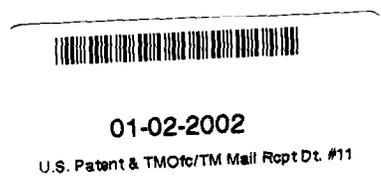


TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD

Applicant: Island Oasis Frozen Cocktail Company, Inc.
Serial No.: 75/883,870
Mark: ISLANDER
Examiner: Stepanie M. Davis
Law Office: 103



APPLICANT'S REPLY BRIEF ON APPEAL

Hon. Commissioner of Patents and Trademarks
Washington, D.C. 20231

Sir:

Applicant submits this brief in reply to the Examining Attorney's Brief mailed on December 21, 2001. In this Reply Brief, Applicant addresses two points raised by the Examining Attorney.

First, the Examining Attorney asserts that Applicant "ignores its own several definitions of the term 'coffee house' as being an establishment where 'coffee and other refreshments' are served." According to the Examining Attorney, those other refreshments "may include frozen drinks and smoothie beverages." (Examining Attorney's Brief, page 3). However, the Examining Attorney's argument is plainly an unsupported nonsequitur. Even if "other refreshments" are served in coffee houses, there is

absolutely no proof in the record that those refreshments "may include frozen drinks and smoothie beverages." The Examining Attorney's leap to the conclusion that "other refreshments" means frozen drinks and smoothies is transparently groundless and should be given no weight.¹

Second, the Examining Attorney improperly relies on a webpage printout submitted for the first time as an attachment to her brief. Applicant objects to this evidence as untimely under Rule 2.142 of the Trademark Rules of Practice and requests that it be stricken and given no consideration.

Recognizing the untimeliness of this submission, the Examining Attorney asks the Board to take judicial notice of a "definition" set forth in that webpage printout. In support of her request, the Examining Attorney cites *B.V.D. Licensing v. Body Action Designs*, 6 USPQ2d 1719 (Fed. Cir. 1998), for the proposition that a "Court may take judicial notice of facts of universal notoriety, which need not be proved." In *B.V.D.*, the Board relied on dictionary definitions appearing in *Webster's Dictionary* and in the *Random House Dictionary* in taking judicial notice of "the fact that ... within the whole United States, the

¹ One beverage, other than coffee, that might be served in a coffee house is suggested in Patrick O'Brian's novel of the turn-of-the-nineteenth-century British Navy, *Master and Commander*. In an early scene, Captain Jack Aubrey and Stephen Maturin meet at a coffee house in Minorca, where Maturin tells the waiter to "Bring us a pot of chocolate, Jep, furiously whipped, and some cream." O'Brian, *Master and Commander* (W.W. Norton & Co.: New York, 1970), page 16.

B.V.D. trademark is at least widely, if not universally, known." *Id.* at 1721.

The untimely evidence offered by the Examining Attorney, however, falls far short of the "universal notoriety" standard set forth in *B.V.D. Licensing*. The Examining Attorney does not proffer a definition from *Webster's* or some other well-known and recognized reference work. Instead she relies on something called "A *Seattle Lexicon*," which is apparently an on-line compilation of terms collected by an individual named Steven E. Callihan. The Examining Attorney neglects to include with the attachment to her brief the introductory webpage to *A Seattle Lexicon*; however, Applicant provides that introductory page as an attachment to this brief. It indicates that Mr. Callihan has put together what purports to be "an interpretive guide for non-Northwesterners who want to get the inside line on the local lingo." Apparently anyone may submit terms for inclusion in this lexicon: "Contributions, suggestions, corrections, and amendments are welcome: send them to Steve Callihan at seattle@callihan.com."

Mr. Callihan himself concedes that the terminology that he has compiled may be "seldomly used" (sic).

"While some terms are known by virtually all Northwesterners, and actually spoken by many, others are known only to some or a few, while spoken by even fewer." *Ibid.*

Thus the on-line, webpage printout on which the Examining Attorney relies is hardly the kind of universal reference source on which the Board may rely for the purpose of taking judicial notice.² That website is nothing more than a random collection of terms gathered by a person of unknown reliability and capability. It proves nothing, and the Board should refuse to take judicial notice of anything contained on that website.

* * * * *

In conclusion, there is nothing of record to support the Examining Attorney's (rather incomprehensible) conclusion that "applicant's goods are a (sic) likely to be the kind of goods offered in the registrant's normal fields of expansion or related to the applicant's (sic) goods under Section 2(d)." (Examining Attorney's Brief, page 3). Applicant's goods are neither related to Registrant's services, nor do they fall within Registrant's normal fields of expansion. Consequently, the refusal to register under Section 2(d) should be reversed.

² The Board faced a similar issue recently in an unpublished decision entitled *In re Nissan*, Serial Nos. 75/531,326, 75/531,325, and 75/531,337 (May 24, 2001). There, the Board refused to take judicial notice of an excerpt from an on-line acronym dictionary. Applicant visited the website and found that anyone could submit an acronym for listing in that "dictionary." The Board concluded that this Acronym Finder was not sufficiently reliable to support its taking judicial notice.

Respectfully submitted,

ISLAND OASIS FROZEN COCKTAIL
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IOL-212

CERTIFICATE OF MAILING

The undersigned hereby certifies that this document is being deposited with the U.S. Postal Service as first class mail, in an envelope addressed to: BOX TTAB NO FEE, Assistant Commissioner For Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513, on 12-28-01.



John L. Welch



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Lingo from the Far Corner

The Seattle area, like most other locales, has its own shorthand notations for referencing different places and locations. The following lexicon is intended as an interpretive guide for non-Northwesterners who want to get the inside line on the local lingo. You'll notice the penchant of the local native to reduce place references down to the absolute minimum. This is largely due to Seattle still being just small enough to have an abundance of one of the kind places and things.

The terms listed here range from the frequently to the seldomly used. Non-Northwesterners should use these terms (in the vain hope of fitting in) only at the risk of being greeted by frequent blank stares. While some terms are known by virtually all Northwesterners, and actually spoken by many, others are known only to some or a few, while spoken by even fewer. However, if you hear one said, armed with this lexicon, you'll know what is meant. The Lexicon is presented in the following categories, each with their own page:



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Contributions, suggestions, corrections, and amendments are welcome: send them to Steve Callihan at seattle@callihan.com.

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since May 1, 1998.

A Seattle Lexicon
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