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

Applicant	:	Tully's Coffee Corporation
Serial No.	:	78/976,010
Filed	:	August 21, 2003
Mark	:	"T" Logo in Class 35

TM Attorney	:	Christopher L. Buongiorno
Law Office	:	102
Docket No.	:	910114.313
Date	:	November 8, 2005

Trademark Trial and Appeal Board
Commissioner for Trademarks
P.O. Box 1451
Alexandria, Virginia 22313-1451

APPLICANT'S REPLY BRIEF

This Reply is in response to the Examining Attorney's brief filed October 19, 2005.

Applicant has appealed the Examining Attorney's Final Refusal under Section 2(d) to register applicant's oval "T" monogram design for retail store services provided on the

premises of a specialty coffee house, on the grounds that it is confusingly similar to a square "T" logo registered for wholesale and retail store services and restaurant services, all featuring tea.

A significant element of applicant's argument is that the subject marks are first and foremost design marks, and that consumers do not vocalize such marks. Instead, consumers distinguish them by sight. As such, a phonetic comparsion is misplaced. Instead, a square logo, when perceived by the typical consumer, would be considered completely different than an oval logo.

The Examining Attorney nonetheless compares the marks as if they were word marks, giving little afterthought to the fact that the marks are not words, are not used orally, and look completely different.

Even worse, instead of acknowledging and refuting the applicant's supporting evidence that the designs are sufficiently different to distinguish the present marks, the Examining Attorney merely objects to applicant's supporting evidence and asks the Board to disregard it. The objection, however, is too late and ineffective.

In the Examining Attorney's brief, the Examining Attorney objects, for the first time, to applicant's evidence showing that, when single-letter design marks are perceived, the design elements have a much more significant impact in preventing confusion than the shared letter has in creating confusion. In its example, to which the Examining Attorney objects, applicant notes that the Atlanta Braves (Reg. No. 2,657,980), the Anaheim Angels (Reg. No. 2,665,314), and the Arizona Diamondbacks (Reg. No. 2,243,911) all have registered single-letter design marks incorporating a capital "A" for identical services. Applicant cited these registrations in its first Response (September 21, 2004); the Examining Attorney did not object. Applicant again cited these registrations in its Request for Reconsideration (April 6, 2005); the Examining Attorney again did not object. Only when the applicant cited the registrations for the third time in its Appeal Brief, when it was too late for the applicant to cure the defect, did the Examining Attorney object. Unfortunately, the Examining Attorney's opportunity to object has

passed, the Examining Attorney has waived all right to object, and the cited registrations must be considered.

As shown by the cited registrations, several single-letter designs incorporating the same letter can be simultaneously registered for the same services. Consumers do not refer to all three baseball teams as "The 'A' Team." and it is not appropriate to compare their logos by asserting that "they are all pronounced 'ay.'" For the same reason, a phonetic comparison of the two marks presently at issue does not come to the proper result.

Thus, the same letter can be registered for the same services, provided there are sufficient differences in the designs, per se, to allow consumers to distinguish them. In the present instance, however, the services are not the same. Applicant is seeking registration for retail store services provided on the premises of a specialty coffee house, while the registrant's services are wholesale and retail services and restaurant services, all featuring tea.

The services and channels of trade differ enough to prevent confusion. Registrant's wholesale services, per se, cannot be grounds for a finding of a likelihood of confusion. Wholesale and retail services are offered through different channels to different consumers under circumstances that preclude confusion, even if the services are offered under identical marks in related industries (*see In re Shipp*, 4 U.S.P.Q.2d 1174, 1176 (TTAB 1987)). Similarly, retail store services are more than sufficiently different from restaurant services to prevent consumers from mistakenly believing one is associated with the other under the present circumstances. Finally, applicant's retail store services are provided on the premises of a specialty coffee house (notably, a coffee house already using a sign with the registered "T" logo), while registrant's retail services feature tea. Thus, the nature of the two companies' retail services are mutually distinct, and are sufficiently different to prevent consumer confusion. The fact that the marks themselves are readily distinguishable, as discussed above, only further reduces any possibility of confusion.

The Examining Attorney repeatedly discusses what *used to be* recited in the description of applicant's services. However, the applicant is no longer seeking to register as broad a listing of services as it originally had. While applicant asserts that its mark is registrable for the services originally recited, that is no longer the issue. The issue is whether applicant's mark is registrable for the services, as currently recited.

For the above reasons, applicant requests reversal of the refusal to register "T" under Section 2(d). The mark is not confusingly similar to the mark in the cited registration.

Respectfully submitted,
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