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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Brent Theyson

Serial No. 85663894

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BRIEF OF THE APPLICANT

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I. INTRODUCTION

COMES NOW the Applicant Brent Theyson (hereinafter “Applicant”) and through counsel The Trademark Company, PLLC, and provides this Brief of the Applicant in support of its appeal of the examining attorney’s refusal to register the instant mark.

II. STATEMENT OF THE CASE

On or about Jun. 28, 2012 Applicant filed the instant trademark with the U.S. Patent and Trademark Office seeking to register the same on in connection with the following goods: Tequila.

On or about May 1, 2014 the Examining Attorney refused registration of the Applicant’s trademark on the grounds that, if registered, it would create a likelihood of confusion with the registered trademarks CHAOS ON THE ROCKS and CHAOS COCKTAILS more fully set forth in U.S. Registration Nos. 4280432 and 4335600.

On or about October 28, 2014 Applicant filed a response to the Office Action dated May 1, 2014 arguing in support of registration. Ultimately, however, Applicant’s argument was not deemed persuasive by the Examining Attorney and, accordingly, on or about November 12, 2014 the Examining Attorney made the refusal final.

The instant appeal now timely follows.

III. ARGUMENT

The Standard for a Determination of a Likelihood of Confusion

A determination of likelihood of confusion between marks is made on a case- specific basis. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (Fed . Cir. 1997). The Examining Attorney is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) The conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing;
- (5) The number and nature of similar marks in use on similar services; and
- (6) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

Id.

The Examining Attorney is tasked with evaluating the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the Examining Attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir. 1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are confusingly similar. In *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not

to be confusingly similar. Further, in *Luigino's Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark "Lean Cuisine" was not confusingly similar to "Michelina's Lean 'N Tasty" even though both marks use the word "Lean" and are in the same class of services, namely, low-fat frozen food.

Concerning the respective goods with which the marks are used, the nature and scope of a party's goods must be determined on the basis of the goods recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computergoods Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). *See generally* TMEP § 1207.01(a)(iii).

Even if the marks are similar, confusion is not likely to occur if the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create an incorrect assumption that they originate from the same source. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held

not confusingly similar to QR for various products (e.g., lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Purchasers who are sophisticated or knowledgeable in a particular field are not necessarily immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely as between Applicant's trademark and the trademark cited and, accordingly, the refusal to register CAOS should be withdrawn.

The Trademarks Are Dissimilar

The points of comparison for a word mark are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973)). Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related. Rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone *may* be sufficient to support a holding that the marks are confusingly similar, but a similarity of one factor is not dispositive of the entire analysis. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Additions or deletions to marks are often sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) the matter

common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.

Different Commercial Impressions

If the respective trademarks create separate and distinct commercial impressions source confusion is not likely. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356-57 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of THE RITZ KIDS for clothing items (including gloves) and RITZ for various kitchen textiles (including barbeque mitts) is likely to cause confusion, because, *inter alia*, THE RITZ KIDS creates a different commercial impression).

In the instant case, Applicant's trademark CAOS creates a commercial impression of an acronym for the letters C A O S for which there is no well-known definition or otherwise. In the alternative, the registered trademark CHAOS ON THE ROCKS and CHAOS COCKTAILS creates a commercial impression of the term chaos, a recognized word in the English language referring to a state of confusion of disorder, in conjunction with the respective descriptive or generic terms on the rocks or cocktails.

The Applicant's mark is a single word mark CAOS. CAOS is not an English language word and is not recognizable or familiar to the relevant consumer. Hence, CAOS as used on tequila conveys several distinct commercial impressions. CAOS could be proprietary (name of the owner), the place where it is made, the name of the company that makes it, the name of the person who formulated the product.

The cited marks CHAOS COCKTAILS and CHAOS ON THE ROCKS comprise several terms which are all English language words and are easily familiar and recognizable to the relevant public. CHAOS COCKTAILS and CHAOS ON THE ROCKS elicit similar mental impressions consisting of images of drunken, messy, out-of-control inebriated states. CHAOS ON THE ROCKS, as the term "ON THE ROCKS" also means in a troubled state, and therefore the mark CHAOS ON THE ROCKS used on

alcoholic mixed beverages conveys confusion and disorder resulting from intoxication.

As for phonetic and auditory dissimilarities, the Applicant's mark is pronounced as "khaws". The cited marks are pronounced as spelled.

Clearly, these differences in the over-all appearance of the Applicant's mark and the cited marks inevitably result in separate and distinct commercial impressions.

Given these separate and distinct commercial impressions, it is submitted that this factor favors a finding of an absence of a likelihood of confusion under this *du Pont Factor*.

Distinctions as Between Applicant's and Registrant's Goods and Services

The nature and scope the goods or services offered in connection with the Applicant's and the registrant's trademarks must be determined on the basis of the goods or services identified in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 sF.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010).

The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board’s dismissal of opposer’s likelihood-of-confusion claim, noting “there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source” though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB’s holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties’ respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

The facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the

use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (regarding computer hardware and software); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) (regarding clothing); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

In the instant matter, Applicant provides the following identification in the subject application: tequila. To the contrary, the registered trademark provides the following: alcoholic mixed beverages except beers. Within this context, these differ insofar as Applicant uses its mark in connection with pure tequila. Registrant, on the other hand, uses its trademarks in connection with mixed alcoholic beverages such as a wine cooler or similar product.

The Applicant's tequila is the distilled beverage from the blue agave plant. *See* Exhibit 6 previously submitted with Applicant's Request to Reconsider dated February 15, 2015 (hereinafter "Exhibit"). There are three variants of CAOS branded tequila: Blanco (double distilled, non-aged), Reposado (double distilled and aged 8-10 months in White American Oak Bourbon barrels and Anejo (double distilled and aged 18 months in White American Oak Bourbon barrels. *See* Exhibit 7. CAOS branded tequila is a pure unadulterated drink easily classified as premium product.

The cited marks CHAOS COCKTAILS and CHAOS ON THE ROCKS, both owned by Sarkesian Ventures LLC are used on alcoholic mixed beverages. Exhibits 2-3. From the Applicant's submitted Specimen of Use for CHAOS ON THE ROCKS, the alcoholic mixed beverage closely

resembles the product identically called CHAOS COCKTAILS and CHAOS ON THE ROCKS. *See* Exhibit 8. This alcoholic mixed beverage is a “low calorie, low carb” vodka cocktail, which mixes vodka with fruit and low calories sweeteners. *See* Exhibits 9-10. A mixed drink with a unit of alcohol, in this case, vodka with juice is not similar to pure, unadulterated blue agave tequila.

It is respectfully submitted that there is little, if any, relation between the goods of the Applicant and the goods found in the cited marks and, as such, this *du Pont* factor also favors a finding of an absence of a likelihood of confusion between the instant marks.

Distinctions Between Trade Channels

The Applicant’s CAOS branded premium tequila is sold in retail stores and in bulk to restaurants and hotels.

In the alternative, the trade channels of the goods of the cited marks are presumably through its website or in some retail stores.

As such, it is respectfully submitted that Applicant’s premium tequila product travel in a channel of trade wholly diverse from those which would be expected for the fruity vodka based low carb-low calorie drink of the cited marks. It is also submitted that the respective goods would not be encountered by the same persons in situations that would create the incorrect assumption that such goods originate from the same source and, accordingly, this *du Pont* factor also favors registration of the Applicant’s mark.

The Marks’ Goods are Marketed Differently

The Applicant’s premium tequila is marketed on its own website www.caostequila.com, social networking (i.e., Facebook, Twitter, Pinterest), blogging, commercials, trade shows and through a direct sales team. The target audience for the Applicant’s CAOS target audience consists of tequila enthusiasts specifically, and social drinkers aged 21 and older, as well as restaurant and hotel owners and/or managers.

In contrast, there is little evidence to show that the goods of any of the cited marks are being actively marketed anywhere, apart from their own website and through social media accounts. The target

audience of the cited marks' are women aged 21 and older, who are health and figure conscious. The fact that the CHAOS COCKTAIL and CHAOS ON THE ROCKS branded drinks seem to be cater to mostly women is evidenced by a page found on their website called "Chaos Chicks Chatter". See Exhibit 11.

The nature of Facebook, Twitter and Pinterest as used by proprietors, is that the data contained therein provide relevant details, updates, events, promotions about their respective products. Facebook, Twitter and Pinterest friends and followers would only follow persons or accounts of specific interest to them. As applied to this case, the followers of the Applicant's CAOS account are those who are interested in premium tequila. The followers of the CHAOS COCKTAILS and CHAOS ON THE ROCKS account can be safely presumed as mostly, if not entirely, young women.

Based upon this finding, consumers would not be presented with situations that would create the incorrect assumption that the goods originate from the same source and, accordingly, this *du Pont* factor also favors registration of the Applicant's mark.

CONCLUSION

Based upon the foregoing it is submitted that the *du Pont* factors addressed herein favor registration of the Applicant's Trademark.

WHEREFORE it is respectfully requested that the Trademark Trial and Appeal Board reverse the decision of the Examining Attorney, remove as an impediment the cited trademark, and approve the instant Application for publication.

Respectfully submitted this 13th day of July, 2015,

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