

ESTTA Tracking number: **ESTTA661992**

Filing date: **03/19/2015**

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

Proceeding	91206921
Party	Plaintiff Rich Products Corporation
Correspondence Address	BRIAN E TURUNG FAY SHARPE LLP 1228 EUCLID AVE 5TH FLOOR, THE HALLE BLDG CLEVELAND, OH 44115 UNITED STATES bturung@faysharpe.com, skoenig@faysharpe.com, chutter@faysharpe.com
Submission	Reply in Support of Motion
Filer's Name	Sandra M. Koenig
Filer's e-mail	skoenig@faysharpe.com, bturung@faysharpe.com, chutter@faysharpe.com
Signature	/sandramkoenig/
Date	03/19/2015
Attachments	RICH701110_Reply.pdf(130759 bytes) RICH701110_Koenig Declaration.pdf(331967 bytes)

**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.)	
)	
)	
)	
)	

**REPLY TO APPLICANT VEGIPRO BRANDS, LLC'S OPPOSITION TO OPPOSER'S
MOTION FOR SUMMARY JUDGMENT**

Opposer, Rich Products Corporation (“RPC” or “Opposer”), makes the following reply to the Opposition to Opposer's Motion for Summary Judgment ("Opposition") filed by Applicant, VegiPro Brands, LLC (“VegiPro” or “Applicant”).

I. VEGIPRO'S OPPOSITION DOES NOT RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING THE DISPOSITIVE DUPONT FACTORS

A. VegiPro's Opposition Does Not Raise a Genuine Issue of Material Fact Concerning the Similarity of the Marks

RPC owns an incontestable federal registration on the Principal Register for its distinctive and arbitrary ON TOP trademark. The “on top” phrase is an idiom that means dominant, successful and victorious. Koenig Decl. at ¶¶ 3, 4, Exs. A, B. VegiPro seeks to register BETTER ON TOP! for identical goods, i.e., whipped topping. The descriptively laudatory word “better” is defined as “of superior quality or excellence.” Koenig Decl. at ¶ 5, Ex. C. VegiPro's

addition of a descriptively laudatory term to RPC's registered mark is not sufficient to avoid confusion. *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1375 (TTAB 2006) ("The general rule is that a subsequent user may not appropriate the entire marks of another and avoid a likelihood of confusion by adding descriptive or subordinant matter thereto."); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984) (LITTLE GOLIATH for a stapler held to be confusingly similar to GOLIATH for pencils).

Thus, the mere addition of BETTER and punctuation to RPC's registered ON TOP mark for identical goods does not distinguish the marks.

VegiPro's allegation that BETTER ON TOP! has a double entendre relating to sexual innuendo is absurd. There is no evidence that BETTER ON TOP! has a sexual innuendo connotation as applied to whipped topping.

As provided in TMEP Section 1213.05(c), "For trademark purposes, a 'double entendre' is an expression that has a double connotation or significance *as applied to the goods or services*" (emphasis in original). When one sees BETTER ON TOP! as applied to whipped topping, one is likely to bring to mind the impression that food tastes "better" when covered with whipped topping, that the topping itself is "better" from a health standpoint, or that the whipped topping tastes "better" when it is served atop food. There is nothing about the mark that implies sex.

The whipped topping goods of both parties are sold (or in the case of VegiPro intended to be sold) in food distribution channels (Frank Decl. at ¶ 7; Harrison Decl. at ¶ 5)—not stores centered on sexual or pornographic goods. Even VegiPro's proposed labels are devoid of sexual indicia (Harrison Decl. at ¶ 4, Ex. A). There is no reason to recognize a sexual innuendo connotation in VegiPro's proposed mark as applied to whipped topping.

When VegiPro put the laudatory term BETTER in front of ON TOP, it did not change the meaning of the mark—BETTER ON TOP! and ON TOP still look alike, sound alike and have the same connotation such that there is a likelihood of confusion. A similarity in even only one of these elements is sufficient to determine a likelihood of confusion. *See Eveready Battery Company v. Green Planet, Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (Similarity in any one of the trilogy of sight sound and meaning “is sufficient to support a determination of likelihood of confusion.”).

Applicant’s mark BETTER ON TOP! implies superior dominance or superior success. The addition of “BETTER” does not change the connotation of RPC's ON TOP mark but merely enhances the implication. Even the sexual innuendo discussed in VegiPro's Opposition is reflective of the same connotative implication, i.e., that sex is “better” or “superior” when the woman is “on top” or in a “dominant” position over the male. Regardless of perceived meanings, the mere addition by VegiPro of the laudatory term “better” and a punctuation mark to RPC's registered ON TOP mark upholds the similarity of the marks.

Furthermore, VegiPro's Opposition conveys the descriptively laudatory meaning of “BETTER” by implying that its product is “better” than applicant’s “ON TOP” whipped topping. In this regard, VegiPro argued that “Opposer’s whipped topping is not truly a dairy free/vegan whipped topping and it contains genetically modified ingredients (GMOs)” while VegiPro’s product is “a truly dairy-free, vegan whipped topping.” Opposition at 1. This reasoning is, effectively, an assertion on the part of VegiPro that its BETTER ON TOP! whipped topping is “BETTER” than RPC’s ON TOP whipped topping, at least in terms of ingredients.

BETTER ON TOP! subsumes the entirety of RPC's registered ON TOP mark between a laudatory descriptor and a punctuation mark. The marks are confusingly similar.

B. VegiPro's Opposition Does Not Raise a Genuine Issue of Material Fact Concerning the Similarity of the Goods

The nature and scope of a party's goods must be determined based on the recitation of goods in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012). If goods are described broadly and there is no limitation as to nature, type, channels of trade or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods.")

Here, the goods are identical. RPC's goods are recited in its registrations as "non-dairy whipped topping." The goods in the VegiPro application opposed herein recite "whipped topping." VegiPro attempts to distinguish the goods by reciting the differences in ingredients; however, aside from minor differences in recipe content, the respective recited goods consist of identical whipped topping products and the respective statements of goods must be construed accordingly.

C. VegiPro's Opposition Fails to Raise any Genuine Issue of Fact Regarding the Overlap in Trade Channels

Neither RPC's registration nor VegiPro's application limit the statement of goods to a particular channel of trade. Thus, it must be presumed that all relevant trade channels are operative. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); TMEP § 1207.01(a)(iii).

Furthermore, RPC's ON TOP whipped topping is sold to consumers via multiple channels including, but not limited to, cash and carry stores, among other channels, with expansion of the trade channels to additional consumer-oriented stores contemplated. See Frank Decl. at ¶ 7. Cash-and-carry stores service ordinary consumers off the street who must pay for their purchases and carry them away (rather than rely on delivery). Koenig Decl. at ¶ 6, Ex. D. The cash-and-carry consumer group also shops in grocery stores, organic foods retailers, or other establishments where whipped toppings are sold. RPC's registration does not limit the scope of trade channels in any way. Similarly, VegiPro's application does not limit trade channels.

II. RPC'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY AND TIMELY FILED

RPC filed its Motion for Summary Judgment prior to the opening of its testimony period. The motion was filed after it was concluded that settlement was not achievable upon review of VegiPro's proposed labeling and the VegiPro's proposed trade channels. The matter was ripe for summary judgment at any time prior to the opening of Opposer's testimony period.¹ The VegiPro application at issue was filed based on intent to use. The Answer confirmed that no use had been made. The marks are confusingly similar, and the recited goods are identical and of a type that would be sold adjacent one another on a refrigerated shelf. Consumers familiar with RPC's ON TOP whipped topping are likely to see VegiPro's BETTER ON TOP! whipped

¹ Applicant's counsel argued that it was "duped" by the timing of the Motion for Summary Judgment. The TTAB procedural rules are clear, and Applicant's counsel should have been cognizant of the Summary Judgment filing deadlines after having defaulted *twice* earlier in the proceedings. As far as settlement negotiations, Opposer's counsel and Applicant's counsel had a series of telephone conversations and e-mails directed to attempts to settle, but settlement did not occur. Applicant's counsel never followed up with Opposer to see if settlement was achievable. Koenig Decl. at ¶¶ 7, 8.

topping and believe it to be marketed as a superior product of RPC or a comparatively better product by a competitor. All of this is damaging to RPC and its registrations.

III. CONCLUSION

Early notice that the Motion for Summary Judgment has been granted is earnestly solicited.

Dated: March 19, 2015

Respectfully submitted,

FAY SHARPE LLP

/Sandra M. Koenig/_____

Brian E. Turung
Sandra M. Koenig
The Halle Building, 5th Floor
1228 Euclid Avenue
Cleveland, Ohio 44115
Phone: (216) 363-9000
Fax: (216) 363-9001
E-mail: bturung@faysharpe.com
skoening@faysharpe.com

Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2015, the foregoing **REPLY TO APPLICANT VEGIPRO BRANDS, LLC'S OPPOSITION TO OPPOSER'S MOTION FOR SUMMARY JUDGMENT** was filed electronically. Notice of this filing was served by First Class Mail, postage prepaid, on the following attorney for Applicant:

BRUNO W. TARABICHI
OWENS TARABICHI LLP
111 N. MARKET ST., SUITE 730
SAN JOSE, CA 95113

/Sandra M. Koenig/_____
Sandra M. Koenig
Attorney for Opposer

RICH 701110US01 840802 1

5. Attached to this Declaration as Exhibit C is a true and accurate copy of a definition for the word "better" as downloaded from <http://dictionary.reference.com>.

6. Attached to this Declaration as Exhibit D is a true and accurate copy of a definition for "cash-and-carry" downloaded from the website <http://dictionary.reference.com>.

7. Prior to filing a Motion for Summary Judgment, I contacted counsel for VegiPro, Bruno Tarabichi, at the request of RPC, to explore settlement. Specifically, RPC wanted to understand how VegiPro intended to use BETTER ON TOP! as a trademark and the channels of trade where it intended to sell whipped topping under the mark. Mr. Tarabichi and I had phone calls and multiple e-mails on November 17, 18, 20, 21 and 22, 2015, directed to possible settlement.

8. Mr. Tarabichi ultimately provided the undersigned with sample labels on November 20, 2015, and advised on the trade channels in which his client intended to sell its whipped topping product on November 20 and 22, 2015. The parties mutually consented to suspend proceedings for sixty days to review the settlement options. I reviewed the information provided by Mr. Tarabichi with the Opposer, RPC. On January 20, 2015, I sent an e-mail to Mr. Tarabichi thanking him for providing examples and other information concerning VegiPro's proposed use of BETTER ON TOP! as a trademark for whipped topping, and informing him that our client remained of the view that there would be a likelihood of confusion between the marks. The e-mail also informed Mr. Tarabichi of our client's decision to move forward with the opposition. I never heard back from Mr. Tarabichi, and Mr. Tarabichi never followed up to see if settlement was achievable.

9. On January 23, 2015, prior to the opening of Opposer's testimony period, RPC filed its Motion for Summary Judgment to preserve its rights.

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 at Cleveland, Ohio on March 19, 2015.


Sandra M. Koenig

RICH 701110US01 841882 1

Exhibit A

Koenig Declaration

on top

Also found in: Dictionary/thesaurus, Medical, Legal, Financial, Encyclopedia.

on top

In a dominant or successful position. It is also put as **come out on top**, as in *As we expected, Paul again came out on top in the chess tournament.* [Mid-1500s] Also see **on top of**.

See also: **top**

The American Heritage® Dictionary of Idioms by Christine Ammer. Copyright © 2003, 1997 by The Christine Ammer 1992 Trust. Published by Houghton Mifflin Harcourt Publishing Company. All rights reserved.

| Copyright © 2003-2015 Farlex, Inc

Disclaimer

All content on this website, including dictionary, thesaurus, literature, geography, and other reference data is for informational purposes only. This information should not be considered complete, up to date, and is not intended to be used in place of a visit, consultation, or advice of a legal, medical, or any other professional.

A Mode Tend Parenting Partnership

Exhibit B

Koenig Declaration

Dictionary ([http://dictionary.reference.com/browse/on top](http://dictionary.reference.com/browse/on+top))
Thesaurus ([http://www.thesaurus.com/browse/on top](http://www.thesaurus.com/browse/on+top))
Translate ([http://translate.reference.com/translate?query=on top](http://translate.reference.com/translate?query=on+top))

on top

(<http://dictionary.reference.com/slideshows/character-words#quixotic>)

top¹

(<http://static.sfdict.com/staticrep/dictaudio/T03/T0370200.mp3>)

[top]

Word Origin

noun

1. the highest or loftiest point or part of anything; apex; summit.

Synonyms: zenith (<http://www.thesaurus.com/browse/zenith>), acme

(<http://www.thesaurus.com/browse/acme>), peak

(<http://www.thesaurus.com/browse/peak>), pinnacle

(<http://www.thesaurus.com/browse/pinnacle>), vertex

(<http://www.thesaurus.com/browse/vertex>).

Antonyms: bottom (<http://www.thesaurus.com/browse/bottom>), base

(<http://www.thesaurus.com/browse/base>), foot (<http://www.thesaurus.com/browse/foot>),

lowest point (<http://www.thesaurus.com/browse/lowest%20point>).

2. the uppermost or upper part, surface, etc., of anything.

3. the higher end of anything on a slope.

4. *British.*

a. a part considered as higher:

"the top of the street."

b. high gear of an automobile.

Where does
come from?

5. **tops.**

- a. the part of a plant that grows above ground, especially of an edible root.
- b. one of the tender tips of the branches or shoots of plants.

6. the part of anything that is first or foremost; beginning:

"Let's go over it from the top again."

7. the highest or leading place, position, rank, etc.:

"at the top of the class."

adjective

23. pertaining to, situated at, or forming the top; highest; uppermost; upper:

"the top shelf."

24. highest in degree; greatest:

"to pay top prices."

25. foremost, chief, or principal:

"to win top honors in a competition."

verb (used with object), topped, topping.

26. to furnish with a top; put a top on.

27. to be at or constitute the top of.

28. to reach the top of.

29. to rise above:

"The sun had topped the horizon."

30. to exceed in height, amount, number, etc.

31. to surpass, excel, or outdo:

"That tops everything."

32. *Theater.* (in spoken dialogue) to reply in a voice of greater volume or higher pitch:
"King Henry must top the crowd noises in his St. Crispin's Day speech."

verb (used without object), **topped**, **topping**.

40. to rise aloft.

Verb phrases

41. **top off**,

- a. to climax or complete, especially in an exceptional manner; finish:
"They topped off the evening with a ferryboat ride at midnight."
- b. to fill (a partly full container) completely:
"to top off a gas tank."

42. **top out**,

- a. to finish the top of (a structure).
- b. to reach the highest level.

Idioms

43. **blow one's top**, *Informal.*

- a. to become enraged; lose one's temper.
- b. to go mad; become insane:
"He must have blown his top to make such a fool of himself."

44. **off the top of one's head**, *Informal.* head (<http://dictionary.reference.com/browse/head>) (def 77).

45. **on top**, successful; victorious; dominant:
"to stay on top."

46. **on top of**,

- a. over or upon.

- b. in addition to; over and above.
- c. close upon; following upon:
"Gale winds came on top of the floods."
- d. in complete control:
"on top of the problem."

47. on top of the world,

- a. successful.
- b. elated:
"The success made her feel on top of the world."

48. over the top,

- a. *Military.* over the top of the parapet before a trench, as in issuing to charge against the enemy.
- b. surpassing a goal, quota, or limit.

49. top oneself, Chiefly British. to kill oneself.

Origin

Old English
(<http://dictionary.reference.com/browse/Old%20English>)

1000

before 1000; Middle English, Old English; cognate with Dutch *top*, German *Zopf*, Old Norse *toppr*

Exhibit C

Koenig Declaration

Dictionary (<http://dictionary.reference.com/browse/better>)
Thesaurus (<http://www.thesaurus.com/browse/better>)
Translate (<http://translate.reference.com/translate?query=better>)

better



Morningside
Translations

10% OFF YOUR NEXT
TRANSLATION

Certified
Translation
& Interpretation
Services

GET A
FREE
QUOTE



(<http://dictionary.reference.com/slideshows/character-words#quixotic>)

better¹ (<http://static.sfdict.com/staticrep/dictaudio/B02/B0285400.mp3>)

[**bet-er**]

Synonyms Examples Word Origin

adjective, *compar. of good with best as superl.*

1. of superior quality or excellence:
"a better coat; a better speech."
2. morally superior; more virtuous:
"They are no better than thieves."
3. of superior suitability, advisability, desirability, acceptableness, etc.; preferable:
"a better time for action."
4. larger; greater:
"the better part of a lifetime."
5. improved in health; healthier than before.
6. completely recovered in health.

adverb, *compar. of well with best as superl.*

Where does
come from?

7. in a more appropriate or acceptable way or manner:

"to behave better."

8. to a greater degree; more completely or thoroughly:

"He knows the way better than we do. I probably know him better than anyone else."

9. more:

"I walked better than a mile to town."

verb (used with object)

10. to increase the good qualities of; make better; improve: *"to better one's grades;"*

"to better the lot of the suburban commuter."

11. to improve upon; surpass; exceed:

"We have bettered last year's production record."

12. *Cards.* to raise (a previous bid).

noun

13. that which has greater excellence or is preferable or wiser:

"the better of two choices."

14. Usually, **betters**. those superior to one in wisdom, wealth, etc.

Idioms

15. **better off**,

a. in better circumstances.

b. more fortunate; happier:

"Because of his asthma, he would be better off in a different climate."

16. **better oneself**, to improve one's social standing, financial position, or education:

"He is going to night school because he wants to better himself."

17. **for the better**, in a way that is an improvement:

"His health changed for the better."

18. **get /have the better of**,

a. to get an advantage over.

b. to prevail against.

19. **go (someone) one better**, to exceed the effort of; be superior to:

"The neighbors went us one better by buying two new cars."

20. **had better**, would be wiser or more well-advised to; ought to:

"We had better stay indoors today."

21. **no better than one should be**, morally inferior; immoral or amoral:

"Don't speak to him; he's no better than he should be!"

Origin

1 Old English

dictionary.reference.com/browse/Middle%20English)

(<http://dictionary.reference.com/browse/Old%20English>)

before 900; Middle English *bettre*, Old English *bet(t)(e)ra*; cognate with Old High German *bezziro* (German *besser*), Dutch *beter*, Old Norse *betr*, Gothic *batiza*, equivalent to *bat-*

Exhibit D

Koenig Declaration

Dictionary ([http://dictionary.reference.com/browse/cash and carry](http://dictionary.reference.com/browse/cash%20and%20carry))
Thesaurus ([http://www.thesaurus.com/browse/cash and carry](http://www.thesaurus.com/browse/cash%20and%20carry))
Translate ([http://translate.reference.com/translate?query=cash and carry](http://translate.reference.com/translate?query=cash%20and%20carry))

cash and carry



(<http://dictionary.reference.com/slideshows/character-words#quixotic>)

cash-and-carry (<http://static.sfdict.com/staticrep/dictaudio/C01/C0187900.mp3>)

[**kash-uh** n-**kar-ee**]

Word Origin

adjective

1. sold for cash payment and no delivery service.
2. operated on such a basis:
"a cash-and-carry business."

Origin

1915-1920

1915-20

Dictionary.com Unabridged

Based on the Random House Dictionary, © Random House, Inc. 2015.

Cite This Source ([http://dictionary.reference.com/cite.html?qh=cash and carry&ia=luna](http://dictionary.reference.com/cite.html?qh=cash%20and%20carry&ia=luna))

Where does "qu
come from?

British Dictionary definitions for cash-and-carry

cash-and-carry

adjective, adverb

1. sold or operated on a basis of cash payment for merchandise that is not delivered but removed by the purchaser

noun

2. a wholesale store, esp for groceries, that operates on this basis
3. an operation on a commodities futures market in which spot goods are purchased and sold at a profit on a futures contract

Collins English Dictionary - Complete & Unabridged 2012 Digital Edition

© William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins

Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009, 2012

Cite This Source ([http://dictionary.reference.com/cite.html?qh=cash and carry&ia=ced2](http://dictionary.reference.com/cite.html?qh=cash+and+carry&ia=ced2))

<p>6 months of Vonage for Less MARCH SALES EVENT</p>	<p>\$9⁹⁹/month for a full 6 months <small>Then \$27.99/mo., Plus taxes & fees with 1-year agreement. Works with your existing high-speed internet.</small></p>	<p>LEARN MORE </p>
---	--	---

Feedback (<mailto:feedback@dictionary.com?subject=Feedback%20for%20Dictionary.com%20Mobile%20Web%20Site>)

Privacy (<http://dictionary.reference.com/privacy>) Terms (<http://dictionary.reference.com/terms>)

About (<http://content.dictionary.com/>) (<http://content.dictionary.com/>)

(<http://content.dictionary.com/>) Apps (<http://dictionary.reference.com/apps>)

Copyright 2015 Dictionary.com LLC