

ESTTA Tracking number: **ESTTA721418**

Filing date: **01/19/2016**

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	Rebuttal Brief
Filer's Name	B. Joseph Schaeff
Filer's e-mail	joseph.schaeff@dinsmore.com
Signature	/bjschaeff/
Date	01/19/2016
Attachments	FRI0115T4ReplyBrief.PDF(62827 bytes)

Index of Cited Cases

Case	Page No.
<i>Marriott Corp. v. Top Boy Intl., Inc.</i> , 165 U.S.P.Q. 642 (T.T.A.B. 1970), aff'd 176 U.S.P.Q. 209 (C.C.P.A. 1972)	4
<i>In re Azteca Restaurant Enterprises Inc.</i> , 50 U.S.P.Q.2d 1209, 1210 (T.T.A.B. 1999)	4
<i>In re Opus One Inc.</i> , 60 U.S.P.Q.2d 1812 (T.T.A.B. 2001)	4
<i>In re Star Belly Stitcher, Inc.</i> , 107 U.S.P.Q.2d 2059 (T.T.A.B. 2013)	5

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 REPLY BRIEF

Applicant's brief contains much that is not germane to this proceeding. For example, on page 4 Applicant states in an off-handed way that Opposer's FRICKIN' mark is descriptive. There is no evidentiary basis for this statement. Opposer owns and has introduced into evidence a number of registrations of marks comprised of the term FRICKIN' or containing FRICKIN' as a prominent element. Applicant has not challenged Opposer's registrations. Many of Opposer's registrations are incontestable. Applicant is foreclosed from asserting that any of Opposer's FRICKIN' marks are descriptive. The point being, just because Opposer does not respond to misstatements in Applicant's brief does not mean that Opposer concedes the validity of such statements.

Opposer contends that Applicant's FLIP'N CHICKEN mark is confusingly similar to Opposer's FRICKIN' CHICKEN, FRICKIN' and FRICKER'S trademarks and service marks. On page 7 of her brief, Applicant compares her FLIP'N CHICKEN mark to Opposer's

FRICKER'S mark. She did not compare FLIP'N CHICKEN to FRICKIN' CHICKEN. That comparison is more pertinent.

The FLIP'N CHICKEN application covers restaurant services, restaurants featuring home delivery, and take-out restaurant services. Opposer's FRICK'N CHICKEN registration covers chicken sandwiches for consumption on or off the premises

There is no *per se* rule that confusion is likely simply because similar or even identical marks are used for food products and for restaurant services. Rather, something more is required to support a finding of likelihood of confusion in such cases. *In re Azteca Restaurant Enterprises Inc.*, 50 U.S.P.Q.2d 1209, 1210 (T.T.A.B. 1999). In *Azteca*, the Board held that AZTECA MEXICAN RESTAURANT for restaurant services was confusingly similar to AZTECA in stylized letters for Mexican food items including tortillas and salsa. The Board determined that the "something more" requirement was met because applicant's Mexican food products would likely be served in the registrant's Mexican restaurant.

In *In re Opus One Inc.*, 60 U.S.P.Q.2d 1812 (T.T.A.B. 2001), the Board held that OPUS ONE for restaurant services was confusingly similar to OPUS ONE for wine. In considering the "something more" requirement, the Board pointed to the well established relationship between wine and restaurants evidenced by the common expression "wine and dine." There was even evidence in the record that the registrant's OPUS ONE wine was served in the applicant's OPUS ONE restaurant. See also *Marriott Corp. v. Top Boy Intl., Inc.*, 165 U.S.P.Q. 642 (T.T.A.B. 1970), *aff'd* 176 U.S.P.Q. 209 (C.C.P.A. 1972) (TOP BOY for drive-in restaurant services held confusingly similar to BIG BOY for hamburger sandwiches. The Board noted that "it is common knowledge that hamburger sandwiches are served in drive-in restaurants." *Id* at 643).

Opposer has made of record its incontestable registrations of FRICKIN' CHICKEN (Reg. No. 1826515) for "chicken sandwiches for consumption *on or off the premises*," FRICKIN' CHICKEN SLIDERS (Reg. No. 3772455) for "*restaurant menu items for consumption on or off the premises*," FRICKIN' (Reg. No. 2156001) for "*restaurant services*" and FRICKIN' (Reg. No. 3182929) for "chicken wings" and other "*prepared food for consumption on and off the premises*".... Clearly, FRICKIN' CHICKEN sandwiches and Opposer's other FRICKIN' menu items are served on Opposer's restaurant premises.

Opposer also submitted into evidence copies of its menu and Applicant's menus. See Exhibits 1, 2, 6 and 7 to the Testimonial Affidavit of Louis J. Schirack. The menus demonstrate that Opposer and Applicant both sell chicken wings and other menu items for consumption on and off their respective restaurant premises. Applicant's application expressly covers "take-out restaurant services." Opposer's take out menu advertises FRICKIN' CHICKEN TO GO. See Exhibit 1 to the Testimonial Affidavit of Louis J. Schirack, page 2, bottom right hand corner.

Opposer's registrations and the parties' menus satisfy the "something more" requirement.

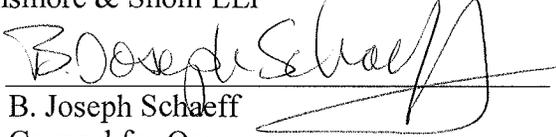
Opposer cited the online Urban Dictionary and The Online Slang Dictionary for the proposition that the terms "frick" and "flip" give similar commercial impressions because they are both socially accepted euphemisms for the infamous "F" word. See Exhibits 4 and 5 to the Testimonial Affidavit of Louis J. Schirack. On page 7 of her brief, Applicant challenged Opposer's reliance on these resources, referring to them as hearsay. The Board has considered Urban Dictionary definitions to be probative: "Urban Dictionary (urbandictionary.com) is a slang dictionary with definitions submitted by visitors to the website. The Board has in the past considered entries from this online dictionary, comprising user-generated content, to be probative evidence." *In re Star Belly Stitcher, Inc.*, 107 U.S.P.Q.2d 2059, 2062 (T.T.A.B. 2013).

Opposer is not aware of similar caselaw support for entries from The Online Slang Dictionary. However, the same reasoning as expressed in *Star Belly Stitcher* should apply.

Applicant's FLIP'N CHICKEN mark is confusingly similar to Opposer's FRICKIN' CHICKEN, FRICKIN' and FRICKER'S marks, particularly the FRICKIN' CHICKEN mark. Applicant and Opposer are direct competitors. Opposer's FRICKIN' CHICKEN, FRICKIN' and FRICKER'S marks are distinctive, and are the subject of incontestable registrations. Opposer's growth from 1 restaurant in 1985 to 24 restaurants currently operating in three states evidences Opposer's commercial success and the strength of Opposer's marks.

For the reasons set forth above and in Opposer's Trial Brief, Applicant requests that registration of Applicant's mark be refused.

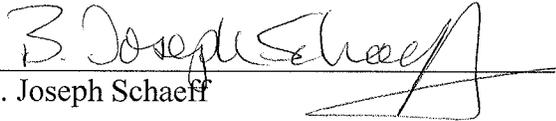
Respectfully submitted,
Dinsmore & Shohl LLP

By 
B. Joseph Schaeff
Counsel for Opposer

Fifth Third Center
One South Main Street
Suite 1300
Dayton, OH 45402
Telephone: 937-449-6436
Facsimile: 937-449-6405
joseph.schaeff@dinsmore.com

CERTIFICATE OF FILING - ESTTA

I hereby certify that this Brief for Opposer is being filed with the Trademark Trial and Appeal Board using the United States Patent and Trademark Office ESTTA website this 19th day of January, 2016.

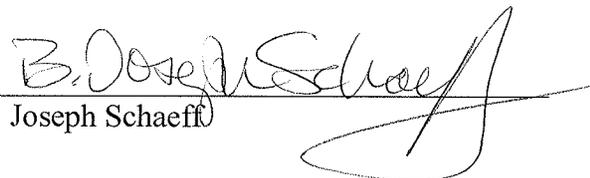

B. Joseph Schaeff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposer's Reply Brief 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 19th day of January, 2016.


B. Joseph Schaeff