

TTAB

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

|                                       |   |                                 |
|---------------------------------------|---|---------------------------------|
| <b>APPLEBEE'S INTERNATIONAL, INC.</b> | ) |                                 |
|                                       | ) |                                 |
| Opposer,                              | ) | Opposition No. 111,517          |
|                                       | ) |                                 |
| vs.                                   | ) | Serial No. 75/301,628           |
|                                       | ) |                                 |
| <b>THE STOUFFER CORPORATION</b>       | ) | Mark: <b>SKILLET SENSATIONS</b> |
|                                       | ) |                                 |
| Applicant.                            | ) |                                 |

Commissioner for Trademarks  
2900 Crystal Drive  
Arlington, VA 22202-3514



10-20-2003

U.S. Patent & TMO/tm Mail Rpt Dt. #64

**BRIEF OF OPPOSER APPLEBEE'S INTERNATIONAL, INC.  
IN RESPONSE TO MOTION FOR RECONSIDERATION OF DECISION**

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, 2900 Crystal Drive, Arlington, Virginia 22202-3514, on

October 16, 2003 *Constance W. Jordan*

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**RULES**

37 C.F.R. Section 2.129(c).....1

Applebee's International, Inc. ("Applebee's") opposes the motion of The Stouffer Corporation ("Stouffer's") under 37 C.F.R. § 2.129(c) for reconsideration of the Board's decision of September 11, 2003, for the reasons set forth below.

#### ARGUMENT

Stouffer's is incorrect in its statement that the Federal Circuit in *In re Coors Brewing Co.*, 68 U.S.P.Q.2d 1059 (Fed. Cir. 2003) "clarified that the 'something more' standard requires a finding that there is substantial evidence" that food and restaurant products be related to other food and beverage products. What the Federal Circuit actually said was:

In light of the requirement that "something more" be shown to establish the relatedness of food and restaurant products for purposes of demonstrating a likelihood of confusion, the Board's finding (in *Coors*) that beer and restaurant services are related is not supported by substantial evidence. p. 1063

The Court went on to say (p. 1064) that the evidence of overlap between beer and restaurant services **in that particular case** was so limited that to uphold the Board's finding would be to "effectively overturn" the requirement of "something more" for a finding of a relationship between food and restaurant services set forth by the Court in *Jacobs v. International Multifoods Corp.*, 212 U.S.P.Q. 641 (CCPA 1982). Thus, rather than change the "something more" standard of the *Jacobs* case, the Court in *Coors* reaffirmed it.

Stouffer's is also incorrect in its statement that the "goods associated with [the marks of the parties in this opposition] are not related, thus a likelihood of confusion between the marks does not exist." In fact, a likelihood of confusion exists precisely because the "something more" required for such a finding is present in this case, as shown by substantial evidence.

In the *Coors* decision (p. 1064) the Federal Circuit acknowledged that the facts of that case were distinguishable from those in *In re Shell Oil Co.*, 26 U.S.P.Q.2d 1687 (Fed. Cir. 1993). There, the Court upheld a Board refusal to register a mark for "service station oil and lubrication

change services" because it was "strikingly similar" to a registered mark for "distributorship services in the field of automotive parts." The Court agreed with the Board that, in addition to the "close similarity of the marks," the services were related and virtually all of the registrant's customers could be prospective customers of the applicant. The Board has found the same facts to exist in the case at hand.

In this opposition, what is being compared for likelihood of confusion is **not** a beer brand vs. restaurant services. What is being compared are main-course entrees available from both a restaurant and a grocery store, both sold under identical marks. The "something more" shown by the evidence of record and noted by the Board in its decision is:

(1) The marks of the parties are identical and convey the same commercial impression (TTAB Decision pp. 21-22).

(2) The products of both Applebee's and Stouffer's are meat entrees with accompanying vegetables or rice, pasta or potatoes (TTAB Decision p. 23).

(3) Both products are intended to be complete meals (TTAB Decision p. 23).

(4) There is "considerable overlap" in the ingredients of the products (TTAB Decision p. 23).

(5) The goods are relatively inexpensive. Stouffer's frozen dinner mixes sell for under \$5. The prices of Applebee's items are generally under \$10. (TTAB Decision p. 23.)

(6) The goods are purchased by the same class of purchasers. Stouffer's dinner mixes are intended to be used by one or two people who want to do some minimal preparation of their meal (White Depo p. 7, from Applebee's Main Brief, p. 19). Applebee's is a family restaurant catering to American tastes (see menu exhibits).

(7) Applebee's SKILLET SENSATIONS meals are frequently purchased for home consumption, as shown by Applebee's carryout menus. See Opposer's Record, No. 20, Carryout Menu, Spring 1998; No. 21, Carryout Menu, Fall 1998; No. 24, Carryout Menu, February 1999; No. 27, Carryout Menu, Spring 2000; No. 28, Carryout Menu, Fall 2000. Stouffer's products are also purchased for home consumption after minimal cooking at home.

(8) The products are directed to the same socioeconomic level of the consuming public and are competitive with each other. In addition to selling its SKILLET SENSATIONS menu items for carry out, remainders from meals are frequently taken home to be eaten later (Applebee's Main Brief, pages 12 and 19). Or a consumer could pick up a Stouffer's frozen dinner mix at the grocery store for preparation at home. No particular degree of sophistication is required for purchase of either entree, or for the minimal preparation of Stouffer's goods (Applebee's Main Brief, p. 19).

(9) Restaurants often sell products in grocery stores; Applebee's has in the past sold its products in grocery stores (TTAB Decision, pp. 23-24).

#### CONCLUSION

*Jacobs v. International Multifoods* is not directly applicable precedent because the issue in the present case is not whether there is confusion between food products and restaurant services, but rather whether there is confusion between two food products, both entrees, one sold in the grocery store and the other sold in a restaurant. Even following *Jacobs* precedent, however, as reaffirmed by the recent *Coors* decision, there is clear evidence in the present case of the "something more" as required by those prior decisions.

For the foregoing reasons, Stouffer's motion for reconsideration should be denied.

Respectfully submitted,

STINSON MORRISON HECKER LLP

Dated: \_\_\_\_\_

10/16/03

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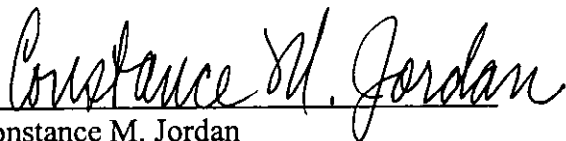
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the above and foregoing **Brief of Opposer Applebee's International, Inc. in Response to Motion for Reconsideration of Decision** was served upon Applicant's attorney by depositing the same in the United States mail, first class postage prepaid, on this 16<sup>th</sup> day of October, 2003, addressed to:

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