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

Marion Sakow, individually and)
on behalf of 633 Seafood)
Restaurant, Inc.,)
Petitioner,)
v.)
2427-2429 Seafood Restaurant)
Corporation,)
Registrant-Respondent.)



11-05-2001

U.S. Patent & TMOfo/TM Mail Ropt Dt. #76

Cancellation No.

PETITION FOR CANCELLATION

Petitioner, Marion Sakow, as an individual resident in New York, New York, and on behalf of 633 Seafood Restaurant Inc., a corporation organized and existing under the laws of the State of New York, located and doing business at 633 Third Avenue, New York, NY 10017, believes that she and 633 Seafood Restaurant, Inc. are being damaged by Registration No. 1,682,271 and hereby petitions to cancel the same.

As grounds of this Petition, it is alleged that:

(1) Registrant-Respondent has obtained Registration No. 1,682,271 for the mark DOCKS OYSTER BAR & SEAFOOD GRILL (and design) for restaurant and bar services in Class 42, claiming a first date of use of November 24, 1985.

(2) Petitioner Marion Sakow is the present owner of 50% (fifty percent) of the outstanding shares of 633 Seafood Restaurant, Inc., having acquired 33 1/3% of the outstanding shares at the formation of the company.

(3) 633 Seafood Restaurant, Inc. has operated the restaurant "DOCKS

OYSTER BAR & SEAFOOD GRILL” at 633 Third Avenue located at Third Avenue and 40th Street since 1988 as an owner of the mark “DOCKS OYSTER BAR & SEAFOOD GRILL (and design)”.

(4) Upon information and belief, on or about November 24, 1985, 2427-2449 Seafood Restaurant Corporation, a corporation organized and existing under the laws of the State of New York, located and doing business at 2427 Broadway, New York, NY 10024, commenced operating a restaurant and bar under the service mark DOCKS OYSTER BAR & SEAFOOD GRILL.

(5) Upon information and belief, Arthur Cutler, Barry Corwin, and Howard Levine were the sole original shareholders of Registrant-Respondent.

(6) Well prior to August 1988, Cutler entered into an oral agreement with Walter Sakow, who was acting as the agent for his wife Marion Sakow. The agreement provided for Cutler, along with Corwin, Levine, and Marion Sakow, to establish a new corporation, 633 Seafood Restaurant, Inc., to establish a flagship restaurant which would provide restaurant and bar services at Third Avenue and 40th Street under the service mark DOCKS OYSTER BAR & SEAFOOD GRILL and for Marion Sakow to participate to the same extent as Arthur Cutler, including any future fruits of establishing a chain of additional restaurants and/or franchising of the service mark or public offering of shares in the corporation owning the mark DOCKS OYSTER BAR & SEAFOOD GRILL and/or selling the restaurant.

(7) In consideration for his wife Marion Sakow receiving a 33 1/3% ownership interest in the Petitioner, 633 Seafood Restaurant, Inc., Walter Sakow arranged for

substantial loans by his wife to Petitioner 633 Seafood Restaurant, Inc. in the aggregate amount of \$1,195,000. It was understood by the Petitioner Sakow and was reasonably contractually expected by her and by Walter Sakow that the existing service mark was to be jointly owned by the Petitioner 633 Seafood Restaurant, Inc. and by the Respondent.

(8) Unknown to Petitioner Sakow, Registrant-Respondent, upon information and belief, through the instructions of Arthur Cutler, filed an application to register the subject mark in the sole name of Respondent, although Cutler as an owner of 50% of the shares in the Registrant-Respondent and in 33 1/3% of the shares of 633 Seafood Restaurant, Inc. and as an operating officer of both companies had agreed to and received the benefit of the substantial consideration provided by Sakow for which consideration there was a reasonable contractual expectation of joint ownership of the mark in Petitioner 633 Seafood Restaurant, Inc. along with Respondent. The act by Cutler of filing an application to register the mark DOCKS OYSTER BAR & SEAFOOD GRILL in the sole name of Registrant was a diversion of an IMPORTANT CORPORATE asset of the Petitioner 633 Seafood Restaurant, Inc. which was a joint owner of the mark. In addition, Cutler's actions breached his fiduciary duty as an officer of 633 Seafood Restaurant, Inc. to the shareholders of 633 Seafood Restaurant, Inc., including Marion Sakow, to preserve the assets of the corporation.

(9) Since at least as early as 1988, both the Petitioner 633 Seafood Restaurant, Inc. and Respondent 2427-2429 Seafood Restaurant Corporation have jointly operated and managed DOCKS OYSTER BAR & SEAFOOD GRILL restaurants

under the service mark as joint owners of the mark. No written license has ever been prepared for Petitioner 633 Seafood Restaurant, Inc. by Respondent or vice versa; none was ever necessary. Upon information and belief, no royalties for usage of the DOCKS OYSTER BAR & SEAFOOD GRILL mark have ever been paid, received, charged, or otherwise accounted for in the operation of either of the 633 Seafood Restaurant, Inc. or the 2427-2429 Seafood Restaurant Corp.

(10) In the formal application papers executed by Arthur Cutler and filed by Registrant-Respondent subject to 18 U.S.C. 1001, it was stated that Registrant-Respondent believed itself "to be the owner of the trademark (sic) sought to be registered; that to the best of my knowledge and belief, no other person, firm, corporation or association has the right to use said mark in commerce,". The statement was false. Petitioner 633 Seafood Restaurant, Inc. was, at the time of the August 8, 1988 filing, the joint owner of the rights to the service mark, was using the service mark as a result of the agreement of Cutler with Sakow, and was opening up a restaurant under the subject service mark at a cost of more than \$2.8 million. The statement of exclusivity was made by Cutler with the knowledge that the statement was false, and upon information and belief, that said false statement was made with the intent to induce the United States Patent and Trademark Office to grant said registration to the Respondent alone and to the detriment of Petitioner. Reasonably relying upon the truth of said false statements, the U.S. Patent and Trademark Office did, in fact, grant said registration to Registrant-Respondent alone.

(11) Petitioner is subject to being damaged by said false statement and the

registration issued in reliance thereon. Well prior to August 1988, Petitioner began its continuous use of the subject mark as the *de facto* and *de jure* joint owner thereof and Petitioners' continued and legal use of said mark has been threatened by allegations of sole ownership of said mark made by Registrant-Respondent.

WHEREFORE, Petitioner prays that Registration No. 1,682,271 be cancelled and that this Petition for Cancellation be sustained.

Petitioner hereby appoints Michael A. Cornman; Meyer A. Gross; Jay A. Bondell, Fritz L. Schweitzer, Jr., and Fritz L. Schweitzer III of the firm of SCHWEITZER CORNMAN GROSS & BONDELL LLP and of the Bar of the State of New York, to act as attorneys for Petitioner herein with full power to prosecute said Petition for Cancellation, to transact all relevant business in the United States Patent and Trademark Office and in the United States Courts and to receive all official communications in connection with this Petition for Cancellation.

Please address all correspondence to Michael A. Cornman, SCHWEITZER CORNMAN GROSS & BONDELL LLP, 292 Madison Avenue, 19th Floor, New York, New York 10017, Tel. (646) 424-0770.

Respectfully submitted,

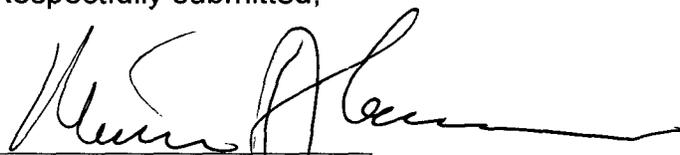
Dated: November 1, 2001

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I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Commissioner of Patents and Trademarks, Washington, D.C. 20231, on November 1, 2001.

Merle L. Cohn

Respectfully submitted,



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Dated: November 1, 2001

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to: Box TTAB, Assistant Commissioner for Trademarks, 2900 Crystal Drive, Arlington, VA 22202-3513 on November 1, 2001



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