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Filing date: **06/24/2015**

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

Proceeding	91207770
Party	Plaintiff Fricker's Progressive Concepts, Inc.
Correspondence Address	B JOSEPH SCHAEFF FIFTH THIRD CENTER ONE SOUTH MAIN STREET, SUITE 500 DAYTON, OH 45402-2058 UNITED STATES joseph.schaeff@dinsmore.com
Submission	Motion to Strike
Filer's Name	B. Joseph Schaeff
Filer's e-mail	joseph.schaeff@dinsmore.com, daytonipdocket@dinsmore.com
Signature	/bjschaeff/
Date	06/24/2015
Attachments	FRI0115T4MotiontoStrike.PDF(74424 bytes )

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

Application Serial No. 85453782  
Mark: FLIP'N CHICKEN  
Filed: October 22, 2011  
Published: October 2, 2012

Fricker's Progressive Concepts, Inc.,	:	
	:	
Opposer,	:	
	:	
v.	:	Opposition No. 91207770
	:	
Samar Haddad,	:	
	:	
Applicant.	:	

OPPOSER’S MOTION TO STRIKE AND FOR SUSPENSION OF PROCEEDINGS

Fricker's Progressive Concepts, Inc., (hereinafter "Opposer") hereby moves the Board to strike the untimely evidence of Applicant, Samar Haddad (hereinafter "Applicant"). Applicant’s untimely evidentiary submissions consist of Applicant’s testimonial affidavit and attached exhibits. This evidence was improperly taken and filed outside of Applicant’s trial period.

Opposer further requests that the Board stay proceedings pending determination of this motion. In the event that the Board grants this motion, Opposer will be relieved of the burden of preparing and submitting rebuttal evidence, currently due by July 17, 2017. In the event that the Board denies this motion, Opposer requests that the Board reset the due dates for Opposer’s Rebuttal Disclosures currently set for June 17, 2015,\* the close of Opposer’s Rebuttal Period, and the other trial dates.

On November 4, 2014, Opposer, at Applicant’s behest and with Applicant’s consent,

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\* The undersigned received notice that Applicant had filed documents with the Board on June 16, 2015 but was not able to view the documents until June 17, 2015. Opposer had insufficient time to prepare and serve its Rebuttal Disclosures.

filed a motion to extend trial dates. On November 21, 2014, the Board granted the motion and reset the trial dates. *See* Documents 13 and 14. Applicant's 30-day trial period ended June 2, 2015. Applicant signed the testimonial affidavit on June 16, 2015, and the affidavit and attached exhibits were filed the same day.

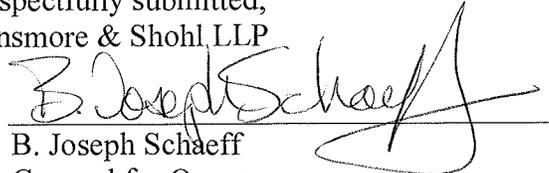
Applicant is defending this opposition *pro se*. The undersigned has been sensitive to this fact, and has been accommodating to Applicant. Nevertheless, Applicant knew or should have known that her evidence was due. *See* Exhibit A hereto, a true and correct copy of an email exchange between the undersigned and Applicant regarding conversations between the undersigned and Applicant's husband. These communications dealt with Applicant's evidence and took place during Applicant's testimony period.

The rule is clear. A party may only take testimony and submit other evidence during its assigned trial period. TBMP §703.01(c) and 37 CFR §2.121(a). The parties never stipulated to an extension of time of Applicant's trial period beyond June 2, 2015, and Applicant did not seek prior leave of the Board. Applicant had ample time to file its evidence within its testimony period, but she did not do so. *See, e.g., M-Tek Inc. v. CVP Systems, Inc.*, 17 U.S.P.Q.2d 1070, 1072 (T.T.A.B. 1990). Instead, Applicant filed her testimonial affidavit and exhibits two (2) weeks after the close of her trial period, the day before Opposer's Rebuttal Disclosures were due. Because the affidavit was signed and filed outside of Applicant's trial period, Opposer requests that the Board strike the affidavit and exhibits from the record.

In the event that the Board denies this motion, Applicant reserves the right to object to Applicant's evidence on the grounds set forth in TBMP §707, and, with the Board's permission, to serve rebuttal evidence.

Respectfully submitted,  
Dinsmore & Shohl, LLP

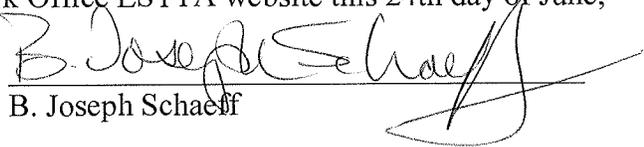
By

  
B. Joseph Schaeff  
Counsel for Opposer

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#### CERTIFICATE OF FILING - ESTTA

I hereby certify that OPPOSER'S MOTION TO STRIKE AND FOR SUSPENSION OF PROCEEDINGS and exhibit thereto are being filed with the Trademark Trial and Appeal Board using the United States Patent and Trademark Office ESTTA website this 24th day of June, 2015.

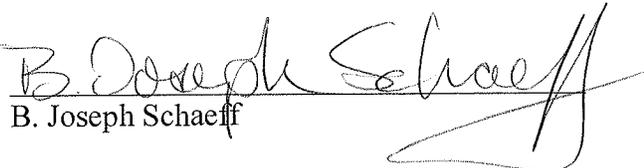
  
B. Joseph Schaeff

#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon Applicant by email and first class U.S. mail, postage prepaid, addressed to:

Samar Haddad  
7629A Pineville-Matthews Rd.  
Charlotte, North Carolina 28226

this 24th day of June, 2015.

  
B. Joseph Schaeff

# EXHIBIT A

## Schaeff, B. Joseph

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**From:** Schaeff, B. Joseph  
**Sent:** Friday, May 15, 2015 11:32 AM  
**To:** 'samar@flipnchicken.com'; 'Christopher Haddad'  
**Cc:** 'Chris Haddad'  
**Subject:** FRI0115T4; Fricker's v. Haddad

Mr. Haddad:

Further to our conversation this morning, here is an example of a certificate of mailing:

### CERTIFICATE OF MAILING

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner for Trademarks, P.O. Box 1451, Alexandria, VA 22313-1451, on \_\_\_\_\_, 2015.

Ms. Haddad:

When can I expect to receive defendants pretrial disclosures?

I urge you, yet again, to consult with counsel regarding this matter.

Regards

Dinsm<sup>o</sup>re

**B. Joseph Schaeff**

Partner

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Dayton, OH 45402  
T (937) 449-6436 • F (937) 449-6405  
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**From:** Schaeff, B. Joseph  
**Sent:** Friday, May 15, 2015 11:09 AM  
**To:** 'Christopher Haddad'  
**Cc:** [samar@flipnchicken.com](mailto:samar@flipnchicken.com); 'Chris Haddad'  
**Subject:** FRI0115T4; Fricker's v. Haddad

Good morning Mr. Haddad.

This is further to our conversation of Wednesday afternoon.

At the outset, I urge you, again, to seek the advice of counsel regarding this matter.

In response to your inquiry, the Trademark Rules of Practice provide in pertinent part that testimony of witnesses may be taken by deposition upon oral examination or upon written questions. If a party serves a notice of taking a testimonial deposition upon written questions, the adverse party may file a motion with the Trademark Trial and Appeal Board, for good cause, for an order that the deposition be taken by oral examination.

Stated another way, Ms. Haddad may seek to depose representatives of my client by written questions; however, my client reserves the right to file a motion with the Trademark Trial and Appeal Board requesting that the depositions be taken in the traditional way, by oral examination. My client would file such a motion to preserve its right to cross-examine the witnesses.

Please consult the Trademark Rules of Practice for more details regarding this procedure (or better yet, have counsel do so).

I note that Ms. Haddad's pretrial disclosures were due on April 18.

Regards,

**Dinsm<sup>o</sup>re**

**B. Joseph Schaeff**

Partner

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