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

Application No.: 75/301,628
Trademark : SKILLET SENSATIONS



10-29-2003

U.S. Patent & TMO/TM Mail Rcpt Dt. #78

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APPLEBEE'S INTERNATIONAL, INC.)	
)	
Opposer,)	
)	
v.)	Opposition No. 111,517
)	
THE STUFFER CORPORATION)	
)	
Applicant.)	
_____	x	

**APPLICANT'S REPLY TO BRIEF OF OPPOSER IN RESPONSE
TO THE MOTION FOR RECONSIDERATION OF THE
DECISION DATED SEPTEMBER 11, 2003**

Applicant, The Stouffer Corporation ("Stouffer"), herein replies to the Response to The Motion for Reconsideration filed by Applebee's International, Inc. ("Applebee's") on October 16, 2003. Stouffer maintains that Applebee's and Stouffer's goods are not related goods in view of the standard defined in *In re Coors Brewing Company*, 68 USPQ2d 1059 (Fed. Cir. 2003), thus no likelihood of confusion has been proven between Applebee's and Stouffer's marks.

Applebee's response is merely a restatement of its arguments in its prior briefs. However, the fact remains, Applebee's did not introduce any probable evidence of likelihood of confusion and clearly no evidence that its goods and Stouffer's goods are related. The Federal Circuit in *In re Coors Brewing Company* reiterated the general rule earlier established in *Jacobs v. International Multifoods Corp.*, 212 USPQ 641 (CCPA 1982) that food and beverages offered in a restaurant are not per se related to food and beverages offered in retail establishments for purposes of a likelihood of confusion determination between a restaurant's mark and a mark associated with a food or beverage sold in a retail store. The Federal Circuit held that "something more" is required even if the marks are identical. *In re Coors Brewing Company*, 68 USPQ2d at 1063.

Applebee's response recited nine (9) alleged reasons as to how the "something more" standard has been established in this opposition. Stouffer submits that Applebee's arguments merely expose the lack of evidence in the record that Applebee's and Stouffer's goods are related or that there is a likelihood of confusion between Applebee's and Stouffer's marks. Stouffer briefly addresses each of Applebee's allegations below.

Applebee's stated that the marks are identical. Assuming Applebee's is correct that the marks are identical, which Stouffer disputes, the Federal Circuit stated that "to establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurants." *Id.*

Applebee's stated that its goods and Stouffer's goods are for similar types of entrees even though one meal is served on a hot skillet and the other is a frozen mix heatable in a microwave. As established in *In re Coors Brewing Company*, the fact that the goods associated with the marks are the same does not obviate the "something more" requirement. See also *Lloyd's Food Products Inc.*

v. Eli's Inc., 25 USPQ2d 2027 (Fed. Cir. 1993) (No likelihood of confusion for barbecue sold in a restaurant named Lloyd's and barbecue sold under the mark LLOYD'S in the refrigerated section of grocery stores).

Applebee's stated that both products are intended to be complete meals even though Applebee's meal is ready to eat and Stouffer's frozen entree requires preparation. Irrespective of the fact that both types of meals are ultimately consumed as entrees, the "complete meal" allegation does not satisfy the "something more" requirement. In *In re Coors Brewing Company*, the two products were beer, both of which were intended to be consumed by an individual. Applebee's assertion concerning the intent of the meals in actuality is a factor against a finding of a likelihood of confusion. Customers that enter an Applebee's restaurant expect to be "served" prepared food. Even a customer ordering carry-out food from Applebee's expects the food to be served hot and ready to eat. As such, Applebee's customers go to restaurants of Applebee's to be pampered by Applebee's employees and to be served "ready to eat" food, and to enjoy the prepared food in public and without the inconvenience of cleaning up after completion of the meal. The carry-out purchaser also expects Applebee's to prepare a "ready-to-eat" meal for immediate consumption on the way home or right after getting home without further preparation of the food.¹ A purchaser of a Stouffer's entree has a completely different intent. A purchaser of a Stouffer's product expects to purchase a frozen food entree at a grocery store for preparation at a later time. Specifically, the customer expects to 1) travel to a grocery store that sells frozen foods, 2) survey the numerous Stouffer's frozen food products in a section that includes many other frozen food products from

¹Applebee's has not introduced any evidence or explained how its customers carry-out any of the menu items on a skillet. Indeed, there is no evidence that Applebee's customers even purchase entree's that are presented on a skillet in the restaurant for only carry-out.

various other vendors, 3) select a particular Stouffer's entree, 4) pay for the frozen entree at a cashier, and 5) go home to either immediately begin preparation of the Stouffer entree or place the entree in the freezer for later preparation and consumption. Although the Stouffer entree is much simpler to prepare than preparing the entree from scratch, the Stouffer entree still requires preparation. The Stouffer entree also requires that the dishes and utensils used for preparing and consuming the entree must be later cleaned up by the consumer. As such, the expectation and overall dining experience of a consumer eating an entree at an Applebee's restaurant is significantly different from the expectation and overall dining experience of a consumer purchasing a frozen food entree at a grocery store for later preparation and consumption at home. These differences are in evidence whereas Applebee's alleged similarities are only arguments.

Applebee's asserted that the ingredients of its products and Stouffer's products overlap. As stated above, the goods in *In re Coors Brewing Company* were identical (i.e. beer); however, the fact that the goods were the same did not satisfy the "something more" requirement.

Applebee's asserted that the goods are relatively inexpensive. Beer is relatively inexpensive, as is barbecue; however, the mere fact that goods are inexpensive does not satisfy the "something more" requirement. See *In re Coors Brewing Company* and *Lloyd's Food Products Inc. v. Eli's Inc.* Although Applebee's asserts that its items are generally under \$10, such an entree price is not relatively inexpensive when compared to the price of a Stouffer's entree that is typically less than \$5 or at least half as much as the Applebee's entree. In addition, after an Applebee's customer has purchased a beverage, appetizer and dessert in addition to the entree and then has paid the taxes and tip for the complete meal, the final price for the Applebee's meal is significantly greater than the

purchase price for the Stouffer's frozen entree.² Stouffer submits that the relative prices associated with its frozen entrees and Applebee's meal ticket that includes an entree is actually a factor against a finding of a likelihood of confusion.

Applebee's also asserted that the same class of purchasers consume Stouffer's frozen food entrees and entrees at Applebee's restaurants. Stouffer does not deny this fact; however, this fact does not satisfy the "something more" requirement. Stouffer submits that although the class of purchasers may be the same, the expectation of such purchasers when consuming Stouffer's frozen food entrees and entrees at Applebee's restaurants is different. As stated above, consumers eating at an Applebee's restaurant expect to have a fully catered meal, whereas the expectation of a Stouffer's customer is to purchase a frozen entree at a grocery for later consumption at home with "minimal preparation."

Applebee's argues that its meals, such as meals served on a hot skillet, are frequently purchased for home consumption. However, Applebee's distinguished its ready-to-eat meal purchased at an Applebee's restaurant from Stouffer's frozen entree by admitting that the Stouffer's frozen entree requires preparation at home before it can be consumed. Similar to the facts in *In re Coors Brewing Company*, Applebee's did not submit any evidence that a consumer ordering an entree from an Applebee's menu and then subsequently driving to an Applebee's restaurant to pick up the ordered entree would be confused into believing the same entree can be purchased as a frozen entree in a grocery store freezer section. Applebee's also did not introduce any evidence that the phrase "skillet sensation" is used on containers used to package the entree ordered for carry-out by

²The price differential between an Applebee's entree and a Stouffer entree is even greater since Stouffer entrees offered under the trademark SKILLET SENSATIONS are packaged to provide four (4) servings.

the Applebee's customer. Indeed, Applebee's did not even introduce evidence that its house mark APPLEBEE'S is included on containers used to package the entree ordered for carry-out by the Applebee's customer. Consequently, carry-out customers of Applebee's merely identify the container used to hold the prepared food ordered as a container of ordered food from Applebee's. Applebee's has not provided any evidence to the contrary; however, there is evidence of no actual confusion during the years that Applebee's and Stouffer's marks coexisted.

Applebee's asserts that no particular degree of sophistication exists between Applebee's fully prepared entrees and Stouffer's frozen entrees. Applebee's statements ignore the reality of the market place. As an initial matter, Applebee's is not an inexpensive restaurant. Other than possibly in the east coast and west coast regions of the United States, a \$10 entree is not considered inexpensive to an average consumer. As stated above, when the beverage, appetizer, dessert, tax and tip are added to the cost of the entree, the ticket price of the meal at Applebee's is significantly higher. An Applebee's consumer that purchases an entree listed at \$10 surely notices the significant price difference from a frozen food entree in a grocery store that costs \$5 or less. A customer would not consider a frozen entree sold for half the price of an entree at Applebee's to be the same. Indeed, an Applebee's customer would more likely expect that the frozen entree, if it were the frozen version of an Applebee's entree, to be more expensive than the same entree offered in the Applebee's restaurant.

Applebee's lastly argues that a few of the hundreds of thousands of restaurants in the United States sell products in grocery stores. Applebee's asserted that it had in the past sold some of its products in grocery stores. What Applebee's failed to mention concerning its past grocery store sales and sales by others is how such products were sold. As an initial matter, Applebee's never sold any

of its entrees in grocery stores, nor has Applebee's introduced any evidence that it even intended to sell entrees in grocery stores. Applebee's did admit that it sold some of its condiments in grocery stores only under its house mark APPLEBEE'S. Applebee's assertion that other restaurants sell goods in grocery stores does not establish that Applebee's prepared food products exclusively offered for purchase at its restaurants are confusingly similar to Stouffer's frozen food entrees sold in the freezer section of grocery stores. Applebee's also did not provide any evidence that these other restaurants offer goods in grocery stores under marks other than the house mark of such restaurants. For example, Taco Bell and ChiChi's are restaurants that offer salsa, taco shells and hot sauce under their respective house marks. Bob Evans restaurants offer sausage under its house mark in the refrigerated section of many grocery stores. White Castle offers, under its house mark, frozen hamburgers in the frozen food section of grocery stores. In each of these limited situations, the goods offered by the restaurant in a grocery store are offered under the house mark of the restaurant. It would make no sense for the restaurant to do otherwise since the goodwill associated with the product sold in the grocery store is derived from the name of the restaurant and reputation of the restaurant, not from some sub-mark periodically used in the text of a menu at the restaurant.

The response filed by Applebee's highlights the fact that the record lacks evidence of "something more" to establish that the prepared entrees offered exclusively in Applebee's restaurants are related to Stouffer's frozen food entrees offered in the frozen food section of a grocery store. Stouffer requests that the TTAB reconsider the final decision and find that Applebee's

goods and Stouffer's goods are not related goods and that there is no likelihood of confusion between Applebee's and Stouffer's marks.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPLICANT'S REPLY TO BRIEF OF OPPOSER IN RESPONSE TO THE MOTION FOR RECONSIDERATION OF THE DECISION DATED SEPTEMBER 11, 2003** was served on Opposer, Applebee's International, Inc., by first class mail, postage prepaid this 27th day of October, 2003, to J. David Wharton, STINSON, MAG & FIZZELL, P.C. 1201 Walnut Street, Suite 2700, Kansas City, MO 64141-6251.



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