



Exhibits

TAB

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

In re Application of

Riskwise L.L.C.

Serial No.: 76/007,040

Filed: March 22, 2000

Mark: CHARGEBACK DEFENDER

Trademark Attorney  
Catherine Pace Cain, Esq.

Law Office 104



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**EX PARTE APPEAL BRIEF IN FAVOR OF REGISTRATION**

**INTRODUCTION AND ISSUE**

This application stands rejected under Section 2(d) of the Lanham Act, 15 U.S.C. 1052(d) based on three registrations owned by one party. The Examining Attorney contends that because the Registrant owns three registrations incorporating the term DEFENDER, she may refuse registration because Applicant's mark follows the "same pattern" of the cited marks. The issue in this case is whether this is proper.

**FACTS**

On March 22, 2000, Applicant, Riskwise L.L.C., applied to register the mark CHARGEBACK DEFENDER for:

Providing credit verification and risk assessment services, namely providing information on the likelihood of a credit card transaction being charged back to a merchant."

The application is based on use in commerce and alleges first use dates of January 1, 1999.

On December 12, 2000, the Examining Attorney initially refused registration based on Registration No. 2,379,978 for the mark COLLECTIONS DEFENDER for:

Financial forecasting, financial research, and financial information services to card issuers regarding the likelihood of future payments on delinquent accounts.

Also, the Examining Attorney requested a disclaimer of the term CHARGEBACK.

The Applicant disclaimed CHARGEBACK, as requested, and argued against the refusal to register. Among other things, Applicant argued that the marks differed completely visually, aurally, and in significance; that the services differ; and that the purchasers, who are sophisticated, could easily differentiate between the marks.

On November 23, 2001, the Examining Attorney issued a second Office Action maintaining the Section 2(d) refusal. Additionally, the Examining Attorney incorporated two additional registrations in the refusal. The Examining Attorney cited U.S. Registration No. 2,352,406 for BANKRUPTCY DEFENDER for:

Providing financial forecasting services, financial research services and providing financial information regarding the likelihood of individuals declaring bankruptcy

and Reg. No. 2,496,603 for ATTRITION DEFENDER for:

Financial forecasting, financial research, and financial information services by electronic means to card issuers regarding the likelihood that particular cardholders will drop from the issuer's portfolio

According to the U.S. Patent and Trademark Office records, all three of the registrations are owned by the same Registrant. Based solely on the existence of these three registrations, the Examining Attorney argued that the Registrant had created a family of marks and that Applicant's mark was likely to be perceived as a member of this family.

On March 7, 2002, Applicant responded to this Office Action, by informing the Examining Attorney that refusing registration based on a family of marks is impermissible during *ex parte* examination. Moreover, Applicant argued that no family of marks exists. In support of this argument, Applicant attached specimens Registrant had submitted during the *ex parte* prosecution of its applications. These specimens dispelled any theory Registrant had used DEFENDER as the basis for a family of marks.

On May 23, 2002, the Examining Attorney issued a final action refusing registration. The Examining Attorney failed to respond to Applicant's argument regarding the family of marks doctrine. However, the Examining Attorney held the following:

In this case, applicant's mark creates the same commercial impression as the *registrant's group of marks* because all of the marks consist of a term that is related to financial services used in connection with the *arbitrary word DEFENDER*.

Applicant's mark *follows the same pattern* as each of the cited marks, that is, a descriptive term for financial services followed by the word DEFENDER. Because of *this pattern*, consumers are likely to view applicant's mark and registrant's marks as indicating a single source . . . .

(emphasis added.)

On September 16, 2002, Applicant filed a Request for Reconsideration. Applicant again argued that the Examining Attorney must find confusion individually, not as a group; that the services are purchased by sophisticated high-level corporate professionals interested in security products and services; and that the term "defender" is not arbitrary but inherently suggestive. To show the significance consumers would attach to the term DEFENDER, Applicant attached existing registrations and common law marks for security software products using the DEFENDER term, and dictionary definitions for "defender" and "defend." These

registrations, common law marks, and definitions showed that consumers would understand DEFENDER and DEFEND meant "to protect" or "guard" against something.

On October 29, 2002, the Examining Attorney summarily denied the request for reconsideration and maintained the final action.

On November 25, 2002, Applicant appealed and submitted a second Request for Reconsideration with Amendment. The amendment restricted the sale of Applicant's services to "Internet merchants at point of sale." Specifically, Applicant amended the identification of services to:

Credit verification and risk assessment services, namely providing information to Internet merchants at point of sale on the likelihood of a credit card transaction being charged back to the merchant.

On this basis, Applicant argued that Applicant's and Registrant's customers primarily differ. Whereas Registrant offers its services to credit card companies, Applicant offers its services to Internet merchants who are deciding whether to accept the issued card at point of sale.

Additionally, Applicant attached evidence showing that fourteen third parties had used, applied for, or registered the term "defender" and variations thereof in the financial services field. The Examiner accepted the amended identification, but denied the Second Request for Reconsideration.

ARGUMENT

I.

**THE REFUSAL OF REGISTRATION UNDER SECTION 2(d) IS GROUNDED ON A THEORY OF A "FAMILY OF MARKS" THAT IS IMPERMISSIBLE ON EX PARTE EXAMINATION AND UNSUPPORTED BY ANY EVIDENCE**

**1. The Examiner's Refusal is Grounded on a Family of Marks Theory**

The Examining Attorney has maintained that she may analyze likelihood of confusion by comparing CHARGEBACK DEFENDER with the registered marks as a group, rather than individually. As the Examiner stated:

Applicant's mark *follows the same pattern* as each of the cited marks, that is, a descriptive term for financial services followed by the word DEFENDER. Because of *this pattern*, consumers are likely to view applicant's mark and registrant's marks as indicating a single source . . . .

Although the final Office Action does not use the term "family of marks," it is undoubtedly the approach that has been employed. To Applicant's understanding, the Examiner nowhere contends that the registered marks, individually, are confusingly similar to Applicant's mark. Rather, she contends that the marks, as a group, resemble Applicant's, because they share the same pattern. This is the essence of a family of marks holding. As Professor McCarthy states:

If a trademark owner uses a plurality of marks with a common prefix, suffix or syllable, [i]t has the opportunity to establish that it has a "family" of marks, all of which have a common "surname." It relies on this to argue that defendant's mark, which incorporates the "family surname," is confusingly similar to the total "family group" .... Even though a junior user's mark may not be that close to any one member of the family, it may have used the distinguishing family "surname" or characteristic so as to be likely to cause confusion.

3 J. Thomas McCarthy, *Trademarks and Unfair Competition*, § 23:60 (4<sup>th</sup> ed. 2003).

To be effective, however, the "family of marks" argument must rest in the ultimate analysis on proof that consumers actually encounter a group of marks as a group, and perceive a pattern. *Id.* Usually, this requires some proof that the marks comprising the family have been

so extensively used and advertised together that the public recognizes the root as a trademark in and of itself. As the Trademark Trial and Appeal Board has required:

In order to establish a "family of marks," it must be demonstrated that the marks asserted to compromise its "family" or a number of them have been used and advertised in promotional material or used in everyday sales activities in such a manner as to create common exposure and thereafter recognition of common ownership based upon a feature common to each mark.

*American Standard Inc. v. Scott & Fetzer Co.*, 200 U.S.P.Q. 457, 461 (T.T.A.B. 1978).

Because of this requirement that the family of marks proponent *prove* that through constant use and advertising, it has educated the public to recognize the pattern, even famous marks like POLAROID have been found not worthy of family of mark protection. *Polaroid Corp. v. America Screen Process Equip. Co.*, 166 U.S.P.Q. 151 (T.T.A.B. 1970). As the Board stated:

[I]t has not been shown that the various marks asserted to comprise said 'family' or, at least, a goodly number of them, have become familiar or known in the photography field as a result of sales or constant exposure through advertising and promotion in a manner which creates an association of common ownership and leads purchasers to ascribe all trademarks in the field bearing the prefix "POLA" with Polaroid.

*Id.* at 154.

It is Applicant's contention, as will be discussed more fully in Section I.B., that the Examiner has not a shred of evidence to support her family of marks contention in this case.

If a family of marks is not shown, the usual rules as to likelihood of confusion apply. Confusion must be determined by comparing applicant's mark with each of the registrant's marks individually. *See Land-O-Nod Co. v. Paulison*, 220 U.S.P.Q. 61, 66 (T.T.A.B. 1983) ("Inasmuch as there is no viable basis for Opposer's claim to a "family of marks" characterized by the term "CHIRO", the issue of likelihood of confusion presented herein must be determined by comparing applicant's mark with each of opposer's two marks individually."); *In re Mobay*

*Chemical Co.*, 166 U.S.P.Q. 218, 219 (T.T.A.B. 1970) (finding no family of marks and therefore comparing applicant's mark with each of the Registrant's eight registered marks individually).

Indeed, this case is directly analogous to *Mobay, supra*, decided over thirty years ago. Registrant owned eight registrations for marks consisting solely of, or including the term CLOUD for mattresses. Applicant applied to register CUSHION-CLOUD for the same goods. The Examining Attorney refused to register Applicant's mark, arguing that the eight registrations evidenced a family of marks. The TTAB reversed the Examining Attorney's decision, holding that a family of marks theory is not available to an Examiner during *ex parte* examination. Comparing the marks individually, the Board found confusion unlikely because:

the word "cloud" carries an obvious suggestion of comfort and softness when applied to mattresses and other items of bedding; that CLOUD for such goods is a weak mark; and [therefore] the registrant of that mark has no right to prevent others from using a trademark which contains the word cloud unless such use is likely to [confuse purchasers...]

This reason utterly applies here. DEFENDER, the common portion of the marks, carries an obvious suggestion of protection in the field of software and financial security products and services, such that it is inherently weak. Further, numerous third parties use the term DEFENDER for such products and services and use that term in the same pattern as the Registrant's alleged family. Therefore, the Registrant, and the Examiner, have no right to bar registration to Applicant unless the marks overall are similar, which they are not. Therefore, based on *Mobay*, the Examining Attorney's decision should be reversed.

**B. The Examiner's Family of Marks Theory is Impermissible On *Ex Parte* Examination And Unsupported By Any Evidence**

The Examining Attorney has not made any showing sufficient to establish a family of marks. In support of her "family of marks" theory, the Examining Attorney relies solely on the existence of the registrations for COLLECTIONS DEFENDER, BANKRUPTCY DEFENDER, and ATTRITION DEFENDER on the Principal Register. Such an approach is clearly erroneous for at least two reasons. First, the "family of marks" doctrine is not available to an examiner in the *ex parte* consideration of registrability precisely because Examiners are singularly not possessed of the information needed to make such a showing. *Mobay Chem.*, 166 U.S.P.Q. at 219, which states:

In determining whether a family of marks exists, it must be shown that a proprietary interest in the family characteristic exists, but that depends upon fact not supposition. Such facts are not available to an Examiner in the *ex parte* consideration of registrability . . .

Second, the mere fact of registrations does not establish a "family of marks." See *Consolidated Foods Corp. v. Sherwood Med. Indus., Inc.*, 177 U.S.P.Q. 279, 282 (T.T.A.B. 1973); *Mobay Chem.*, 166 U.S.P.Q. at 219. To demonstrate ownership of a "family of marks," competent evidence is required that: (1) prior to the entry into the field of the opponent's mark, the marks containing the claimed family feature . . . were used and promoted together by the proponent in such a manner as to create public recognition coupled with an association of common origin predicated on the "family feature"; and (2) the "family feature" is distinctive (i.e., not descriptive or highly suggestive or so commonly used in the trade that it cannot function as the distinguishing feature of an party's mark). *Land-O-Nod*, 220 U.S.P.Q. at 66; *accord American Standard*, 200 U.S.P.Q. at 461.



Here, the record disproves, rather than proves, that Registrant has used its mark in such a manner as to create a family of marks. The Registrant's specimens previously submitted by Applicant -- the only evidence available in the record -- show that Registrant has not used, advertised, or promoted COLLECTIONS DEFENDER, BANKRUPTCY DEFENDER and ATTRITION DEFENDER together. See, Appendix Exhibit A.<sup>1</sup>

Moreover, as Applicant has demonstrated and will discuss in detail in Section II(A) below, many third parties are using, or have adopted, marks comprised of the term DEFENDER. Further, many use the term in the same pattern as Registrant's alleged "family." Thus, the term "defender" is not distinctive to Registrant in its field. Instead, based on this record, "defender" is inherently suggestive and so commonly used that, without evidence of distinctiveness, it is very unlikely that a family of marks could be bottomed on this term. See, e.g., *Land-O-Nod*, 220 U.S.P.Q. at 66 ("CHIRO" found highly suggestive as applied to mattresses and box springs and commonly registered and/or used by third parties in same trade such that "it is highly unlikely that a family of marks could be bottomed upon this term."); *American Standard*, 200 U.S.P.Q. at 462 ("AQUA" found suggestive and commonplace in plumbing field such that "there is little, if any support, for opposer's claim to a 'family'").

Because the Examining Attorney has not and cannot demonstrate that Registrant owns a "family of marks" containing the term DEFENDER, the analysis of likelihood of confusion in

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<sup>1</sup> In light of the voluminous record, for the Board's convenience, Applicant has submitted an Appendix containing the evidence Applicant submitted previously in this case and cited in this brief. Appendix Exhibit A is a copy of the Registrant's specimen for COLLECTIONS DEFENDER. Appendix Exhibit B is a dictionary definition of DEFENDER. Appendix Exhibit C contains dictionary definitions of attrition, bankruptcy, and collections. Appendix Exhibits D and E are third party registrations, applications, and common law uses, in the security software and financial services fields, respectively. Appendix Exhibit F is a copy of cases submitted to the Examiner during the *ex parte* prosecution.

the final Office Action is based on error. The Examiner has taken marks which, because they are composed of descriptive and suggestive terms, are to be accorded a narrow scope of protection, and without any support in law or in fact expanded that scope to one normally accorded a family of marks. Because the Examiner's refusal lacks any shred of support in fact or in law, the refusal is improper.

**II.**  
**WHEN EACH OF THE REGISTERED MARKS ARE INDIVIDUALLY  
 COMPARED WITH APPLICANT'S MARK IN THEIR ENTIRETIES,  
THERE IS NO LIKELIHOOD OF CONFUSION**

**A. When CHARGEBACK DEFENDER Is Compared With Each of the Registered Marks, There Is No Likelihood of Confusion**

In refusing registration, the Examining Attorney erroneously claimed that the subject mark was confusingly similar to three marks as a group, which neither individually (nor as a group) look similar, sound similar, or have similar meanings to Applicant's mark. Moreover, the Examining Attorney failed to adequately consider that the registered marks are weak, that the consumers differ and are sophisticated and that the services are differ.

**1. Registrant's Marks Are Weak**

The evidence in this case reflects that the term DEFENDER is highly suggestive of the Registrant's services. Riverside Webster's II Dictionary defines "defend" as: "to protect from danger, attack or harm." *See* Appendix Exhibit A of this brief. The evidence further establishes that the term DEFENDER is commonly used, adopted, and/or registered by third parties as part of composite marks for financial services and software to suggest the highly desirable trait that the services or software will protect or guard against a certain thing. *See*, Appendix Exhibits C and D of this brief. It is well established that the scope of protection afforded a merely descriptive or highly suggestive term is less than that accorded an arbitrary

or coined mark. A highly suggestive mark falls within the general category of weak marks. The scope of protection extended to these marks has been so limited as to permit another to subsequently use and/or register a composite mark comprising this term plus other matter, whether such matter be equally suggestive or even descriptive, for substantially similar goods. Thus, adding other matter to a merely descriptive or highly suggestive designation may result in a mark that is distinguishably different therefrom so as to avoid confusion in the trade. *See, Land-O-Nod*, 220 U.S.P.Q. at 67.

In light of the inherently weak nature of the DEFENDER term and of the cited marks in the entirety, without evidence of distinctiveness, the Registrant cannot claim exclusive rights to DEFENDER in the field.

**2. No Actual Confusion**

Moreover, if the dates of first use listed in the cited registrations are accurate, the parties marks have co-existed in the marketplace for at least three years without, to Applicant's knowledge, any evidence of actual confusion. Given the length of time the marks allegedly have been used nationally, one would expect confusion to have arisen, if confusion were likely.

**3. The Marks Differ in Sight, Sound, and Meaning**

As is clear from looking at the marks, COLLECTIONS DEFENDER does not look like CHARGEBACK DEFENDER. As is equally clear from speaking the marks, COLLECTIONS DEFENDER does not sound like CHARGEBACK DEFENDER. Finally, the terms "CHARGEBACK" and "COLLECTIONS" meanings entirely differ. As the record shows, the term "CHARGEBACK" is defined as "a paying bank's refusal to honor a check." App.'s Resp. dated June 11, 2001, at pp. 2-3. The term "COLLECTION" means "handling of past-due

accounts by specialists, who attempt to get a promise to pay from the delinquent borrower and ultimately recover all or part of the debt." *Id.* at p. 3.

Nowhere in the Office Actions does the Examining Attorney compare the registered mark COLLECTIONS DEFENDER with CHARGEBACK DEFENDER and find that these two marks have an overall similar sight, sound, or meaning. The Examining Attorney simply focuses on the fact that COLLECTIONS and CHARGEBACK are disclaimed, and the remaining portions of the mark are identical. Action dated May 23, 2002, at p. 4. However, it is well settled that it is improper to dissect a mark, *In re Shell Oil Co.*, 26 U.S.P.Q.2d 1687, 1688 (Fed. Cir. 1993), and it is improper to find that one portion of a mark has no trademark significance, leading to a direct comparison between only that which remains. *See Schering Corp v. Alza Corp.*, 207 U.S.P.Q. 502 (T.T.A.B. 1980); *In re National Data Corp.*, 753 F.2d 1056, 1059 (Fed. Cir. 1985)("the technicality of a disclaimer has no legal effect on the issue of the likelihood of confusion").

Moreover, the first part of the marks "CHARGEBACK" and "COLLECTIONS" is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser. *See Presto Prods., Inc. v. Nice-Pak Prods. Inc.*, 9 U.S.P.Q.2d 1895, 1897 ( T.T.A.B. 1988). Even if that first term is descriptive, it can distinguish marks in a likelihood of confusion analysis. *In re Iberia*, 2001 TTAB LEXIS 634 (T.T.A.B. Aug. 27, 2001) (holding "BUSINESS" to be dominant portion of the mark BUSINESS INTERCONTINENTAL, despite descriptiveness of the term, because it appeared first, among other things).<sup>3</sup>

For the same reasons, BANKRUPTCY DEFENDER and ATTRITION DEFENDER do not look like, or sound like CHARGEBACK DEFENDER. Nor do these marks have similar

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3 While not published and therefore not precedential, this case is instructive.

meanings. As the record shows, the term "bankruptcy" is defined as "a debtor who, upon voluntary petition or one invoked by his or her creditors, is judged legally insolvent and whose remaining property is administered for those creditors or distributed among them." App.'s Resp. dated March 7, 2002, Ex. B, see also Exhibit B of this brief. As the record shows, the term "attrition" is defined as "a rubbing away or wearing down by friction; a gradual lessening in number of strength due to constant stress." *Id.* The term "CHARGEBACK" does not mean, or even remotely suggest, either of these things.

4. **Consumers Are Sophisticated and Differ**

a. **The Consumers are Sophisticated**

Of the many factors that the Examining Attorney must consider in determining whether confusion is likely, the T.T.A.B.'s reviewing court has consistently held that the level of purchaser "sophistication is important and often dispositive." *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 U.S.P.Q.2d 1388, 1392 (Fed. Cir. 1992). This is so because sophisticated purchasers may be expected to use greater care. *Id.* Likewise, "there is always less likelihood of confusion where goods are expensive and purchased after careful consideration." *Id.*

Where purchasers are sophisticated, even minor differences in the marks have been found sufficient to prevent confusion. *Tower Publications v. MTS, Inc.*, 1991 U.S. District LEXIS (N.D. Ill. 1991) (no confusion between TOWER RECORDS and TOWER BOOKS); *Programmed Tax Systems, Inc. v. The Raytheon Company*, 193 U.S.P.Q. 435, 437 (P.T.S. and PTS DESIGN with the "T" extending over the other letters held not confusing); *Gruner + Jahr USA Publishing v. Meredith Corp.*, 26 U.S.P.Q. 1583 (no likelihood of confusion between the marks PARENTS and PARENTS magazine; *Mister Hero Sandwich Systems, Inc. v. Roman*

*Mean Company*, 781 F.2d 884, 228 U.S.P.Q. 364 (Fed. Cir. 1986) (no likelihood of confusion between ROMAN and ROMAN BURGER, both for food products).

As in the cases discussed above, the purchasers in this case are highly skilled professionals. The purchasing class are high level corporate professionals interested in financial security products. By the very nature of their professions, such customers would be expected to exercise a high degree of care and discrimination in the selection of their companies' goods and services. Moreover, as the parties' services here will be used to access sensitive billing information critical to their customer's businesses, the parties' services will be selected only after investigating and deliberating carefully. Such consumers, like VISA and MASTERCARD, simply would have no reason to confuse the marks at issue or, without investigating, attribute them to one source.

**b. The Consumers Differ**

Moreover, Applicant's and Registrant's customers primarily differ. Based on the recitation of services, whereas Registrant primarily offers its services to credit card companies, Applicant offers its services to Internet merchants who are deciding whether to accept the issued card at point of sale.<sup>4</sup> These purchaser groups differ.

Further, to the extent that any of these large institutions did buy both the parties' services, no showing exists that these services would ordinarily be used or purchased by the same department. Unless there is an overlap of purchasers *within* an institution, there can be no

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<sup>4</sup> ATTRIBUTION DEFENDER and COLLECTIONS DEFENDER's services are expressly limited, by their recitations, to credit card issuers. Although Registration No. 2,353,406 for BANKRUPTCY DEFENDER is not expressly limited to credit card customers, the nature of the services recited renders it unlikely that Internet merchants at the point of sale would use such services. Bankruptcy forecasting would be far more of interest to card issuers who undertake to serve as third party guarantors of the individual investigated, than to Internet merchants. Whereas the former is envisioning a long term relationship, the latter is not.

likelihood of confusion. *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 21 U.S.P.Q.2d 1388, 1391(Fed. Cir. 1992).

c. **The Parties' Services Distinctly Differ**

Although both parties services are, broadly speaking, in the financial services field, this does not suffice to render the services related or confusion likely. *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713 (Fed. Cir. 1992), and cases cited there.

Courts have ruled against a finding of likelihood of confusion in several cases where even narrower differences between the goods and services existed. *See, e.g., Allstate Ins. Co. v. Allstate Inv. Corp.*, 136 U.S.P.Q. 156 (W.D. La. 1962) (no likelihood of confusion between ALLSTATE for insurance and ALLSTATE for mortgage brokerage); *Federal Television & Radio Corp. v. Federal Television Corp.*, 84 U.S.P.Q. 394 (2<sup>nd</sup> Cir. 1950) (no likelihood of confusion between FEDERAL for radio supplies and FEDERAL for television sets); *Consumers Petroleum Co. v. Consumers Co. of Ill.*, 78 U.S.P.Q. 227 (7th Cir. 1948) (no likelihood of confusion between CONSUMERS for fuel oil and CONSUMERS for coal and wood fuel); *Modular Cinemas of Am., Inc. v. Mini-Cinemas Corp.*, 175 U.S.P.Q. 355 (S.D.N.Y. 1972) (no likelihood of confusion between MINI-CINEMA for theater showing family films and MINI-CAMERAS for theater showing erotic films); *Kiekhaefer Corp. v. Willys-Overland Motors, Inc.*, 111 U.S.P.Q. 105 (C.C.P.A. 1956) (no likelihood of confusion between HURRICANE for outboard motors and HURRICANE for auto engines.)

This is especially true, in the case of large institutional purchasers, as here. The issue is not whether the parties' services can be placed semantically in some broad category, but whether they are competitive or complementary such that confusion could occur. *Astra Pharmaceutical Prods. v. Beckman Instruments*, 718 F.2d 1201, 220 U.S.P.Q. 786 (1<sup>st</sup> Cir.

1983). The mere fact that both parties' services rely on software to provide financial services does not render them related. *Electronic Design & Sales*, 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992).

The services at issue here are neither competitive nor complementary. Whereas Registrant's services are used to determine whether to issue or revoke a credit card to an individual, Applicant's services are used to determine whether to accept a third party's credit card at point of sale. These services are not related. Therefore, under *Electronic Design & Sales*, 21 U.S.P.Q.2d 1388 (Fed. Cir. 1992) and *Astra, supra*, the Examiner's refusal should be reversed.

#### CONCLUSION

The marks neither look alike, sound alike, nor have the same meaning. The registered marks are weak and are used on differing services sold to different classes of consumers. To the extent that any overlap in consumer classes exists, such consumers are sophisticated, institutional purchasers. These purchasers will buy the parties' services only after carefully investigating and comparing the parties and their services to their competitors. Such sophisticated purchasers would have no reason to mistake the parties' marks or attribute the marks to one source. The registered marks have co-existed with numerous other marks, using the term DEFENDER, in the Registrant's same or related field. In fact, Applicant is aware of no confusion.

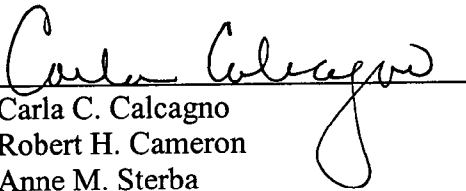
Wherefore, in light of these factors and the other factors discussed in this brief, Applicant respectfully requests that under *In re E.I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 U.S.P.Q. 563 (C.C.P.A. 1973) all pertinent factors resolve in Applicant's favor. Accordingly, the Board should reverse the refusal to register and allow Applicant's mark to publish for opposition.



07/16/2003TTAB

Dated: July 3, 2003

Respectfully submitted,

By 

Carla C. Calcagno  
Robert H. Cameron  
Anne M. Sterba  
Attorneys for Applicant  
ROTHWELL, FIGG, ERNST & MANBECK, P.C.  
1425 K Street, N.W.  
Suite 800  
Washington, D.C. 20005  
Telephone: (202)783-6040

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