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

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Applicant	Marcus Samuelsson Group LLC
Applied for Mark	RED ROOSTER HARLEM 310 LENOX AVE. NEW YORK CITY
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of: Marcus Samuelsson Group LLC
Application No.: 85/927,336
Filed: May 9, 2013
Mark:



APPLICANT'S APPEAL BRIEF

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Applicant, Marcus Samuelsson Group LLC (“Applicant”), hereby submits this brief in support of its appeal of the Examining Attorney’s refusal to register the trademark RED ROOSTER HARLEM 310 LENOX AVE. NEW YORK CITY & Design for “restaurant services; bar services,” designated Application Serial No. 85/927,336.

PROCEDURAL HISTORY

Applicant submitted Application Serial No. 85/927,336 (the “Application”) to register the trademark RED ROOSTER HARLEM 310 LENOX AVE. NEW YORK CITY & Design (“Applicant’s Logo”), shown below, for “restaurant services; bar services” on May 9, 2013.



(App. Ser. No. 85/927,336, May 9, 2013, Application, TSDR, Dkt. 1.) The Application was initially refused registration in a non-final Office action on July 19, 2013. (Id., Jul. 19, 2013, Office Action, TSDR, Dkt. 6.) Thereafter, Applicant’s counsel participated in a telephone conference with the Examining Attorney and, as a result of that conference, prosecution of the Application was suspended on January 17, 2014. (Id., Jan. 17, 2014, Suspension Letter, TSDR, Dkt. 9.) The Examining Attorney issued a final Office action on February 16, 2016, simultaneously lifting the suspension and refusing registration of Applicant’s Logo based on a perceived likelihood of confusion, under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with U.S. Registration No. 3,719,283 for FAMOUS RED ROOSTER CAFE in standard characters for “restaurants; restaurant services” (the “Cited Mark”). (Id., Feb. 16, 2016, Office Action, TSDR, Dkt. 14.)

Applicant filed a Request for Reconsideration on June 16, 2016 arguing that, because the parties' marks differ materially in appearance, connotation, and commercial impression and because the Trademark Office has previously allowed registration of Applicant's other RED ROOSTER trademarks, as well as third-party ROOSTER marks, for the same or similar services, registration of Applicant's Logo is not likely to cause consumer confusion with the Cited Mark. (Id., Jun. 16, 2016, Request for Reconsideration after Final Office Action, TSDR, Dkt. 15 (hereinafter "RFR").) On July 7, 2016, the Examining Attorney denied Applicant's Request for Reconsideration and, on August 12, 2016, Applicant filed its Notice of Appeal with the Trademark Trial and Appeal Board (the "Board"). (Id., Jan. 17, 2014, Reconsideration Letter, TSDR, Dkt. 17; Ex Parte Appeal No. 85927336, Aug. 12, 2016, Appeal to Board, TTABVue, Dkt. 1.).

FACTUAL BACKGROUND

Applicant is the corporate entity that owns the restaurant brands created by the celebrated chef Marcus Samuelsson, who was the youngest chef ever to receive two three-star ratings from *The New York Times*. Mr. Samuelsson started the RED ROOSTER HARLEM restaurant in 2010. He was inspired by the history and story of Harlem, New York, and, in fact, named his restaurant after the (now closed) famous Harlem speakeasy. The Red Rooster speakeasy was known as a diverse hangout for Harlem locals and celebrities such as Willie Mays, Nat King Cole, and James Baldwin, as well as a place where food, music, and the Harlem community were celebrated. In the six years since the RED ROOSTER HARLEM restaurant opened, Applicant has offered consistently high-quality, complicated, artisanal dishes that reflect its location, quickly making it part of the fabric of Harlem and New York City. Applicant began using its RED ROOSTER HARLEM and RED ROOSTER HARLEM & Design trademark in commerce

as early as December 14, 2010. It has been using Applicant's Logo in connection with its bar and restaurant services since at least as early as December 31, 2010.

On February 2, 2011, Applicant filed an application to register its trademark RED ROOSTER HARLEM EST. 2010 & Design trademark for "bar and restaurant services." (RFR, pp. 20-22.) On October 4, 2011, Applicant filed another application, this time to register its RED ROOSTER HARLEM mark, in standard font, also for "bar and restaurant services." (RFR, pp. 17-19.) These applications were each assigned to a different examining attorney, both of whom explicitly considered the likelihood of confusion between Applicant's marks and the Cited Mark¹ and both of whom separately concluded that confusion was not likely and approved the marks for registration. (RFR, pp. 17-22.) As a result, Applicant owns U.S. Registration No. 4,400,290 for its RED ROOSTER HARLEM EST. 2010 & Design mark (the RED ROOSTER & Design Registration), which issued on September 20, 2013, and U.S. Registration No. 4,894,070 for its RED ROOSTER HARLEM word mark, which issued on February 2, 2016 ("Applicant's RED ROOSTER Word Registration" and, together with Applicant's RED ROOSTER & Design Registration, "Applicant's RED ROOSTER Registrations"). (RFR, pp. 12-22.) The Cited Mark, along with Applicant's RED ROOSTER Registrations and Applicant's Logo are shown below:

¹ The application for the Cited Mark was filed on February 25, 2008 and the registration issued on December 1, 2009. (App. Ser. No. 85/927,336, Feb. 16, 2016, Office Action, TSDR, Dkt. 14.)

	<u>Mark</u>	<u>Services</u>
Cited Mark	FAMOUS RED ROOSTER CAFE	Restaurants; Restaurant services
Applicant's RED ROOSTER Word Registration	RED ROOSTER HARLEM	Bar and restaurant services
Applicant's RED ROOSTER & Design Registration		Bar and restaurant services
Applicant's Logo		Restaurant services; bar services

Applicant's Logo is virtually identical to Applicant's RED ROOSTER Registrations, differing only in that it contains additional literary and design elements. Despite the Trademark Office's previous conclusions that Applicant's RED ROOSTER Registrations are not confusingly similar to the Cited Mark, and despite differences in the appearance, connotation, and commercial impression of Applicant's Logo and the Cited Mark, the Examining Attorney assigned to review Applicant's Logo refused registration. (App. Ser. No. 85/927,336, Jul. 7, 2016, Reconsideration Letter, TSDR, Dkt. 17.)

LEGAL ARGUMENT

A. Legal Standard

In a likelihood of confusion analysis, the Board looks to the factors set forth in *In re E.I. DuPont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973), paying particular attention to the factors most relevant to the case at hand. See *In re Allegiance Staffing*, 115 U.S.P.Q.2d 1319

(T.T.A.B. 2015), citing *In re E.I. DuPont de Nemours & Co.*, 177 U.S.P.Q. 563 (C.C.P.A. 1973) (“[O]ur 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 [*DuPont* factors]. Each factor may, from case to case, play a dominant role.”). These factors include “any other established fact probative of the effect of use.” *In re Strategic Partners, Inc.*, 102 U.S.P.Q.2d 1397 (T.T.A.B. 2012). The Board has previously determined that an applicant’s prior registrations for similar marks is an “other established fact probative of the effect of use.” *Id.* (overturning examining attorney’s refusal to register where applicant’s ownership of a prior registration for a substantially similar mark was an established fact probative of registerability that must be considered).

Of the thirteen *DuPont* factors, the following three factors, each of which is discussed below, are the most relevant to the *ex parte* determination of whether a likelihood of confusion exists between Applicant’s Logo and the Cited Mark: (1) an established, probative fact, in this case, Applicant’s ownership of two other registrations for marks nearly identical to Applicant’s Logo; (2) the similarity or dissimilarity of the marks in their entirety as to sight, connotation, and commercial impression; and (3) the strength of the cited mark.

Importantly, “each case must be decided on its own particular facts and circumstances.” *In re British Bulldog, Ltd.*, 224 U.S.P.Q. 854, 856 (T.T.A.B. 1984). Applicant respectfully submits that, when the relevant *DuPont* factors are considered -- the Trademark Office’s prior allowance of Applicant’s RED ROOSTER Registrations, the significant differences between Applicant’s Logo and the Cited Mark, and the weakness of the Cited Mark -- there is no likelihood of confusion and the refusal to register Applicant’s Logo should be reversed.

B. Analysis

1. The Application of a Uniform Standard Requires that Applicant's Logo Be Allowed to Register

Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), provides: “A certificate of registration of a mark upon the principal register provided by this Act shall be prima facie evidence of the validity of the registered mark and of the registration of the mark, of the owner’s ownership of the mark, and of the owner’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.” Federal registration creates a strong presumption “that the mark is dissimilar to other registered marks for similar goods or services.” *Liberty Mut. Ins. Co. v. Liberty Ins. Co.*, 127 U.S.P.Q. 312, 185 F. Supp. 895, 902 (E.D. Ark. 1960), *cited with approval in Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 181 U.S.P.Q. 272, 492 F.2d 1399 (C.C.P.A. 1974).

Further, the courts and the Board encourage the Trademark Office to use a uniform standard in assessing marks. *In re Nett Designs, Inc.*, 57 U.S.P.Q.2d 1564, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“Needless to say, this court encourages the PTO to achieve a uniform standard for assessing registrability of marks.”). The Board has stated that “[u]niform treatment under the Trademark Act is desirable.” *In re Consolidated Cigar Co.*, 35 U.S.P.Q.2d 1290 (T.T.A.B. 1995).

Taking these two concepts together, it is clear that where an applicant already owns registrations, the applicant is both entitled to a presumption that the registered marks are not confusingly similar to the cited mark and entitled to receive uniform treatment from the Trademark Office when it considers a new application for a mark highly similar to the registered marks. The Board has recognized this concept in prior decisions. In *In re Strategic Partners*,

Inc., the Board reversed the examining attorney's Section 2(d) refusal to register applicant's mark because "applicant already owns a registration for a substantially similar mark for the identical goods." 102 U.S.P.Q.2d 1397. Similarly, in *In re Allegiance Staffing*, the Board reversed the examining attorney's Section 2(d) refusal in part because applicant owned a registration for the same mark for the same services covered by the subject application and "none of the five different examining attorneys who examined the cited registrations refused registration based on a likelihood of confusion with the same mark for which registration is sought in the current application." 115 U.S.P.Q.2d 1319.

Here, two different examining attorneys already determined that Applicant's RED ROOSTER Registrations are not confusingly similar to the Cited Mark. Further, when the Trademark Office issued the registration certificates for these marks, it endowed upon Applicant a presumption that Applicant's RED ROOSTER Registrations are not confusingly similar to the Cited Mark. Applicant's Logo is almost identical to both of Applicant's RED ROOSTER Registrations: All three marks feature the phrase RED ROOSTER HARLEM, the RED ROOSTER & Design Registration prominently displays the same rooster design, and all three marks are for "bar and restaurant services." (RFR, pp. 17-22.) Given this high degree of similarity between the marks, the application of a uniform standard to the assessment of Applicant's Logo dictates a finding that Applicant's Logo is not confusingly similar to the Cited Mark.

Not only is Applicant's Logo nearly identical to Applicant's RED ROOSTER Registrations, but, to the extent that Applicant's Logo is different from Applicant's RED ROOSTER Registrations, it is also different from the Cited Mark. In fact, of Applicant's three marks, Applicant's Logo has the most elements and is the most distinct from the Cited Mark.

First, there are more differences in the literary elements of Applicant's Logo as compared to the Cited Mark. The Cited Mark contains four words, RED ROOSTER and two other words.

Applicant's RED ROOSTER Registrations contain, respectively, three words (RED, ROOSTER, and HARLEM) and five words (RED, ROOSTER, HARLEM, EST., and 2010). By contrast, Applicant's Logo contains nine words (RED, ROOSTER, HARLEM, 310, LENOX, AVE., NEW, YORK, and CITY).

Second, Applicant's Logo contains several significant design elements. It not only prominently features a large version of a stylistic rooster design ("Applicant's Rooster Image"), but also (a) displays Applicant's Rooster Image in the center of three concentric circles and (b) utilizes literary elements -- RED ROOSTER HARLEM and 310 LENOX AVE. NEW YORK CITY -- in different sized fonts and arranged in different parts of the space between the two inner-most circles. By comparison, neither Applicant's RED ROOSTER Word Registration nor the Cited Mark contain any design elements.

Finally, Applicant's Logo creates a more distinct overall impression from the Cited Mark than Applicant's RED ROOSTER Registrations. Applicant's Logo gives the impression of seal through use of concentric circles with a large rooster in the center; use of the words RED, ROOSTER, and HARLEM in one size and style font above and below the rooster, between two of the circles; and use of the phrases 310 LENOX AVE. and NEW YORK CITY in smaller font on the sides of the rooster, between the same two circles. Consumers encountering Applicant's Logo will be struck first by the most prominent element: Applicant's Rooster Image. Influenced by the uniform, larger font of RED ROOSTER HARLEM (as compared to 310 LENOX AVE. NEW YORK CITY), consumers also will consider RED ROOSTER HARLEM to be a single phrase. In contrast, Applicant's RED ROOSTER & Design Registration does not look like a

seal, while Applicant's RED ROOSTER Word Registration has no design elements at all. Certainly, if Applicant's RED ROOSTER Registrations differ in sight, sound, connotation, and commercial impression from the Cited Mark -- and the Trademark Office has already determined that they do -- then Applicant's Logo must also differ in sight, sound, connotation, and commercial impression from the Cited Mark.

Accordingly, because *two different* examining attorneys have already found that Applicant's RED ROOSTER Registrations are not confusingly similar to the Cited Mark, because Applicant's Logo is virtually identical to Applicant's RED ROOSTER Registrations, and because Applicant's Logo creates an even more distinct commercial impression from the Cited Mark than Applicant's RED ROOSTER Registrations, the only uniform conclusion is that Applicant's Logo is not confusingly similar to the Cited Mark.

2. The Marks are Different in Sight, Connotation, and Commercial Impression

To evaluate likelihood of confusion, the marks must be considered in their entireties and in their commercial settings and “[a]ll relevant facts pertaining to the appearance and connotation must be considered.” *Recot Inc. v. M.C. Becton*, 54 U.S.P.Q.2d 1894, 214 F.3d 1322, 1329 (Fed. Cir. 2000); *see Opryland USA Inc. v. Great American Music Show, Inc.*, 23 U.S.P.Q.2d 1471, 970 F.2d 847, 851 (Fed. Cir. 1992) (“When it is the entirety of the marks that is perceived by the public, it is the entirety of the marks that must be compared.”).

Despite substantial similarity with a registered mark -- even for identical or similar goods -- a mark may be registered if there are even slight differences that avoid creating a likelihood of confusion. *Industrial Adhesive Co. v. Borden, Inc.*, 218 U.S.P.Q. 945 (T.T.A.B. 1983) (dismissing opposition to the registration of WONDER BOND PLUS for cyanoacrylate adhesive filed by prior registrant for BOND-PLUS for industrial adhesive); *Taco Time Int'l, Inc. v. Taco Town, Inc.*, 217 U.S.P.Q. 268 (T.T.A.B. 1982) (permitting registration of TACO TOWN for fast

food restaurant services despite prior registration of TACO TIME for restaurant services).

Indeed,

even close similarity between two marks is not dispositive of the issue of likelihood of confusion. Similarity in and of itself is not the acid test. Whether the similarity is likely to provoke confusion is the crucial question. For this reason, cases involving the single alliteration, addition or elimination of only a single letter from the old mark to the new reach divergent results.

McGregor-Doniger Inc. v. Drizzle, Inc., 599 F.2d 1126, 1133 (2d Cir. 1979) (superseded by rule on other grounds as stated in *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 406 (2d Cir. 2004)) (no likelihood of confusion between DRIZZLE for women’s overcoats and DRIZZLER for golf jackets).

Here the parties’ marks differ by more than just a single alliteration, addition, or elimination of only a single letter. They are visually distinct in numerous ways and create different commercial impressions. The Cited Mark, shown below on the right, is a standard character mark with no design elements. It consists of only four words, with FAMOUS as the first word and CAFE as the last word.

Applicant’s Logo



Cited Mark

FAMOUS RED ROOSTER CAFE

In contrast, Applicant’s Logo is a composite mark that, when viewed in its entirety, gives the visual impression of a seal. Applicant’s Logo contains a number of significant design elements, namely the prominent and stylistic design of a rooster surrounded by three concentric circles.

Within the circles, and framing the Applicant's Rooster Image, are nine words in a stylized font: RED, ROOSTER, HARLEM, 310, LENOX, AVE., NEW, YORK, and CITY. Applicant's Logo does not include the words FAMOUS or CAFE. Further, each of the words RED, ROOSTER, and HARLEM in Applicant's Logo are in the same style and size font, giving the impression that these three words form a unit -- RED ROOSTER HARLEM. As the Trademark Office recognized when it approved Applicant's RED ROOSTER Word Registration, HARLEM cannot be discounted, as its inclusion greatly informs the commercial impression created by the mark. That is, a mark that represents restaurant services that embody the spirit and history of and that are rendered in one of New York City's most famous neighborhoods: Harlem. No such commercial impression is given by the Cited Mark.

Further, Applicant's Rooster Image is the most dominant element of Applicant's Logo, both because it is the largest and most prominent element and because its location at the center of three concentric circles focuses viewers' attention. *See, e.g., Parfums de Coeur, Ltd. v. Lory Lazarus*, 83 U.S.P.Q.2d 1012 (T.T.A.B. 2007) (finding that the design element in applicant's BM BODYMAN & Design was the dominant portion of the mark, due in part to the fact that it was "prominently displayed," "the largest element in the mark," and had "the effect of catching the eye and engaging the viewer before the viewer looks at the word BODYMAN," thus distinguishing the mark from opposer's BOD MAN word mark); *see also Steve's Ice Cream, Inc. v. Steve's Famous Hot Dogs*, 3 U.S.P.Q.2d 1477 (T.T.A.B. 1987) (finding no likelihood of confusion where the prominent design element of applicant's STEVE'S and design mark rendered the mark distinguishable from the registrant's STEVE'S word mark).

Any argument that RED ROOSTER is the most dominant element in Applicant's Logo because the remaining words are disclaimed ignores the dominance, both in location and size, of

Applicant's Red Rooster Image. While the words in a composite word and design mark can sometimes be the most significant element of a mark, this is not the case where, as here, the design element is large and prominently placed. In *In re Covalinski*, the Board reversed the examining attorney's refusal to register applicant's REDNECK RACEGIRL mark, finding that there was no likelihood of confusion with the earlier registered RACEGIRL mark for the same goods because applicant's mark included a design element that was "very large [and] prominently displayed." 113 U.S.P.Q.2d 1166 (T.T.A.B. 2014); see also *In re White Rock Distilleries Inc.*, 92 U.S.P.Q.2d 1282 (T.T.A.B. 2009) (finding no likelihood of confusion between the registered mark TERZA VOLTA and design and VOLTA in part because "the prominent design feature and the term TERZA in the registered mark serve to distinguish the registered mark visually from applicant's mark"); *Ferro Corp. v. Ronco Laboratories, Inc.*, 356 F.2d 122 (C.C.P.A. 1966) (finding no likelihood of confusion between applicant's FERRO-GARD and design mark and registrant's nine registrations for FERRO and FERRO-formative marks in part because of the dominant design aspect of applicant's composite mark).

Even if RED ROOSTER is considered the dominant element of Applicant's Logo -- and Applicant does not concede that it is -- the proper comparison of Applicant's Logo and the Cited Mark is of the marks *as a whole*. *Parfums de Coeur, Ltd.*, 83 U.S.P.Q.2d 1012 ("Even if an element of a mark is dominant, this does not mean that other elements may simply be ignored in the likelihood of confusion analysis."). Even though Applicant disclaimed portions of its mark, a "disclaimer does not remove the disclaimed matter from a mark." *In re TSI Brands, Inc.*, 67 U.S.P.Q.2d 1657, 1661 (T.T.A.B. 2002). In *In re TSI Brands, Inc.*, the Board considered the disclaimed, descriptive wording in an application for AK AMERICAN KHAKIS (and design) for sportswear when deciding there was no likelihood of confusion with AK (and design) for

athletic clothing. *Id.* at 1661-62. As in *In re TSI Brands*, all of the elements of Applicant's Logo and the Cited Mark must be considered as this is how consumers will encounter the marks in the marketplace and as it is the consumers' overall impression that is of concern. When Applicant's Logo and the Cited Mark are properly considered in their entireties, as set forth above, it is clear there is no likelihood of confusion.

Finally, it is important to recall that the registrant's rights in the Cited Mark do not extend beyond the words in that mark to the other words or design elements of Applicant's Logo. "[R]ights associated with a mark in standard characters reside in the wording (or other literal element, e.g., letters, numerals, punctuation) and not in any particular display." Trademark Manual of Examining Procedure (TMPEP) § 1207.01(c)(iii) (April 2016). "Generally, rights in the word would not be extended to include protection for that word combined with, for example, other words or a design element." *In re White Rock Distilleries Inc.*, 92 U.S.P.Q.2d at 1284; *see also Fossil, Inc. v. The Fossil Group*, 49 U.S.P.Q.2d 1451, 1454 (T.T.A.B. 1998) ("[O]pposer's registrations of the word FOSSIL in typed drawing form do not afford opposer rights in the word FOSSIL combined with other wording or with designs."). While the Cited Mark is in standard font and covers any font, it does not follow that the registrant also has rights in the many additional words and design elements that comprise Applicant's Logo. Instead, the rights in the Cited Mark are limited to the four words. A comparison of the overall impression of the set of four words in the Cited Mark and the overall impression of Applicant's Logo as a whole yields only one conclusion: there is no likelihood of confusion.

3. There is Room for Applicant's Logo and the Cited Mark to Coexist on the Principal Register

When assessing likelihood of confusion, the strength of the cited mark or marks can be one of the most critical factors to consider. *See Sun Banks of Fla. v. Sun Fed. Sav. & Loan*, 651

F.2d 311, 315 (5th Cir. 1981). The ultimate test of the relative strength of a mark is the distinctiveness of that mark in the mind and perception of the relevant customer group. *See* 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 11:85 (4th Ed. 2006); *Lang v. Retirement Living Pub. Co., Inc.*, 949 F.2d 576, 581 (2d Cir. 1991) (“Ultimately, the strength of the mark turns on its ‘origin-indicating’ quality, in the eyes of the purchasing public.”).

It is well-established that the likelihood of confusion between marks is reduced when their common elements are in use by others as trademarks. *See, e.g., Promark Brands Inc. and H.J. Heinz Co. v. GFA Brands, Inc.*, 114 U.S.P.Q.2d 1232 (T.T.A.B. 2015) (“Such third party registrations and uses are competent to show that...marks containing the [common] term have been registered and used for related goods because the remaining portions of the marks may be sufficient to distinguish the marks as a whole from one another.”). That principle applies here, where the only elements Applicant’s Logo and the Cited Mark have in common are the terms RED and ROOSTER. The fact that the two marks share these terms is not determinative that a likelihood of confusion exists. *See Lever Bros. Co. v. American Bakeries Co.*, 216 U.S.P.Q. 177, 693 F.2d 251 (2d Cir. 1982) (holding AUTUMN for margarine not confusingly similar to AUTUMN GRAIN for bread); *Embarcadero Technologies Inc. v. RStudio, Inc.*, 105 U.S.P.Q.2d 1825 (T.T.A.B. 2013) (finding RSTUDIO for computer software and related services and ER/STUDIO for computer software and related services not confusingly similar); *In re Nobody’s Perfect Inc.*, 44 U.S.P.Q.2d 1054 (T.T.A.B. 1997) (finding no likelihood of confusion between NOBODY’S PERFECT for apparel retail store services and NO BODY’S PERFECT for “feminine underwear”).

Moreover, the Trademark Office already has held that marks containing ROOSTER for restaurant and bar services can coexist in the absence of confusion, in that it has granted registration of a number of these marks for services in this field. Because these other marks coexist with the Cited Mark on the Principal Register, Applicant's Logo should be permitted to do so as well.

Below is a list of seventeen (17) such registrations, including Applicant's RED ROOSTER Registrations, demonstrating that the owner of the Cited Mark does not have the exclusive right to register or use marks containing the word ROOSTER, or the words RED ROOSTER, for restaurant and bar services:

MARK	REG. NO.	OWNER	RELEVANT SERVICES
RED ROOSTER HARLEM	4,894,070	Marcus Samuelsson Group LLC	Bar and restaurant services
RED ROOSTER HARLEM EST. 2010 & Design	4,400,290	Marcus Samuelsson Group LLC	Bar and restaurant services
BC ROOSTERS A FUN, CASUAL JOINT & Design	3,412,197	Roosters Restaurant Management Corp.	Restaurant services
ROOSTER BAY & Design	3,768,523	US Foods, Inc.	Restaurant services
ROOSTER & MOON COFFEE PUB (stylized)	4,056,781	Rooster & Moon Coffee Pub LLC	Restaurant and bar services
RUDE ROOSTER	4,218,163	Price-Davis, Inc.	Fast food and non-stop restaurant services

MARK	REG. NO.	OWNER	RELEVANT SERVICES
UNCLE ROOSTERS	3,196,397	Dunning, Wayne "Rooster" DBA Uncle Roosters	Restaurant services featuring hot dogs, bratwurst, sausages, hamburgers, barbecue, soups, sandwiches or chili, with or without sides, namely baked beans, potato salad, cole slaw, chips and desserts
TWISTED ROOSTER	3,997,969	OCM Development, LLC DBA Twisted Rooster	Restaurant and bar services, including restaurant carryout services
THE DIZZY ROOSTER	4,009,556	Womack Strategic Management, L.L.C.	Bar services
TIN ROOSTER	4,495,862	Oneida Indian Nation of New York	Restaurant, bar, and cocktail lounge services
TIN ROOSTER DANCEHALL & BBQ & Design	4,495,905	Oneida Indian Nation of New York	Restaurant, bar, and cocktail lounge services
MAD ROOSTER CAFÉ	4,822,360	Axis Holdings, LLC	Restaurant and cafe services
ROOSTER CREEK	4,624,208	Rooster Creek, LLC	Restaurant services
BUD. E. ROOSTERS	4,627,327	Bud E. Roosters Holdings, LLC	Restaurant services featuring hand breaded fried chicken sold in stand- alone fast food restaurants
THE ROOSTER MAY CROW, BUT THE HEN DELIVERS!	4,799,872	Henhouse Incorporated DBA Henhouse Cafe	Café and restaurant services
ROOSTERSPIN & Design	4,817,063	Color Bee LLC	Bar and restaurant services
IRON ROOSTER	4,968,578	Iron Rooster-IP, LLC	Bar and restaurant services

(RFR, pp. 17-63.)

That the Trademark Office has found that the above marks can coexist without confusion demonstrates its recognition that consumers are able to differentiate between and among marks incorporating ROOSTER for restaurant and bar services, based on even slight differences. In view of the foregoing, Applicant respectfully submits that Applicant's Logo may coexist with the Cited Mark without confusion.

CONCLUSION

The significant differences between the parties' marks render them distinct in appearance, connotation, and commercial impression and make confusion unlikely, particularly when viewed in light of the Trademark Office's previous determinations that Applicant's RED ROOSTER Registrations are not confusingly similar to the Cited Mark and in light of the coexistence of the Cited Mark with Applicant's RED ROOSTER Registrations and other ROOSTER-formative marks for restaurant and bar services. In view of the foregoing, Applicant respectfully requests that the refusal to register on the basis of likelihood of confusion be reversed and the subject application be permitted to pass to publication.

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Respectfully submitted,

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