

ESTTA Tracking number: **ESTTA516678**

Filing date: **01/17/2013**

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

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	Fox Restaurant Concepts LLC		
Entity	limited liability company	Citizenship	Arizona
Address	4455 East Camelback Road, Suite B100 Scottsdale, AZ 85018 UNITED STATES		

Attorney information	Glenn S. Bacal Bacal Law Group, P.C. 6991 East Camelback Road, Suite D-102 Scottsdale, AZ 85251 UNITED STATES glenn.bacal@bacalgroup.com,jamie.tuccio@bacalgroup.com,david.andersen@bacalgroup.com Phone:4802456233
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Applicant Information

Application No	85677047	Publication date	12/25/2012
Opposition Filing Date	01/17/2013	Opposition Period Ends	01/24/2013
Applicant	Sunshine C & C, Inc. 197 Hilltop Crescent Walnut Creek, CA 94597 UNITED STATES		

Goods/Services Affected by Opposition


Class 029. All goods and services in the class are opposed, namely: Veggie burger patties
Class 043. All goods and services in the class are opposed, namely: Restaurant and hotel services


Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	4098996	Application Date	07/05/2011
Registration Date	02/14/2012	Foreign Priority Date	NONE
Word Mark	ZINBURGER		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 030. First use: First Use: 2007/12/17 First Use In Commerce: 2007/12/17 Hamburger sandwiches

U.S. Registration No.	3582319	Application Date	12/19/2007
Registration Date	03/03/2009	Foreign Priority Date	NONE
Word Mark	ZINBURGER WINE & BURGER BAR		
Design Mark			
Description of Mark	<p>The mark consists of the design of a cow with its nose in a glass of wine above the word "ZINBURGER". The words "WINE & BURGER BAR" appear below the word "ZINBURGER". The colors red and white appear in the body of the cow design. The color red appears in the wine in the wine glass and in the letters "ZIN" of "ZINBURGER". The outline of the cow and the wine glass are in the color black. The letters "BURGER" of "ZINBURGER" and the words "WINE & BURGER BAR" all appear in the color black.</p>		
Goods/Services	Class 043. First use: First Use: 2007/12/17 First Use In Commerce: 2007/12/17 Wine bar services and cafe services featuring sit down service of gourmet burgers made with meat		

U.S. Registration No.	3578742	Application Date	12/19/2007
Registration Date	02/24/2009	Foreign Priority Date	NONE
Word Mark	ZINBURGER WINE & BURGER BAR		

Design Mark			
Description of Mark	The mark consists of the of the word "ZINBURGER" above the words "WINE & BURGER BAR". The color red appears in the letters "ZIN" of "ZINBURGER". The letters "BURGER" of "ZINBURGER" and the words "WINE & BURGER BAR" all appear in the color black.		
Goods/Services	Class 043. First use: First Use: 2007/12/17 First Use In Commerce: 2007/12/17 Wine bar services and cafe services featuring sit down service of gourmet burgers made with meat		

U.S. Registration No.	3620050	Application Date	08/09/2007
Registration Date	05/12/2009	Foreign Priority Date	NONE
Word Mark	ZINBURGER		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 043. First use: First Use: 2007/12/17 First Use In Commerce: 2007/12/17 Full service restaurant services featuring sit down service of wine and gourmet burgers made with meat		

Attachments	85363525#TMSN.jpeg (1 page)(bytes) 77356293#TMSN.jpeg (1 page)(bytes) 77356291#TMSN.jpeg (1 page)(bytes) 77251739#TMSN.jpeg (1 page)(bytes) Notice of Opposition Zen Burger.pdf (8 pages)(99239 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by USPS Express Mail Post Office to Addressee on this date.

Signature	/Glenn S. Bacal/
Name	Glenn S. Bacal
Date	01/17/2013

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

Fox Restaurant Concepts LLC

Opposer,

v.

Sunshine C & C, Inc.

Applicant.

Opposition No. _____

Serial No.: 85677047

For the mark: ZEN BURGER

Published for Opposition:
December 25, 2012

NOTICE OF OPPOSITION



Opposer Fox Restaurant Concepts LLC (“Opposer”) will be harmed by registration of the applied for mark ZEN BURGER that is the subject of Application Ser. No. 85677047 (the “Application”) filed by Sunshine C & C, Inc. (“Applicant”), and Opposer hereby opposes the Application on the basis that ZEN BURGER is likely to cause confusion with Opposer’s registered marks for and incorporating ZINBURGER®.

The Parties

1. Opposer is an Arizona limited liability company with its principal place of business at 4455 East Camelback Road, Suite B100, Phoenix, Arizona 85018.
2. On information and belief, Applicant is a California corporation with its principal place of business at 197 Hilltop Crescent, Walnut Creek, California 94597.

Opposer’s Registration and Use of Its Marks

3. Opposer is the owner of valid and subsisting federal registrations for the following marks (collectively, the “ZINBURGER® Marks”):

Mark	Reg. No.	Goods/Services
ZINBURGER	4098996	Hamburger sandwiches.
	3582319	Wine bar services and cafe services featuring sit down service of gourmet burgers made with meat.
	3578742	Wine bar services and cafe services featuring sit down service of gourmet burgers made with meat.
ZINBURGER	3620050	Full service restaurant services featuring sit down service of wine and gourmet burgers made with meat.

4. Opposer has used one or more of the ZINBURGER® Marks in connection with Opposer’s restaurants since at least as early as December 2007.

5. Since opening the first ZINBURGER® restaurant, Opposer has expanded the use of ZINBURGER® geographically, including new restaurants in recent years across the country from Arizona to New Jersey, with plans to expand to other locations.

6. Since opening the first ZINBURGER® restaurant, Opposer and its licensees have expanded use of ZINBURGER® to include an increasing number of options for those diners who are looking for vegetarian and veggie based items.

7. At Opposer’s ZINBURGER® restaurants, Opposer offers not just conventional burgers made with meat but also veggie burgers and other healthy menu items such as salads.

8. Although ZINBURGER® was originally established as a sit-down wine and burger restaurant, in recent years its reputation has increasingly grown among consumers as also being one of the top “fast food” restaurants.

9. In recent years, consumers and others have referred to Opposer’s ZINBURGER® restaurants as “ZEN BURGER.”

10. The following is an example of a consumer who referred to Opposer’s ZINBURGER® restaurant in Tucson, Arizona as ZEN BURGER:



11. In recent years, people have found Internet listings for Opposer’s ZINBURGER® restaurants by using the search term “ZEN BURGER.”

12. One Internet listing for Opposer’s ZINBURGER® restaurant in Tucson, Arizona, reveals the following about how people found the listing:

People found this by searching for: Zen Burger Tucson, Zinburger Tucson Az Menu, Zinburger Menu Tucson Az, Zinburger Menu Tucson, Zinburger Tucson, Zen Burger Menu Tucson, Az, Zinburger Menu, Zinburger Tucson Menu, and Zinburger Interview.

13. Opposer has regularly taken actions to enforce its rights in the ZINBURGER® Marks against third-party users of marks that are likely to cause confusion with the ZINBURGER® Marks.

Applicant's Attempt to Register ZEN BURGER and Opposer's Objection

14. On July 13, 2012, Applicant filed an application (Ser. No. 85677047) with the USPTO to register the standard character mark ZEN BURGER in Class 29 for “veggie burger patties” and in Class 43 for “restaurant and hotel services” (the “Application”).

15. On August 14, 2012, counsel for Opposer sent a letter to counsel for Applicant, informing Applicant of Opposer's rights in the ZINBURGER® Marks and asking Applicant to withdraw the Application and not commence use of ZEN BURGER.

16. Counsel for Opposer confirmed that the letter was received and signed for at the office of counsel for Applicant on August 16, 2012.

17. Neither Applicant nor its counsel ever responded to the letter from Opposer's counsel, and Applicant has provided no indication that it will abandon the Application or its intended use of ZEN BURGER in commerce.

Standing

18. Opposer has used its ZINBURGER® Marks in commerce prior to the date that Applicant first applied to register the mark ZEN BURGER in connection with the same kinds of services.

19. Applicant's proposed use and registration of ZEN BURGER is likely to cause confusion with Opposer's ZINBURGER® Marks.

20. Applicant's proposed use and registration of ZEN BURGER will impair the value of Opposer's rights in the ZINBURGER® Marks.

21. Applicant's proposed use and registration of ZEN BURGER will cause harm to Opposer and its business.

Likelihood of Confusion

22. Applicant's proposed use and registration of the ZEN BURGER mark is likely to cause confusion with Opposer's ZINBURGER® Marks.

23. Applicant's applied for mark ZEN BURGER is substantially similar in appearance, sound, connotation, meaning, and commercial impression to Opposer's ZINBURGER® Marks.

24. Because there is evidence that some consumers and others already refer to Opposer's ZINBURGER® restaurants as ZEN BURGER, Applicant's use of ZEN BURGER will lead consumers and others to believe, mistakenly, that Applicant is somehow associated with Opposer.

25. Because some consumers already find Internet listings for Opposer's ZINBURGER® restaurants by using the search phrase "ZEN BURGER," Applicant's use of ZEN BURGER will cause a likelihood of confusion among consumers searching for either Opposer's or Applicant's restaurants.

26. Applicant's Application to register ZEN BURGER covers goods and services that are identical to the goods and services with which Opposer previously used and/or registered its ZINBURGER® Marks, namely restaurant services and veggie burgers.

27. Opposer's expansion of the menu items that it offers under the ZINBURGER® Marks to include more vegetarian and veggie based items increases the

likelihood of confusion that would result from Applicant's use and registration of ZEN BURGER.

28. Opposer's expansion of its own use and expansion of the licensed use of the ZINBURGER® Marks to new geographic locations increases the likelihood of confusion that would result from Applicant's use and registration of ZEN BURGER.

29. On information and belief, Applicant will offer and sell its goods and services under the ZEN BURGER mark to the same kinds of consumers to whom Opposer and its licensees offer and sell their goods and services under the ZINBURGER® Marks.

30. On information and belief, Applicant will offer and sell its goods and services under the ZEN BURGER mark in the same or similar channels of trade in which Opposer and its licensees offer and sell their goods and services under the ZINBURGER® Marks.

31. Applicant's use of ZEN BURGER would trade on Opposer's goodwill in its ZINBURGER® Marks.

32. Applicant's applied for mark ZEN BURGER so resembles Opposer's ZINBURGER® Marks so as to make it likely, when applied to Applicant's goods and services, to cause mistake and confusion among, and to deceive, the trade and the public, with consequential injury to Opposer.

33. On information and belief, Applicant was on notice of Opposer's ZINBURGER® Marks prior to filing the Application and selecting the mark ZEN BURGER.

Conclusion

34. Applicant is not entitled to a registration for ZEN BURGER.

35. Applicant's ZEN BURGER mark is likely to cause confusion with Opposer's prior registered ZINBURGER® Marks.

36. Opposer will be damaged by Applicant's registration of ZEN BURGER.

THEREFORE, Opposer respectfully requests that Application Serial No. 85677047 be refused registration.

Respectfully submitted this 17th day of January, 2013.

BACAL LAW GROUP, P.C.

By: /s/Glenn Spencer Bacal
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Certificate of Mailing or Transmission Pursuant to 37 C.F.R. § 1.8

Application No.: 85677047
Mark: ZEN BURGER
Opposer: Fox Restaurant Concepts LLC
Type of Filing: Notice of Opposition

I hereby certify that this Notice of Opposition is being filed electronically with the United States Trademark Trial and Appeal board pursuant to 37 C.F.R. §1.8.

I hereby further certify that this Notice of Opposition is being sent via express mail addressed to correspondent of record as required by the rules:

CHRISTOPHER DITICO
RAJ ABHYANKER, P.C.
1580 W EL CAMINO REAL STE 8
MOUNTAIN VIEW, CALIFORNIA 94040-2462

/s/ Jamie Tuccio

January 17, 2013

Date