interstate commerce use of its BETTER ON TOP! mark in connection with whipped topping. Furthermore, the subject application is an intent-to-use application. Applicant has not verified use of the mark in either an amendment to allege use or a statement of use. As such, Applicant’s whipped topping could have only been on the market for a short time, if at all, leaving almost no opportunity for actual confusion. Thus, this factor should not weigh against likelihood of confusion.

8. *RPC has the Right to Exclude Others from Use of Its Mark on Whipped Topping and Other Products (DuPont Factor 11)*

RPC owns three Principal Register Registrations of ON TOP for non-dairy whipped topping. Ownership of a certificate of registration is prima facie evidence of the owner's exclusive right to use the registered mark in commerce on or in connection with the good specified in the registration. See Lanham Act, § 33(a), 15 U.S.C. § 1115(a). See also *Park 'N Fly v. Dollar Park and Fly, Inc.*, 224 USPQ 327, 330 (1985); and *In re Hartz Hotel Services Inc.*, 102 USPQ2d 1150, 1152 (TTAB 2012). Therefore, ownership of these registrations gives RPC prima facie exclusive rights to use the ON TOP marks in association with non-dairy whipped topping. Moreover, RPC has even earlier common law rights in its ON TOP marks dating back over 28 years. RPC enjoys substantially exclusive use of ON TOP in association with whipped toppings throughout the United States. Frank Decl. ¶ 4. RPC has the right to exclude others from use of ON TOP on these goods. This factor supports a finding of likelihood of confusion.

9. The Potential for Future Confusion is Likely (DuPont Factor 12)

In light of the identical nature of the goods, the striking similarity between the marks as to sound, appearance, and commercial impression (differing only by the laudatory term BETTER), the legally presumed identical channels of trade, the fame of the ON TOP Trademark, and RPC's enjoyment in substantially exclusive use of ON TOP, RPC respectfully submits that the potential for future confusion is substantial.

Because all relevant *DuPont* factors favor likelihood of confusion, RPC respectfully requests that the Board issue an order entering judgment against VegiPro Brands, LLC, with prejudice, sustaining this opposition and refusing registration of Application Serial No. 85/577,551.

V. CONCLUSION

For the foregoing reasons, there are no genuine issues of material fact to be tried. RPC is entitled to summary judgment as a matter of law. RPC therefore requests that the Trademark Trial and Appeal Board grant its Motion for Summary Judgment on the issue of likelihood of confusion and refuse registration of application 85/577,551.

Dated: January 23, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2015, the foregoing **OPPOSER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF** was filed electronically. Notice of this filing was served by First Class Mail, postage prepaid, on the following attorney for Applicant:

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RICH 701110US01 782685 1

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

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For the mark BETTER ON TOP!
Published in the *Official Gazette* on August 14, 2012

Rich Products Corporation,)	
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v.)	
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VegiPro Brands, LLC,)	
)	
Applicant.)	
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DECLARATION OF ERICA FRANK

I, Erica Frank, hereby declare as follows:

1. I am over the age of 18, competent to make this declaration, and I am familiar with the facts stated below. I offer this declaration in support of Opposer's Motion for Summary Judgment.

2. I have worked at Rich Products Corporation ("RPC") for nine (9) years. Currently, I am the Manager, IP for RPC. I am familiar with the marketing and advertising of RPC's whipped topping products including its ON TOP line of whipped topping.

3. RPC is the owner of the following United States trademark registrations:

Reg. No.	Mark	Goods
1882377	ON TOP	Non-dairy whipped topping
1496918	RICH'S ON TOP	Non-dairy whipped topping
4215194	ON TOP w/Design	Non-dairy whipped topping

Collectively these registered marks will be referred to as RPC's ON TOP Marks.

4. RPC has used ON TOP as a trademark for its non-dairy whipped topping since at least as early as 1986 and continuously through the present day. RPC has sold its ON TOP whipped topping across the United States for many years and since well prior to March 22, 2012, the Applicant's intent-to-use filing date.

5. Photographs of product packaging bearing the ON TOP Marks are attached as Exhibit A. RPC has prominently marked its whipped topping packaging with its ON TOP Marks since at least as early as 1986 and well prior to Applicant's March 22, 2012 filing date.

6. RPC spends significant time, effort and money in marketing its products including through print and on the internet. Sample marketing materials, website pages and advertisements for RPC's ON TOP product are attached as Exhibit B. Similar types of print and electronic advertisements to promote ON TOP whipped topping have been used by RPC since well prior to March 22, 2012, the Applicant's filing date.

7. RPC's products bearing its ON TOP Marks are sold throughout the United States. The products are sold to consumers via multiple channels including through cash and carry stores, foodservice distribution, independent bakeries, industrial clients and in-store bakeries with supermarkets. Expansion of the trade channels to additional consumer oriented stores is contemplated.

The matters stated in this declaration are true and accurate to the best of my personal knowledge. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States that that the foregoing is true and correct.

Date: January 20, 2015

Erica Frank
Erica Frank

RICH 701110US01 (789233.1)

Opposition No. 91206921

Frank Exhibit A







Opposition No. 91206921

Frank Exhibit B



love AT FIRST SIP

With an irresistibly fresh and creamy taste, On Top® Whipped Topping is the easy way to make your beverages even better – and its consistent performance and high yield are pretty irresistible, too. Learn more at richfoodservice.com



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love AT FIRST SIP

On Top® Whipped Topping



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on top & other pre-whipped toppings

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ON TOP & OTHER PRE-WHIPPED TOPPINGS

On Top® is the perfect blend of performance, taste and value. Whether it's a hot dessert or an icy cold sundae or shake, On Top® delivers the perfect creamy finish customers are looking for. An On Top® dollop holds up longer than aerosol topping, and is also preferred in taste tests. Plus, On Top® provides 100% yield from every easy-to-open, easy-to-use bag. For just pennies a dollop, you can charge more for desserts and beverages. Available in original, natural, chocolate and sugar-free varieties for your topping needs.



on top & other pre-whipped toppings

PRODUCT LOCATOR

Zipcode

RICH'S GLUTEN FREE PRODUCTS



Request a sample pack of Rich's Gluten Free products. Each sample kit contains the basic foundation to create a variety of gluten free menu solutions – individual 10" pizza, 6" pre-sliced sub roll and a fudge brownie. Be prepared to delight your customers with exactly what they are looking for!

request a sample

**NON-DAIRY WHIPPED TOPPING (BOWL) - 01353**

Pre-whipped, non-dairy topping, with a light, creamy texture. Slightly less fat than On Top®. Packaged in 16 oz plastic tub.

**ON TOP® WHIPPED TOPPING CHOCOLATE - 01855**

Chocolate-flavored, pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 16-oz pastry bag with decorator tip and easy-open seal.

**ON TOP® WHIPPED TOPPING SUGAR FREE - 02090**

Sugar-free, pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 16-oz pastry bag with decorator tip and easy-open seal. For a child nutrition bid specification, please contact our Helpline at 1-800-356-7094 or email helpline@rich.com.

**ON TOP® WHIPPED TOPPING - 02559**

Pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 16-oz pastry bag with decorator tip and easy-open seal. For a child nutrition bid specification, please contact our Helpline at 1-800-356-7094 or email helpline@rich.com.

**ON TOP® WHIPPED TOPPING (8 OZ BAG) - 02567**

Pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 8-oz pastry bag with decorator tip and easy-open seal. For a child nutrition bid specification, please contact our Helpline at 1-800-356-7094 or email helpline@rich.com.

**RICH WHIP® NON-DAIRY WHIPPED TOPPING - PAIL - 06031**

Pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 10-lb pail. For a child nutrition bid specification, please contact our Helpline at 1-800-356-7094 or email helpline@rich.com.

**RICH'S® DESSERT TOPPING -- SIMPLE SERV™ - 06371**

Pre-whipped, non-dairy topping with a light, creamy texture, designed for use in Simple Serv™ machine. Packaged in 12-oz bags, 12 bags/case.

**ON TOP® WHIPPED TOPPING- TOP 'N GO™ - 06593**

Pre-whipped, non-dairy topping with a light, creamy texture, designed for use in Top 'N Go™ machine. Packaged in 20-oz bags, 6 bags/case.

**COOKIES 'N CRÈME ON TOP® MADE WITH OREO® - 07874**

Pre-whipped, non-dairy topping with a light, creamy texture and made with real Oreo® cookies. Packaged in 16-oz pastry bag with decorator tip and easy-open seal.

**ON TOP® WHIPPED TOPPING MADE WITH CREAM - 09073**

Pre-whipped topping made with a combination of dairy and non-dairy ingredients, for non-dairy stability and the taste of real cream. Packaged in 16-oz pastry bag with decorator tip and easy-open seal.

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ON TOP & OTHER PRE-WHIPPED TOPPINGS

On Top® Whipped Topping Chocolate



Chocolate-flavored, pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 16-oz pastry bag with decorator tip and easy-open seal.

specifications

Product Code	01855	Gross Case Weight	11.35 LB
Units Per Case	10	Net Case Weight	10 LB
Unit Weight	16 OZ	Case Dimensions	15.75 IN (L) x 11.812 IN (W) x 8.875 IN (H)
GTIN Case	10049800018553	Pallet	Tiers: 10 High: 8
GTIN Item	00049800018558	Kosher	DAIRY

PRODUCT LOCATOR

Zipcode

RICH'S GLUTEN FREE PRODUCTS



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request a sample

nutrition

Nutrition Facts

serving size: 2 TBSP (8 G)

Amount Per Serving

Calories: 25

Calories from Fat: 15

Per Serving % Daily Value *

total fat	1.5g	3%
saturated fat	1.5g	8%
trans fat	0g	
cholesterol	0mg	0%
sodium	5mg	8%
carbohydrates	3g	1%
dietary fiber	0g	0%
sugars	2g	
protein	0g	

Included Recipes

Cherry Chocolate Shake

Double Chocolate Semifreddo

Turtle Pancakes

ingredients

WATER, HIGH FRUCTOSE CORN SYRUP, PARTIALLY HYDROGENATED PALM KERNEL OIL, SUGAR, COCOA ALKALI PROCESSED, CONTAINS LESS THAN 2% OF THE FOLLOWING: *SODIUM CASEINATE (A MILK DERIVATIVE), DEXTROSE, ARTIFICIAL FLAVOR, POLYSORBATE 60, SORBITAN MONOSTEARATE, SALT, GUAR GUM, XANTHAN GUM. * NOT A SOURCE OF LACTOSE CONTAINS MILK

allergens

milk

storage

Shelf life

- Frozen: 365 days
- Refrigerated: 2 weeks (unopened)
- Ambient: 0 days

tips & handling

KEEP REFRIGERATED

STORAGE

- ARRIVES FROZEN.
- THAW IN REFRIGERATOR OVERNIGHT AS NEEDED.
- NEVER REFREEZE.
- COVER TIP WITH STORAGE CAP PROVIDED.

SHELF LIFE

1 YEAR FROZEN 2 WEEKS REFRIGERATED

1. OPEN BAG ON DOTTED LINE
2. PUSH THROUGH PERFORATION TO POSITION THE TIP
3. TWIST TOP OF BAG 4. SQUEEZE & TWIST TOP OF BAG TO DISPENSE SEAL

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ON TOP & OTHER PRE-WHIPPED TOPPINGS

On Top® Whipped Topping



Pre-whipped, non-dairy topping with a light, creamy texture. Packaged in 16-oz pastry bag with decorator tip and easy-open seal. For a child nutrition bid specification, please contact our Helpline at 1-800-356-7094 or email helpline@rich.com.

specifications

Product Code	02559	Gross Case Weight	13.32 LB
Units Per Case	12	Net Case Weight	12 LB
Unit Weight	16 OZ	Case Dimensions	15.812 IN (L) x 11.812 IN (W) x 9.125 IN (H)
GTIN Case	10049800025599	Pallet	Tiers 9 High: 9
GTIN Item	00049800025592	Kosher	DAIRY

PRODUCT LOCATOR

Zipcode

nutrition

Nutrition Facts

serving size: 2 TBSP (8 G)

Amount Per Serving

Calories: 25
 Calories from Fat: 15

		Per Serving % Daily Value *
total fat	2g	3%
saturated fat	2g	9%
trans fat	0g	
cholesterol	0mg	0%
sodium	0mg	9%
carbohydrates	2g	1%
dietary fiber	0g	0%
sugars	2g	
protein	0g	

ingredients

WATER, HIGH FRUCTOSE CORN SYRUP, PARTIALLY HYDROGENATED PALM KERNEL OIL, CONTAINS LESS THAN 2% OF THE FOLLOWING: *SODIUM CASEINATE (A MILK DERIVATIVE), DEXTROSE, ARTIFICIAL FLAVOR, POLYSORBATE 60, SORBITAN MONOSTEARATE, GUAR GUM, XANTHAN GUM, COLORED WITH TURMERIC AND ANNATTO EXTRACTS. * NOT A SOURCE OF LACTOSE CONTAINS MILK

allergens

milk

storage

Shelf life

- Frozen: 365 days
- Refrigerated: 2 weeks (unopened)

tips & handling

KEEP REFRIGERATED

STORAGE: ARRIVES FROZEN. THAW IN REFRIGERATOR OVERNIGHT AS NEEDED. NEVER REFREEZE. COVER TIP WITH STORAGE CAP PROVIDED.

SHELF LIFE: 1 YEAR FROZEN 2 WEEKS THAWED AND REFRIGERATED

1. OPEN BAG ON DOTTED LINE
2. PUSH THROUGH PERFORATION TO POSITION THE TIP
3. TWIST TOP OF BAG
4. SQUEEZE & TWIST TOP OF BAG TO DISPENSE

RICH'S GLUTEN-FREE PRODUCTS



Request a sample pack of Rich's Gluten Free products. Each sample kit contains the basic foundation to create a variety of gluten free menu solutions – individual 10" pizza, 6" pre-sliced sub roll and a fudge brownie. Be prepared to delight your customers with exactly what they are looking for!

request a sample



Pretty Please with Chocolate On Top®!

Long gone are the days of plain vanilla desserts! Consumers say, "Bring on the toppings!"

Regardless of whether your customers are ordering hot desserts, hot fudge sundaes, or icy cold shakes, Rich's Chocolate On Top® is the perfect way to "top it off" with the creamy goodness that sweets lovers crave!

Foodservice industry studies show that breakfast items are starting to invade dinner menus throughout the country. And it's not standard breakfast items like cream of wheat and sausage that are making the great leap...

"Rich's knows that consumers are clamoring for all things chocolate, from milkshakes, sundaes, pastas and moonas to pancakes, crepes and cookies. In fact, market research reveals that 60 percent of all consumers crave chocolate and regularly eat it in some form," said Kara Burke, Marketing Manager, Rich's Foodservice. "Our signature 'On Top' topping, in the classic chocolate flavor, is delivering sweet rewards for customers who are using these luscious confections as just the answer to consumer demand for chocolate."

Restaurants around the country are responding to consumer appetites for chocolate and other sweets in endlessly creative ways, and Rich's portfolio of flavored toppings and icings is proving a most-delicious way to wow those audiences.

"A rich, creamy dusting of Chocolate On Top adds a special touch to just about anything," Burke admitted. "After all, chocolate is everyone's favorite flavor."

Rich's cutting-edge technology and on-trend innovations are proven to have an impact on the customer's bottom line. As the only provider of colored, scented and flavored non-dairy toppings and icings, Rich's Foodservice ensures that customers can have heaps of deliciously distinctive ways to please their patrons.

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MORE VALUES STORIES



Rich's Digital "RED" Tool Clears Customer Path to Purchase

As a customer-centric organization, Rich's is always focused on supporting its customers in their efforts to build more sales and profits. "At the end of the day, this is a people business, and without strong relationships that help customers become more successful in the marketplace...



Rich's Steps Up to Support Hurricane Sandy Relief Efforts: Donates \$100,000 worth of food and coordinates two truckloads full of donations

When Hurricane Sandy tore across the eastern US coast in late October it left thousands of families cold, hungry and homeless in its wake. The tragic events of that day stopped transportation, shutdown businesses and changed countless lives forever. As families begin to rebuild and...

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

In the Matter of Application Serial No. 85/577,551
For the Mark: BETTER ON TOP!

Rich Products Corporation,)	
)	
Opposer,)	Opposition No. 91206921
)	
v.)	
)	
VegiPro Brands, LLC,)	
)	
Applicant.)	
)	
_____)	

**DECLARATION OF DIANE M. JACQUINOT IN SUPPORT
OF OPPOSER RICH PRODUCTS CORPORATION’S MOTION FOR
SUMMARY JUDGMENT**

I, Diane M. Jacquinot, declare and state as follows:

1. I am a paralegal with the firm of Fay Sharpe LLP, attorneys for the Opposer, Rich Products Corporation (hereinafter “RPC”) and, as such, I am fully familiar with the facts and circumstances of this matter. I make this Declaration to authenticate materials that will be used in Opposer Rich Products Corporation’s Motion for Summary Judgment.

2. Attached to this Declaration as Exhibit A are copies of the RPC ON TOP trademark registrations that I downloaded from the USPTO Trademark Status and Document Retrieval (“TSDR”) database and the accompanying Trademark Electronic Search System (“TESS”) showing the current status of each RPC ON TOP trademark registration.

3. Attached to this Declaration as Exhibit B is the definition of the word “better” taken from the online Merriam-Webster dictionary. This definition can be authenticated at <http://www.merriam-webster.com/dictionary/better>.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on January 16, 2015.

/s/ Diane M Jacquinot
Diane M. Jacquinot

Opposition No. 91206921

Jacquinet Exhibit A

Int. Cl.: 29

Prior U.S. Cl.: 46

United States Patent and Trademark Office

Reg. No. 1,882,377

Registered Mar. 7, 1995

**TRADEMARK
PRINCIPAL REGISTER**

ON TOP

RICH PRODUCTS CORPORATION (DELA-
WARE CORPORATION)
1150 NIAGARA STREET
BUFFALO, NY 14213

FIRST USE 2-5-1986; IN COMMERCE
2-5-1986.

OWNER OF U.S. REG. NO. 1,496,918.

SER. NO. 74-494,842, FILED 2-28-1994.

FOR: NON-DAIRY WHIPPED TOPPING, IN
CLASS 29 (U.S. CL. 46).

CHARLES L. JENKINS, EXAMINING ATTOR-
NEY



United States Patent and Trademark Office

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Typed Drawing

Word Mark	ON TOP
Goods and Services	IC 029. US 046. G & S: non-dairy whipped topping. FIRST USE: 19860205. FIRST USE IN COMMERCE: 19860205
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	74494842
Filing Date	February 28, 1994
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	December 13, 1994
Registration Number	1882377
Registration Date	March 7, 1995
Owner	(REGISTRANT) Rich Products Corporation CORPORATION DELAWARE 1150 Niagara Street Buffalo NEW YORK 14213
Attorney of Record	Brian E. Turung
Prior Registrations	1496918
Type of Mark	TRADEMARK
Register	PRINCIPAL
Affidavit Text	SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20060710.
Renewal	1ST RENEWAL 20060710
Live/Dead Indicator	LIVE

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Int. Cl.: 29

Prior U.S. Cl.: 46

United States Patent and Trademark Office **Reg. No. 1,496,918**
Registered July 19, 1988

**TRADEMARK
PRINCIPAL REGISTER**

RICH'S ON TOP

RICH PRODUCTS CORPORATION (DELA-
WARE CORPORATION)
1150 NIAGARA STREET
BUFFALO, NY 14213

FIRST USE 2-5-1986; IN COMMERCE
2-5-1986.
OWNER OF U.S. REG. NOS. 926,957 AND
987,976.

FOR: NON-DAIRY WHIPPED TOPPING, IN
CLASS 29 (U.S. CL. 46).

SER. NO. 681,042, FILED 8-28-1987.
ROGER KATZ, EXAMINING ATTORNEY



United States Patent and Trademark Office

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Typed Drawing

Word Mark RICH'S ON TOP
Goods and Services IC 029. US 046. G & S: NON-DAIRY WHIPPED TOPPING. FIRST USE: 19860205. FIRST USE IN COMMERCE: 19860205
Mark Drawing Code (1) TYPED DRAWING
Serial Number 73681042
Filing Date August 28, 1987
Current Basis 1A
Original Filing Basis 1A
Published for Opposition April 26, 1988
Registration Number **1496918**
Registration Date July 19, 1988
Owner (REGISTRANT) RICH PRODUCTS CORPORATION CORPORATION DELAWARE ONE ROBERT RICH WAY BUFFALO NEW YORK 14213
Attorney of Record Brian E. Turung
Prior Registrations 0926957;0987976
Type of Mark TRADEMARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR). SECTION 8(10-YR) 20080826.
Renewal 1ST RENEWAL 20080826
Live/Dead Indicator LIVE

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United States of America

United States Patent and Trademark Office



Reg. No. 4,215,194

Registered Sep. 25, 2012

Int. Cl.: 29

TRADEMARK

PRINCIPAL REGISTER

RICH PRODUCTS CORPORATION (DELAWARE CORPORATION)
ONE ROBERT RICH WAY
BUFFALO, NY 14213

FOR: NON-DAIRY WHIPPED TOPPING, IN CLASS 29 (U.S. CL. 46).

FIRST USE 1-1-1986; IN COMMERCE 1-1-1986.

OWNER OF U.S. REG. NOS. 1,496,918 AND 1,882,377.

THE MARK CONSISTS OF THE WORDS "ON TOP" IN FRONT OF TWENTY-FOUR (24) HORIZONTAL LINES.

SN 85-380,953, FILED 7-26-2011.

DEIRDRE ROBERTSON, EXAMINING ATTORNEY



David J. Kyfos

Director of the United States Patent and Trademark Office



United States Patent and Trademark Office

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Word Mark	ON TOP
Goods and Services	IC 029. US 046. G & S: non-dairy whipped topping. FIRST USE: 19860101. FIRST USE IN COMMERCE: 19860101
Mark Drawing Code	(3) DESIGN PLUS WORDS, LETTERS, AND/OR NUMBERS
Design Search Code	26.13.12 - Quadrilaterals with bars, bands and lines
Serial Number	85380953
Filing Date	July 26, 2011
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	December 20, 2011
Registration Number	4215194
Registration Date	September 25, 2012
Owner	(REGISTRANT) Rich Products Corporation CORPORATION DELAWARE One Robert Rich Way Buffalo NEW YORK 14213
Attorney of Record	BRIAN E. TURUNG
Prior Registrations	1496918;1882377
Description of Mark	Color is not claimed as a feature of the mark. The mark consists of the words "ON TOP" in front of twenty-four (24) horizontal lines.
Type of Mark	TRADEMARK
Register	PRINCIPAL
Live/Dead Indicator	LIVE

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Opposition No. 91206921

Jacquinet Exhibit B



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?! Quiz
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Dictionary Thesaurus Medical Encyclo. **New! Spanish Central**

better

better

13 ENTRIES FOUND:

- better
- bettor
- good

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'bet-ter *adjective* \be-tar\

- : higher in quality
- : more skillful
- : more attractive, appealing, effective, useful, etc.

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Full Definition of BETTER

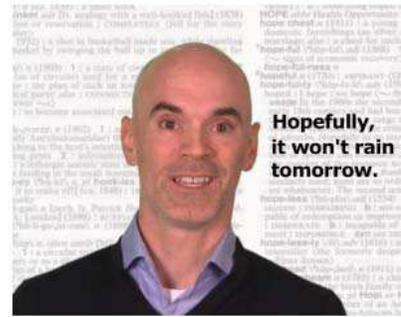
comparative of good

- 1 : greater than half <for the *better* part of an hour>
- 2 : improved in health or mental attitude <feeling *better*>
- 3 : more attractive, favorable, or commendable <in *better* circumstances>
- 4 : more advantageous or effective <a *better* solution>
- 5 : improved in accuracy or performance <building a *better* engine>

See *better* defined for English-language learners »
See *better* defined for kids »

Examples of BETTER

- Her second book is *better* than her first one.
- This one is *no better* than that one.
- She's a *better* golfer than I am.
- He's a *better* singer than he is an actor.
- He's much *better* with children now that he's a father himself.
- The weather is *better* today than it was yesterday.
- They came up with a *better* solution to the problem.
- Don't you have something *better* to do than to watch TV all day?



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amazon.com

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Labnashi Indian Droplet Style Twin \$18.50

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A quick quiz about stuff worth knowing
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TOP 10 LISTS

Should You "Flush Out" or "Flesh Out" Your Plan?
Top 10 Commonly Confused Words, V

2014 Word of the Year: Culture
Here's What this Year's Top Look-ups About Us

