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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86081482

MARK: CAROLINA'S SUMMER HUMMER



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APPLICANT: B & B Spirits, LLC

CORRESPONDENT'S REFERENCE/DOCKET NO:

BBSL-1-TM

CORRESPONDENT E-MAIL ADDRESS:

EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the trademark examining attorney's final refusal to register the trademark CAROLINA'S SUMMER HUMMER for alcoholic beverages, namely, distilled liquors and distilled spirits. Registration was refused on the Principal Register pursuant to Trademark Act Section

2(e)(2), 15 U.S.C. Section 1052(e)(2) on the grounds that the applicant's mark, CAROLINA'S SUMMER HUMMER, is primarily geographically descriptive of Applicant's goods.

FACTS

On October 3, 2013, the applicant applied to register the mark CAROLINA'S SUMMER HUMMER on the Principal Register for "alcoholic beverages, namely, distilled liquors and distilled spirits."

On February 19, 2014, the trademark examining attorney issued an Office Action in which registration was refused based upon the fact that the applicant's mark was primarily geographically descriptive of the goods pursuant to Section 2(e)(2) of the Trademark Act. Registration was further refused based upon the requirements to provide information about the geographic wording in the mark and a disclaimer.

In its response on August 19, 2014, the applicant provided a response to the information requirement, and argued against the Section 2(e)(2) refusal and disclaimer requirement.

On September 9, 2014, the trademark examining attorney issued a final refusal pursuant to Section 2(e)(2) of the Trademark Act on the grounds that the mark was geographically descriptive. The requirements to provide information and a disclaimer were withdrawn.

On March 10, 2015, the applicant filed its notice of appeal and on May 11, 2015 the applicant filed its appeal brief.

The application was forwarded to the trademark examining attorney for a brief in accordance with Trademark Rule 2.142(b) on May 13, 2015.

ISSUE ON APPEAL

The sole issue on appeal is whether Applicant's proposed mark CAROLINA'S SUMMER HUMMER is primarily geographically descriptive of Applicant's goods.

ARGUMENT

The proposed mark, CAROLINA'S SUMMER HUMMER, is primarily geographically descriptive. A mark is primarily geographically descriptive when the following is demonstrated:

- (1) The primary significance of the mark is a generally known geographic place or location;
- (2) The goods and/or services for which applicant seeks registration originate in the geographic place identified in the mark; and
- (3) Purchasers would be likely to make a goods-place or services-place association; that is, purchasers would be likely to believe that the goods and/or services originate in the geographic place identified in the mark.

TMEP §1210.01(a); see *In re Societe Generale des Eaux Minerales de Vittel S.A.*, 824 F.2d 957, 959, 3 USPQ2d 1450, 1452 (Fed. Cir. 1987); *In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1853 (TTAB 2014).

A. The Primary Significance of CAROLINA is a Generally Known Geographic Place.

The primary significance of CAROLINA is a generally known geographic place. The dictionary pages attached to the office action of February 19, 2014 make clear that Carolina was formerly “an English colony of southeast North America... divided into North Carolina and South Carolina in 1729” and that these two states “are often referred to as **the Carolinas.**” The American English version of the Collins dictionary is also attached hereto as the original dictionary excerpt was from the British English dictionary.¹

Further, commonly used nicknames for geographic locations are generally treated as equivalent to the proper geographic name of the place identified. TMEP §1210.02(a). The Trademark Trial and Appeal Board in *In re Carolina Apparel*, 48 USPQ2d 1542, 1543 (TTAB 1998) determined that CAROLINA APPAREL is primarily geographically descriptive of retail clothing store services where evidence showed that “Carolina” is used to indicate either the state of North Carolina or South Carolina. There is no dispute that the Carolinas are a place known generally to the public, and that the geographic area is neither remote nor obscure. Finally, the “SUMMER HUMMER” portion is highly descriptive or generic matter which is readily separable from the CAROLINA’S portion as discussed below.

B. The Goods Originate in the Geographic Place Identified in the Mark, Namely, South Carolina.

The goods originate in the geographic place identified in the mark, namely Carolina, or South Carolina. For goods to be considered to originate from a geographic location, the record must show that the goods are sold there, manufactured or produced there, packaged and shipped from there, and/or contain a main ingredient or component derived from there. See *In re Jacques Bernier Inc.*, 894 F.2d 389, 391-92, 13 USPQ2d 1725, 1727 (Fed. Cir. 1990), *opposition sustained sub nom. Fred Hayman*

¹ Collins Dictionary (2015), retrieved from collinsdictionary.com. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

Beverly Hills, Inc. v. Jacques Bernier Inc., 38 USPQ2d 1691 (TTAB 1996) (holding applicant's perfume did not originate from RODEO DRIVE because, although goods did not have to be manufactured or produced at the geographic site and could "be sold there" to originate from the geographic location, there was insufficient evidence to show that perfume was sold on RODEO DRIVE); *In re Joint-Stock Co. "Baik,"* 80 USPQ2d 1305, 1310 (TTAB 2006) (holding applicant's vodka originated from BAIKALSKAYA, a Russian word meaning "from Baikal," because it was made from the water of Lake Baikal and applicant produced various vodkas from a location near Lake Baikal); *In re JT Tobacconists*, 59 USPQ2d 1080, 1083 (TTAB 2001) (holding applicant's cigars, cigar cases, and humidors originated from MINNESOTA because they were packaged and shipped from MINNESOTA, and applicant's business was located in MINNESOTA); *In re Nantucket Allserve Inc.*, 28 USPQ2d 1144, 1145-46 (TTAB 1993) (holding applicant's beverages originated from NANTUCKET because labels for applicant's goods suggested a connection with NANTUCKET, additional evidence suggested that some ingredients came from NANTUCKET and that applicant's goods were sold at applicant's store located in NANTUCKET, and applicant's corporate headquarters and research and development center were located in NANTUCKET); TMEP §1210.03.

Here, Applicant admits that its goods are or will be sold in South Carolina. See Applicant's communication of August 19, 2013. Moreover, the applicant is a South Carolina limited liability company with its business address in South Carolina, per the application and applicant's brief. See, Applicant's Brief, p. 4. Thus, it is clear that the goods of the Applicant originate in the state of South Carolina, or Carolina.

C. Purchasers Would Likely Make a Goods/Place Association.

When there is no genuine issue that the geographical significance of a term is its primary significance, and the geographical place is neither obscure nor remote, a public association of the goods

and/or services with the place is presumed if an applicant's goods and/or services originate in the place named in the mark. TMEP §1210.04; *see, e.g., In re Cal. Pizza Kitchen Inc.*, 10 USPQ2d 1704, 1706 (TTAB 1988) (holding CALIFORNIA PIZZA KITCHEN primarily geographically descriptive of restaurant services rendered in California); *In re Handler Fenton Ws., Inc.*, 214 USPQ 848, 849-50 (TTAB 1982) (holding DENVER WESTERNS primarily geographically descriptive of western-style shirts originating in Denver).

As evidenced above, the primary significance of "Carolina" is geographic and "Carolina" is neither obscure nor remote. Thus, a goods/place association is presumed.

To establish a goods-place or services-place association, the evidence need only show a "reasonable basis" for concluding that the public is likely to believe that the mark identifies the place from which the goods and/or services originate. *See In re JT Tobacconists*, 59 USPQ2d 1080, 1083-84 (TTAB 2001) (finding that nothing in the record suggested that it would be incongruous or unexpected for the purchasing public to believe that applicant's cigars, cigar cases and humidors, "manufactured products which could have their origin practically anywhere," came from the place named in the mark, as applicant was located in the place and the goods were packaged and shipped from the location, such that consumers would have a reasonable basis to believe the goods came from the place named in the mark); *In re Cambridge Digital Sys.*, 1 USPQ2d 1659, 1661-62 (TTAB 1986) (finding that the location named in the mark was renowned for educational institutions and the record demonstrated the location was a manufacturing and commercial center producing related goods such that purchasers of applicant's goods would reasonably believe they emanate from the place named in the mark); *see also* TMEP §1210.04; *cf. In re Loew's Theatres, Inc.*, 769 F.2d 764, 767-68, 226 USPQ 865, 867-68 (Fed. Cir. 1985). Because there is nothing to suggest that it unexpected for the purchasing public to believe that applicant's alcoholic beverages come from South Carolina, the applicant is located in the place and the

goods will be sold there, a “reasonable basis” for concluding that the public is likely to believe that the mark identifies the place from which the goods originate exists.

D. The Addition of the Highly Descriptive or Generic SUMMER HUMMER Does Not Obviate the Geographical Descriptiveness of the Mark.

The addition of generic or highly descriptive wording to a geographic word or term does not diminish that geographic word or term’s primary geographic significance. TMEP §1210.02(c)(ii); *see, e.g., In re Hollywood Lawyers Online*, 110 USPQ2d 1852, 1853-54 (TTAB 2014) (holding HOLLYWOOD LAWYERS ONLINE primarily geographically descriptive of attorney referrals, online business information, and an online business directory); *In re Cheezwhse.com, Inc.*, 85 USPQ2d 1917, 1920 (TTAB 2008) (holding NORMANDIE CAMEMBERT primarily geographically descriptive of cheese). Here, the addition of the highly descriptive or generic wording “SUMMER HUMMER” does not obviate the primary geographic significance of “CAROLINA’S” in the mark.

The evidence of record that “SUMMER HUMMER” is highly descriptive and likely generic is overwhelming and firmly supports a finding that inclusion of this matter does not obviate the primary geographic significance of “CAROLINA’S” in the mark. The third party web pages made of record establish that the wording SUMMER HUMMER is commonly used, highly descriptive or generic, and needed in the industry. The evidence includes the following:

- *Allrecipes.com* provides a “Summer Hummer” recipe that includes vodka.
- *Barnonedrinks.com* provides a recipe for “Wisconsin’s Summer Hummer” that includes vodka.
- *Whattodrink.com* provides a “Summer Hummer Recipe” containing Citron® vodka.
- *Boozemixer.com* provides a “Summer Hummer” recipe containing vodka.

- *Recipetips.com* provides a “Summer Hummer Recipe” featuring vodka.
- *Idrink.com* contains a “Summer Hummer drink recipe” containing vodka.
- *Cocktail.uk.com* provides a “Summer Hummer Cocktail” recipe featuring vodka.
- *Kingcocktail.com* answers the query “How do you make a summer Hummer?” and provides a recipe that includes rum and Kahlua® alcohols.
- *Mademan.com* provides instructions on “How To Make Summer Hummer Cocktail” with a recipe that includes two alcoholic ingredients: vodka and raspberry liquor.
- *Thespir.it/cocktail-recipe/wisconsins-summer-hummer/* provides the recipe for “Wisconsin’s Summer Hummer” featuring vodka.
- *Shot-cocktail-recipe.com* provides “Summer Hummer #2 Cocktail Recipe” featuring Citron® vodka.
- *Slimkicker.com* answers the question “How many calories are in Summer Hummer” and provides a recipe for the cocktail, which includes vodka.
- *Thedrinkchef.com* provides a “SUMMER HUMMER” recipe containing four alcoholic beverages: vodka, peach schnapps, triple sec and grenadine.
- *Chacha.com* provides an answer to the question “What is in a summer hummer drink” with a recipe that includes Bacardi® rum.
- *Tastingspoons.com* provides “A Summer Hummer” description that indicates that “Aperol is the liquor in it” and provides a recipe that includes Aperol® as well as vodka.
- *Cocktail.com* provides a recipe for a “Sumer Hummer” cocktail that includes rum and Pimm’s No.1® gin.
- *Hummerdrinks.com* includes recipes for cocktails named “Hummer Tea” and “Hummer Punch” both of which contain “Carolina’s Summer Hummer” as an ingredient. The

webpage also describes the vodka drink that was created in South Carolina by the applicant.

The evidence of record overwhelmingly proves that the wording “summer hummer” is highly descriptive and likely generic and firmly supports a finding that inclusion of this matter does not obviate the primary geographic significance of “CAROLINA’S” in the mark.

E. Applicant’s Arguments Are Unpersuasive.

1. The Term “Carolina’s” is Geographically Descriptive.

The applicant “respectfully disagrees” that the term CAROLINA’S is geographically descriptive but does not provide any argument or evidence to dispute the fact that the term is geographically descriptive. Applicant’s Brief, p. 5. As discussed previously herein, the term is a recognized abbreviation for South Carolina and North Carolina. The possessive form of the mark further emphasizes that the goods are from South Carolina. Therefore, the term CAROLINA’S is geographically descriptive of the goods.

2. The term “Summer Hummer” is Not Inherently Distinctive.

The crux of the applicant’s argument is that the wording SUMMER HUMMER is inherently distinctive, rather than generic or highly descriptive. The evidence discussed previously herein firmly disputes this assertion. The term SUMMER HUMMER identifies a particular cocktail. The term is neither arbitrary nor merely suggestive in connection with the applicant’s goods. Consumers will immediately understand that the applicant’s goods are alcoholic beverages for making the cocktail commonly known as a summer hummer.

The applicant contends that its goods are not cocktails, but are instead distilled liquors and distilled spirits. This fact does not obviate the highly descriptive nature of the wording SUMMER

HUMMER in relation to the goods. Consumers will reasonably presume that the wording is used to describe the cocktail or an ingredient for making a summer hummer. A term that describes an ingredient of the goods is merely descriptive. TMEP §1209.01(b); *see In re Keebler Co.*, 479 F.2d 1405, 178 USPQ 155 (C.C.P.A. 1973) (holding RICH 'N CHIPS merely descriptive of chocolate chip cookies); *In re Andes Candies Inc.*, 478 F.2d 1264, 178 USPQ 156 (C.C.P.A. 1973) (holding CREME DE MENTHE merely descriptive of candy); *In re Entenmann's, Inc.*, 15 USPQ2d 1750 (TTAB 1990) (holding OATNUT merely descriptive of bread containing oats and hazelnuts), *aff'd per curiam*, 928 F.2d 411 (Fed. Cir. 1991); *Flowers Indus., Inc. v. Interstate Brands Corp.*, 5 USPQ 2d 1580 (TTAB 1987) (holding HONEY WHEAT merely descriptive of bread containing honey and wheat); *In re Int'l Salt Co.*, 171 USPQ 832 (TTAB 1971) (holding CHUNKY CHEESE merely descriptive of cheese flavored salad dressing).

The applicant's assertion that the mark does not appear in other registered marks or goods does not overcome the fact that the term is highly descriptive. Even if the applicant were the only user of the descriptive term SUMMER HUMMER, the fact that an applicant may be the first or only user of a merely descriptive designation does not necessarily render a word or term incongruous or distinctive; as in this case, the evidence shows that SUMMER HUMMER is merely descriptive, if not generic. *See In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012); *In re Sun Microsystems, Inc.*, 59 USPQ2d 1084, 1087 (TTAB 2001); TMEP §1209.03(c). Moreover, the evidence firmly establishes that the term SUMMER HUMMER is commonly used in the marketplace to describe a cocktail.

Similarly, the fact that a descriptive word or term is not found in the dictionary is not controlling on the question of registrability. *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1456 (TTAB 2004); *In re Orleans Wines, Ltd.*, 196 USPQ 516, 517 (TTAB 1977); TMEP §1209.03(b).

Moreover, the applicant's contention that the separate terms have different meanings does not obviate the descriptiveness of the term SUMMER HUMMER. Descriptiveness is considered in relation

to the relevant goods and/or services. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012). “That a term may have other meanings in different contexts is not controlling.” *In re Franklin Cnty. Historical Soc’y*, 104 USPQ2d 1085, 1087 (TTAB 2012) (citing *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979)); TMEP §1209.03(e). Here, the term SUMMER HUMMER has only one meaning as it relates to the applicant’s goods: a particular cocktail.

Determining the descriptiveness of a mark is done in relation to an applicant’s goods and/or services, the context in which the mark is being used, and the possible significance the mark would have to the average purchaser because of the manner of its use or intended use. *See In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012) (citing *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 963-64, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)); TMEP §1209.01(b). Descriptiveness of a mark is not considered in the abstract. *In re Bayer Aktiengesellschaft*, 488 F.3d at 963-64, 82 USPQ2d at 1831.

Finally, the fact that the applicant uses the mark in describing an ingredient in other drinks does not overcome the fact that the term is highly descriptive if not generic of the goods. Consumers will reasonably presume that the applicant’s alcoholic beverages are summer hummers, which can be used as an ingredient in other mixed cocktails.

CONCLUSION

The trademark examining attorney has demonstrated that: (a) the primary significance of the mark is geographic; (b) Applicant’s goods originate in Carolina; and (c) a goods/place association is presumed and otherwise is proven through evidence. Further, the Applicant has supplied ample

evidence demonstrating that the added matter in the mark, summer hummer, is highly descriptive. Finally, the Applicant has rebutted Applicant's arguments in favor of registration. For the foregoing reasons, the trademark examining attorney respectfully requests that the refusal to register under Section 2(e)(2) of the Trademark Act be affirmed.

Respectfully submitted,

/Andrea Koyner Nadelman/

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Example Sentences Including 'the Carolinas'

A little Spanish gun, they truck them in by the ton from the Carolinas.
Lawrence Block TIME TO MURDER AND CREATE (1976)
Dole became the first woman in the Carolinas ever to win a major-party nomination for U. S. Senate.
PHILADELPHIA ENQUIRER (2002)

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stolen trucks.
USA TODAY (2003)
The Ozarks of Arkansas have enjoyed a little boomlet, and the Carolinas have appealed to those looking for a mild winter climate.
Shelley, Florence WHEN YOUR PARENTS GROW OLD (2ND EDN) (1968)

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