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

Proceeding	85636673
Applicant	Cajun Conti, LLC
Applied for Mark	OCEANA GUMBO STEAKS SEAFOOD POBOYS OYSTER BAR
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APPLICANT: CAJUN CONTI, LLC	*	MARK SOUGHT TO BE REGISTERED:
	*	
SERIAL NUMBER: 85636673	*	OCEANA GUMBO STEAKS SEAFOOD
	*	POBOYS
	*	
FILING DATE: MAY 28, 2012	*	ATTORNEY DOCKET NUMBER:
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APPEAL BRIEF BY APPLICANT, CAJUN CONTI, LLC

Background

This Appeal arises from a Final Office Action dated April 1, 2013 in the above captioned matter. Applicant’s mark, “Oceana,” has been rejected under Section 2(d) of the Trademark Act for likelihood of confusion. This rejection is based upon U.S. Registration No. 3928634 (“Oceanana”). The Examiner’s previous rejection based upon U.S. Registration No. 2937731 (“Ocean Grill”) was withdrawn based upon Applicant’s Response to Office Action submitted March 18, 2013. For the reasons expressed below, Applicant respectfully submits that its mark should not be refused for likelihood of confusion.

Applicant has filed two separate applications, a word mark (Serial Number 85636654) and a logo (Serial Number 85636673). Final rejections of these applications are being simultaneously appealed.

The Examiner cited an inapplicable string of cases in support of the Section 2(d) rejections. As explained more fully below, this string of cases is distinguishable from the instant likelihood of confusion analysis. These cases support finding a rejection for identical marks that

have been coupled with an additional word or, alternatively, a change in spelling that results in an identical pronunciation of two marks.

The Examiner has indicated that the similarity of the marks, the similarity of the services, and the similarity of trade channels of the services are the factors most relevant to the rejection of the application.

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Argument

Applicant's mark has been rejected under Section 2(d) of the Trademark Act for likelihood of confusion. This rejection is based upon U.S. Registration No. 3928634 ("Oceanana"). The Examiner's previous rejection based upon U.S. Registration No. 2937731 ("Ocean Grill") was withdrawn based upon Applicant's Response to Office Action submitted March 18, 2013. For the reasons expressed below, Applicant respectfully submits that its mark should not be refused for likelihood of confusion. The Examiner has indicated that similarity of the marks, similarity of the services, and similarity of trade channels of the services are the factors most relevant to the rejection of the application.

Applicant respectfully submits that its proposed mark, "Oceana," is not confusingly similar to U.S. Registration No. 3928634 for "Oceanana." For the reasons explained below, Applicant respectfully submits that the cited cases does not support a rejection for likelihood of confusion in the present application. The Action indicates that consumers are generally more inclined to focus on the first word, prefix or syllable in any trademark or service mark. However, the cases relied upon in this rejection analyze marks that are not analogous to "Oceanana" and "Oceana."

In *In re Viterra Inc.*, the confusingly similar marks were "X-Seed" and "XCEED." 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). These two marks were identical in pronunciation and only differed by a change in spelling that was used to achieve the same sound.

In *In re Nat'l Data Corp.*, the Court compared "The Cash Management Exchange" and "Cash Management Account." 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985). In *Nat'l Data*, the marks were identical except for disclaimed descriptive terms.

In *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, the Court compared “Veuve Clicquot Ponsardin” and “Veuve Clicquot.” 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Here, two of three full words in the marks were identical.

In *Mattel Inc. v. Funline Merch. Co.*, the Board compared “Rad Rigs” and “Rad Rods.” 81 USPQ2d 1372, 1374-75 (TTAB 2006). Much like in *Nat’l Data*, the first full word in the marks is identical. The descriptive term was disclaimed.

In *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, “Kidwipes” and “KidStuff” were found confusingly similar. 9 USPQ2d 1895, 1897 (TTAB 1988). The first half of these marks is identical (“Kid”) and coupled with descriptive terms. Consumers would likely assume that the owner of the “Kid” mark was simply selling different products.

The Examiner further argues that the disclaimed wording “GUMBO STEAKS SEAFOOD POBOYS OYSTER BAR” is typically less dominant when comparing marks. To support this assertion, the Examiner cites *In re Dixie Rests., Inc.*, 105 F.3d 1405 (Fed. Cir. 1997), and *In re Nat’l Data Corp.*, 753 F.2d 1056 (Fed Cir. 1985). In *Dixie*, an applicant attempted to register the mark “The Delta Cafe” and was rejected based upon the registration of “Delta” for similar goods and services. *Dixie* is inapplicable to the present application. Unlike the marks in *Dixie*, “Oceana” and “Oceanana” are not identical. In *Dixie*, disclaimed material was found to be less dominant but the marks were identical. Here, Applicant’s disclaimed material may be viewed as less dominant but the marks differ in sound and spelling. Thus, *Dixie* does not apply.

As explained above, in *In re Nat’l Data Corp.*, the Court compared “The Cash Management Exchange” and “Cash Management Account.” 753 F.2d at 1058. In *Nat’l Data*, the marks were identical except for disclaimed descriptive terms. Again, the marks were identical except for disclaimed descriptive terms. Although disclaimed material may be viewed as less

dominant, “Oceana” and “Oceanana” differ in sound and spelling, unlike the identical marks in *Nat’l Data*.

Looking to the present application, Applicant submits that its mark is not confusingly similar with the registered mark under this analysis. Unlike the above cited cases, the marks do not have full identical words and do have an identical sound achieved with a different spelling. Rather, Applicant submits that, the two marks would have to share only identical characters coupled with different descriptive terms. Here, the two marks share some common characters but are not simply prefixes coupled to descriptive terms. The cases listed above only support a rejection for identical words or an identical sound achieved with a different spelling.

Further, the two marks sound considerably different. Applicant’s mark, “Oceana,” is pronounced OH-SHE-AH-NA. It is four syllables and creates a distinct sound. The registered mark, “Oceanana,” is pronounced OH-SHE-AH-NA-NA. While consumers may be inclined to focus on the first part of a mark in some cases, the “NA-NA” in the registered mark is clearly the dominant aspect of that mark. The fourth and fifth syllables of this mark create a unique sound that differs from Applicant’s mark.

In rejection based upon similarity of sounds, the Examiner explains that slight differences in the sound of similar marks will not avoid a likelihood of confusion. In support of this rejection, the Examiner cites *In re Energy Telecomm. & Elec. Ass’n*, 222 USPQ 350, 351 (TTAB 1983). In *Energy*, “ENTELEC & DES.” was refused based on the registration of “INTELEC.” *Id.* Unlike the present application, the two marks were identical except for a change in spelling, which was used to achieve the same sound and commercial impression. This case is inapplicable to the present application, as the two marks, “Oceana” and “Oceanana” do not have just a slight difference. The spelling and pronunciation are distinct.

In further support of the rejection based on similarity of sounds, the Examiner also cites *In re Viterra Inc.*, where the confusingly similar marks were “X-Seed” and “XCEED.” 671 F.3d at 1362. These two marks were identical in pronunciation and only different in a change in spelling to achieve the same sound. Thus, as with *Energy*, *Viterra* is inapplicable to the present application.

The Examiner further argues that “Oceana” is a dominant prefix of both marks. In support of this rejection, the Examiner looks to *In re Mighty Leaf Tea*, 601 F.3d 1342 (Fed Cir. 2010). In *Mighty Leaf*, the mark “ML” found to be confusingly similar to “ML MARK LESS.” *Id.* This case is inapplicable to the present application, as it should be used to analyze identical marks with added additional words. As the court explains, “the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical.” *Id.* at 1348. Here, no terms are identical. Accordingly, a rejection based upon *Mighty Leaf* is inappropriate.

In further support of the rejection based on prefixes, the Examiner cites *In re Optical Int’l*, 196 USPQ 775 (TTAB 1977). In *Optical*, the attempted registration of “Optique” was found to be confusingly similar to “Optique Boutique.” *Id.* Unlike the marks in the present application, the marks in *Optical* were identical except for an identical descriptive term. Thus, *Optical* does not support the current rejection, as the terms are not identical.

Additionally, Applicant avers that, if the above cited cases were directly applicable to the present rejection, the two registered marks, “Ocean Grill” and “Oceanana,” would be confusingly similar and could not be simultaneously registered, as they are currently.

Finally, the Examiner indicated that Applicant's goods and services are similar to those of the registrants'. Applicant does not dispute this assertion. Rather, Application argues that there is no likelihood of confusion, as the marks are distinct.

Conclusion

For the reasons explained above, Applicant respectfully requests that the Trademark Trial and Appeal Board reverse the final rejection of the Examiner and permit the registration of Applicant's mark, "Oceana."

Respectfully submitted:

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