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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Cajun Conti, LLC*

Serial Nos. 85636654 and 85636673

Mark N. Melasky of Koeppel Traylor for Cajun Conti, LLC.

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Before Quinn, Bucher and Lykos,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Cajun Conti, LLC (“applicant”) filed, on May 28, 2012, applications under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), to register the marks OCEANA GRILL (GRILL disclaimed) (in standard characters)<sup>1</sup> and the mark shown at right, (the words “Gumbo,” “Steaks,” “Seafood,” “Poboys,” and “Oyster Bar”



<sup>1</sup> Application Serial No. 85636654, alleging first use anywhere and first use in commerce in 2002.

disclaimed),<sup>2</sup> both for “restaurant services, including sit-down service of food and take-out restaurant services” in International Class 43.

The trademark examining attorney refused registration in application Serial No. 85636654 under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, when used in connection with applicant’s services, so resembles the previously registered marks OCEAN GRILL (GRILL disclaimed) (in typed form) for “restaurant services” in International Class 43,<sup>3</sup> and OCEANANA (in standard characters) for “hotel, motel, restaurant, bar and catering services” in International Class 43,<sup>4</sup> as to be likely to cause confusion. In application Serial No. 85636673, registration was refused under Section 2(d) based only on Registration No. 3928634 for the mark OCEANANA. The registered marks are owned by different entities.

When the refusal was made final in each application, applicant appealed. Applicant and the examining attorney filed briefs.

Because the two appeals involve common questions of law and fact, the Board will decide the appeals in this single opinion.

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<sup>2</sup> Application Serial No. 85636673, alleging first use anywhere and first use in commerce in 2008. The application includes the following description of the mark: “The mark consists of a blue banner outlined in black that says ‘Oceana’ in white stylized text that is outlined in red and black. The banner contains a black ornamental design at the top of it. A red crawfish with a white hat and apron, all of which are outlined in black, appears to the right of the banner. A brown and white boat floating on the blue ocean appears in a brown outlined circle below the banner. Blue sky appears behind the boat, and the word ‘OCEANA’ appears in black on the boat. A blue banner outlined in black with the white words outlined in black ‘GUMBO STEAKS SEAFOOD POBOYS OYSTER BAR’ appear across the bottom. The background blue is not part of the mark.”

<sup>3</sup> Registration No. 2937731, issued April 5, 2005; combined Sections 8 and 15 affidavit accepted and acknowledged.

<sup>4</sup> Registration No. 3928634, issued March 8, 2011.

Applicant does not dispute the similarity between the services, but argues that there is no likelihood of confusion because of differences between the marks. (Brief, p. 8). As to the word marks, applicant contends that the marks “share only some similar characters” and are pronounced differently. With respect to applicant’s design mark, applicant again points to the differences between the words in the marks; no mention is made of the design features.

The examining attorney maintains that the marks are similar and that the services are “substantially similar.” The examining attorney introduced a dictionary definition of the word “grill.”<sup>5</sup>

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the second *du Pont* factor, the similarity or dissimilarity between the services, applicant does not dispute that the services are similar. Indeed, for purposes of our likelihood of confusion analysis, the services are considered to be legally identical. It is settled that in making our determination regarding the

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<sup>5</sup> The examining attorney also introduced third-party registrations showing that the same mark has been registered by a single entity for restaurant services, as well as for hotel and/or bar services. Inasmuch as the services herein are identical, either in full or in part (*see discussion, infra*), this evidence is superfluous.

relatedness of the services, we must look to the services as identified in the applications and the cited registrations. *See Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's services in each application are identified as "restaurant services, including sit-down service of food and take-out restaurant services"; Registration No. 2937731 covers "restaurant services," and the recitation in Registration No. 3928634 includes "restaurant services."

Because there are no limitations to the recitations of services in the applications or the cited registrations as to channels of trade and classes of purchasers, we must presume that the services travel through all usual channels of trade (different types of restaurants) and are offered to all normal potential purchasers (*e.g.*, ordinary consumers). *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *see also Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Moreover, because the services identified in the applications and the cited registrations are legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.").

The identity between the services, trade channels and purchasers are factors that weigh heavily in favor of a finding of a likelihood of confusion.

The crux of these appeals centers on the first *du Pont* factor. Insofar as the marks are concerned, we must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1960 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Moreover, in comparing the marks, we are mindful that where, as here, applicant’s services are identical to the services of each registrant, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the services. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

We now turn to consider the similarity or dissimilarity between each of applicant’s marks and the cited marks.

**Application Serial No. 85636654**

Applicant's mark is OCEANA GRILL (GRILL disclaimed) in standard characters, and the cited marks are OCEAN GRILL (GRILL disclaimed) in typed form and OCEANANA in standard characters.<sup>6</sup>

We first turn to compare the marks OCEANA GRILL and OCEAN GRILL. The word "grill" is defined as "a usually informal restaurant or dining room." (merriam-webster.com) (Office action dated 9/19/12). This generic/highly descriptive term has been properly disclaimed apart from each mark; the term plays no source-indicating function in either mark. *See, e.g., In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) ("DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE).

The marks are identical in construction, and very similar in appearance, differing by only one letter (an additional "A" in applicant's mark). Given this minimal difference, the marks also sound alike. As to meaning, both marks suggest restaurants that offer seafood from the ocean. Given these similarities, the marks engender highly similar overall commercial impressions.

In comparing the marks OCEANA GRILL and OCEANANA, we initially note that the dominant portion of applicant's mark is OCEANA. Given the generic/highly descriptive nature of the term "GRILL," the presence of this term in applicant's mark does little or nothing to distinguish the marks. We find that this dominant portion is very similar in appearance and sound to registrant's mark. Further, the

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<sup>6</sup> Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings.

marks convey similar meanings, namely, restaurants that serve seafood from the ocean. These similarities result in marks that engender highly similar overall commercial impressions.

Contrary to applicant's urging, the coexistence of the cited registrations on the register does not compel a different result here given the similarities between applicant's mark and each of the registered marks. *See AMF, Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of these registrations is not evidence of what happens in the marketplace or that consumers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive."); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1272 (TTAB 2009). *See also*, TMEP § 1207.01(d)(x) (April 2014).

We conclude that applicant's mark and each of the registered marks, when used in connection with identical restaurant services, are so similar that confusion is likely to occur among purchasers.

**Application Serial No. 85636673**

Applicant's mark comprises the words OCEANA GUMBO, STEAKS, SEAFOOD, POBOYS, and OYSTER BAR (the words "Gumbo," "Steaks," "Seafood," "Poboy," and "Oyster Bar" disclaimed) and design features; the cited mark is OCEANANA in standard characters.

It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in

determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (“There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”).

Where both words and a design comprise the mark (as in applicant’s mark), then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers, would be remembered by them, and would be used by them to request the goods and/or services. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012), *citing CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“in a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed”); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430-31 (TTAB 2013); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). *See also Giant Food, Inc. v. Nation’s Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). In applicant’s mark, the literal portion of the mark, namely OCEANA GUMBO, STEAKS, SEAFOOD, POBOYS, and OYSTER BAR, is the dominant portion, and is accorded greater weight over the design features when comparing this mark to the cited mark. Further, with respect to this literal portion of applicant’s mark, we give less weight to the generic/highly descriptive words GUMBO, STEAKS, SEAFOOD, POBOYS, and OYSTER BAR (informing consumers of the type or style of food served in applicant’s restaurant)

that have been properly disclaimed. *In re Chatam Int'l. Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004); and *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). In the case of applicant's mark, the only distinctive literal portion of the mark is OCEANA. Accordingly, we view OCEANA as the dominant portion of applicant's mark.

The dominant portion of applicant's mark, OCEANA, and the entirety of registrant's mark OCEANANA are very similar in appearance, differing by just the two additional letters "NA" at the end of registrant's mark. The marks are also very similar in sound. With respect to meaning, the marks both suggest a restaurant that serves seafood from the ocean.

In comparing the marks, we must consider the marks in their entireties, not merely a dominant portion. Applicant's mark includes prominent design features, as set forth in its description of the mark. The features include a crawfish "chef" and a fishing boat on the water. Although we have considered all of the design features, as well as the additional wording, we view all as merely reinforcing the ocean theme of applicant's mark. Thus, these additional features do not serve to sufficiently distinguish applicant's mark from the cited mark OCEANANA.

In sum, given the similarities between the marks, we find that they engender similar overall commercial impressions.

We conclude that applicant's mark and the registered mark, when used in connection with identical restaurant services, are so similar that confusion is likely to occur among purchasers.

Application Serial Nos. 85636654 and 85636673

**Decision:** The refusal to register under Section 2(d) in each application is affirmed.