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BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applicant	Central Dynamics, LLC
Applied for Mark	EMENUS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Serial No.: 86/862,221
Mark: EMENUS and Design
Applicant: Central Dynamics, LLC
Examining Attorney: Ryan Michael Cinaci
Law Office 116

APPLICANT'S *EX PARTE* APPEAL BRIEF

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INTRODUCTION

Applicant Central Dynamics, LLC appeals the Examining Attorney's refusal to register Applicant's mark EMENUS & design in Application Serial No. 86/862,221 ("the Application"). The Examining Attorney's refusal on the grounds that Applicant's EMENUS & design mark is generic is not supported by the requisite clear and convincing evidence. Moreover, the Examining Attorney has improperly concluded that Applicant's EMENUS & design mark is merely descriptive while ignoring significant evidence of acquired distinctiveness. As set forth herein, the Board should reverse these rejections and approve Applicant's mark for registration on the Principal Register.

PROSECUTION HISTORY

On April 12, 2016, the trademark examining attorney issued a first Non-Final Office Action refusing registration pursuant to Section 2(e)(1) of the Trademark Act because the mark is allegedly highly descriptive. The Office Action also included a generic advisory and asserted that Applicant's 2(f) claim was insufficient because the mark is allegedly highly descriptive.

On October 12, 2016, Applicant filed a Response to Office Action traversing the Section 2(e)(1) refusal.

On November 4, 2016, the trademark examining attorney issued a second Non-Final Office Action refusing registration pursuant to Section 2(e)(1), asserting that Applicant's mark is generic. The Office Action also included an alternative refusal as merely descriptive and asserted that claim of acquired distinctiveness was insufficient.

On May 4, 2017, Applicant filed a Response to Office Action traversing the Section 2(e)(1) refusals as generic and merely descriptive. Applicant's response was accompanied by substantial evidence in support of the mark's acquired distinctiveness.

On June 9, 2017, the trademark examining attorney issued a Final Office Action maintaining refusals pursuant to Section 2(e)(1) of the Trademark Act and asserting that Applicant's mark is generic. The Final Office Action again included an alternative refusal alleging that the mark is merely descriptive. The instant ex-parte Appeal followed.

SUMMARY OF EVIDENCE

Examining Attorney's Evidence

The Examining attorney appended evidence in two of the three Office Actions. Here is a summary of the Examining Attorney's evidence.

- The Non-Final Office Action of April 12, 2016 included the following evidence:
 - Oxford Dictionary definitions for “e”
 - American Heritage Dictionary definitions for “e”
 - Oxford Dictionary definitions for “menu”
 - American Heritage Dictionary definitions for “menu”
 - Webpage for “eZee eMenu”
 - Webpage for “Lucid POS EMenu”
 - Webpage for “CRS Solutions”
 - Webpage for “Dytel Technology Group”
 - Webpage for “Bleep eMenu”
 - Webpage for “Cube Digital Media”
 - Webpage for “Dealertrack”
 - Webpage for “Advantech”
 - Webpage for “Expodine”
 - Webpage for “BevEat”

- Webpage for “Restaurant Software Solutions”
- The Final Office Action of June 9, 2017 included the following evidence:
 - Applicant’s website re: EMENUS
 - Merriam-Webster definition for “e”
 - Glossary of Internet Terms for letter “e”
 - Acronym finder for letter “e”
 - Merriam-Webster definitions for “menu”
 - MacMillan Dictionary definitions for “menu”
 - Website for “Firecast EasyStart”
 - Article from Restaurant Magazine
 - Website for “LayerTech”
 - U.S. Reg. No. 3,648,978 for EMENUS & design

Applicant’s Evidence

Applicant submitted the following evidence in the Response to Non-Final Office Action dated May 4, 2017:

- Declaration of Michael J. Bennett
- Exhibit A: Examples of advertising/marketing materials
- Exhibit R: Hospitality Magazine Article
- Exhibit S: Hotel Online Article
- Exhibit Q: Hotel Online Article

ARGUMENT

I. The EMENUS Mark is NOT Generic

“Generic terms are common names that the relevant purchasing public understands primarily as describing the genus of goods or services being sold.” *In re Dial-A-Mattress Operating Corp.*, 240 F.3d 1341, 1344 (Fed. Cir. 2001). “A mark is not generic simply because it plays some role in denoting to the public what the product or service is; rather, a mark may serve a ‘dual function – that of identifying a product or service while at the same time indicating its source.’” *Booking.com B.V. v. Matal*, 278 F.Supp 891, 902 (E.D. Va. 2017) (quoting S. Rep. No. 98-627, at 5 (1984)). The trademark examining attorney must establish that a mark is generic by clear and convincing evidence. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016).

A two-part inquiry is used to determine whether a particular term is generic: (1) determine the class or genus of goods or services at issue; and (2) determine whether the relevant public understands the term primarily to refer to the class or genus of goods or services at issue. *In re Dial-a Mattress*, 240 F.3d at 1344). (quoting *H. Marvin Ginn Corp., v. Int’l Ass’n of Fire Chiefs, Inc.*, 782 F.2d 987, 990 (Fed. Cir. 1986)). Regarding the first part of the inquiry, the genus of the services may be defined by an applicant’s identification of services. *In re Cordua Rests.*, 823 F.3d at 602. Here, Applicant uses its EMENUS mark in connection with “Providing temporary use of on-line non-downloadable software for data base management by hotels around the world to enable their clients and guests to see online menus and photos of meals to order.” December 30, 2015, Application, TSDR p. 1.

With regard to the second part of the genericness inquiry, the Examiner asserts that “the relevant public comprises ordinary consumers who purchase applicant’s goods, because there are no restrictions or limitations to the channels of trade or classes of consumers.” This conclusion is

incorrect as it contradicts Applicant's services that expressly recite "providing temporary use of on-line non-downloadable software for data base management by hotels..." The "use" is therefore provided to "hotels," not to any member of the public. Thus, the proper inquiry for the second step of the genericness analysis is "do professionals in the hotel industry understand the EMENUS mark primarily to refer to providing temporary use of on-line non-downloadable software for data base management by hotels around the world to enable their clients and guests to see online menus and photos of meals to order?" Based on the evidence in the record (and the lack of clear and convincing evidence to the contrary), the clear answer to this question is "No."

As set forth above, the Examiner bears the heavy burden of demonstrating Applicant's EMENUS mark is generic by clear and convincing evidence. The Examiner first cites evidence that the prefix 'e' is commonly recognized to mean "electronic." The Examiner next cites dictionary definition for "menus" as meaning "a comparable list or assortment of offerings." Thus, it follows based on the Examiner's evidence that the term emenus would mean an "electronic comparable list or assortment of offerings." However, the Examiner inexplicably concludes that "[w]hen these individual words are combined into one term, i.e. the applied-for mark 'EMENUS', the meaning of the compound term is electronic software for the creation or interaction with a list or assortment of offerings." June 9, 2017, Final Office Action, TSDR p. 1.

Inclusion of the word "software" in the Examiner's purported definition must be supported by evidence and does not follow simply because of the presence of an "e" prefix in Applicant's mark. Indeed, the Examiner cannot support inclusion of the word "software" simply because "e" means electronic, as doing so in other terms having an "e" prefix would render those terms nonsensical. For example, e-mail would be electronic software mail rather than electronic mail; e-commerce would be electronic software commerce rather than electronic commerce; e-vite would be

electronic software invite rather than electronic invite; e-cigarette would be electronic software cigarette rather than electronic cigarette; and e-reservation would be electronic software reservation rather than electronic reservation.

In addition to the foregoing, the Examiner's statement that "the relevant public would perceive the mark as a whole to be the generic purpose when applied to the applicant's software services" is conclusory and unsupported by any evidence whatsoever. As explained above and as recited in the description of services, the relevant consuming public for Applicant's services is professionals in the hotel industry. The Examiner citation to a handful of websites is not dispositive of the inquiry, as most of these websites are not use the term EMENUS to identify Applicant's services and they are also not related to the hotel industry. Applicant will address each in turn:

- April 12, 2016, Non-Final Office Action, TSDR p. 7: Website for "eZee eMenu." The term eMenu is used to brand the software which is described as "digital restaurant menu for smart phone and tablets." The website explains that "eZee eMenu is [an] interactive menu application... for iPhones, Android Phones, iPads and Tablets." Thus, use of the term eMenu for branding is not evidence that the term is generic. Moreover, the software here is downloadable and directed to end-users as opposed to Applicant's software which is non-downloadable software directed to hotel professionals.
- April 12, 2016, Non-Final Office Action, TSDR p. 8: Website for "Lucid POS EMENU." The term eMenu is used as branding and therefore is not evidence of a generic term. Website states "Try LUCID eMENU. It is easy to navigate and also seamlessly integrates with LUCID POS."
- April 12, 2016, Non-Final Office Action, TSDR p. 9: Website for "CRS Solutions" and an "iPad Menu by eMenu International." The term eMenu is used to brand the company

providing the iPad Menu. Thus, use of the term eMenu for branding is not evidence that the term is generic. Moreover, the software here is downloadable and directed to end-users as there are links to the App Store for downloading the software. This is different from Applicant's software which is non-downloadable software directed to hotel professionals.

- April 12, 2016, Non-Final Office Action, TSDR p. 10: Website for “DynaMenu – E-Menu Solution for restaurants.” Term EMENU is used as branding for the software, which is directed to restaurants. Website states “Use Dyne EMenu to achieve all this and more!” Use of EMENU as branding is not evidence that term is generic. Also, there is no evidence that software is directed to relevant hotel professionals.
- April 12, 2016, Non-Final Office Action, TSDR p. 11: Website for “eMenu Touch Screen Menu Application.” The uses the term EMENU to brand its software. “eMenu is an interactive, touch screen menu application... Through eMenu, Bleep aim to provide the ultimate customer experience for dining and entertainment establishments through this dynamic and innovative application.” If eMenu was the name of class of goods, then the user would not use “Menu Application” which is the generic name for the goods. Use of the EMENU term as brand is not evidence of genericness.
- April 12, 2016, Non-Final Office Action, TSDR p. 12: Website for Cube Digital Media eMenu application. Use of the term eMenu to brand an application is not evidence that the word is generic.
- April 12, 2016, Non-Final Office Action, TSDR p. 13: Website for “eMenu for iPad” application. “eMenu is an application to the dynamic and interactive web map display.” Once again, use of the term eMenu to brand an application is not evidence that the word is generic.

- April 12, 2016, Non-Final Office Action, TSDR p. 14: Website for “Advantech eMenu and Self-Ordering System.” The website identifies its customers as “restaurants and theme parks” and there is no indication that the software is “non-downloadable” or targeted to hotel industry professionals.
- April 12, 2016, Non-Final Office Action, TSDR p. 15: Website for “Expodine” application. The description of the application states “for easy navigation, the digital/eMenu lists the dishes using images, ingredients...” Here, terms “menu” and “emenu” are used in a descriptive fashion to explain the application’s features. The application itself is not described as an emenu. Moreover, there is no evidence that the Expodine application is directed to hotel professionals.
- April 12, 2016, Non-Final Office Action, TSDR p. 16: Website for BevEat mobile applications. “Your customer can download BevEat mobile applications on Android or iOS mobile devices.” Consequently, the application here is not analogous to Applicant’s non-downloadable software directed to hotel professionals.
- April 12, 2016, Non-Final Office Action, TSDR p. 17: Website for eMenus application. The term eMenus is used to brand the application. For example, “customers using eMenu are seeing increases in food sales in the area of 10%...” This use of EMENU to brand application is not evidence of genericness.
- June 9, 2017, Final Office Action, TSDR, p. 9: Website for “FireCast Digital Menu Boards and Electronic Menus.” This webpage is marketing a hardware solution; it states “replace your entire menuboard with LCD screens, or combine the screen displays with traditional menu panels.” The software allows control of the screens – “if you need to control hundreds or even thousands of menu boards at once, you can upgrade to our FireCast Enterprise

Software.” Thus, use of the term “electronic menu” in this context is irrelevant to Applicant’s software platform and does not provide evidence of genericness.

- June 9, 2017, Final Office Action, TSDR, p. 10: Article from Restaurant Magazine titled “Restaurant Menu Software ‘eMenu’ Ready to Wave Goodbye to Traditional Paper Menus.” This article is using the term eMenu to refer to a particular brand of software, and is therefore not evidence that the term is generic. Moreover, Applicant objects to this evidence because the Examiner failed to include the entire webpage. The evidence attached to the Office Action is cut-off at bottom where it says “About eMenu:” indicating there was additional content regarding this eMenu application that was not included.
- June 9, 2017, Final Office Action, TSDR, p. 11: Website for Layer_Tech which includes a “Menu Maker” application. “Business owners can register each dish their restaurant/shop sells into an e-Menu... dishes registered in the menu maker is linked to the POS system.” Thus, the terms “emenu” and “menu” are used to describe aspects of the software, but not as the name of the software. While this is evidence of descriptiveness, it does not constitute evidence of genericness. Moreover, Applicant objects to this evidence because the Examiner failed to include the entire webpage as the contents is clearly cut-off.

There is no evidence in the record that relevant hospitality industry professionals view the term EMENUS as primarily the name or label for a genus of goods or services containing Applicant’s non-downloadable software for hotel professionals. When all the evidence presented by the examining attorney is viewed collectively, it establishes use of the term emenu being used as a brand and not as an identifier or name of any goods or services, much less applicant’s specific recited services. While multiple uses of emenu brand may evidence a weak mark, it is not evidence that the word is generic. Further, as set forth more fully below, Applicant’s EMENUS mark has acquired

secondary meaning and relevant consumers readily associate EMENUS only with Applicant's goods and services and not as the term for the genus of applicant's recited services. The Board has previously recognized that "evidence of generic use is offset by applicant's evidence that shows not only a significant amount of proper trademark use but also trademark recognition by customers, publishers, and third parties." *In re America Online, Inc.*, 77 USPQ2d 1618 (TTAB 2006).

Furthermore, Applicant notes that its EMENUS mark has been registered on the supplemental register for the same services since March 11, 2011 – see U.S. Registration No. 3,648,978 attached by the Examiner to the Final Office Action. June 9, 2017, Final Office Action, TSDR, pp. 12-14. "For the purposes of registration on the supplemental register, a mark... must be capable of distinguishing the applicant's goods or services." 15 U.S.C. § 1091. Consequently, it follows that a generic mark cannot be registered on the supplemental register and Applicant's earlier registration provides further persuasive evidence that the EMENUS mark is not generic. Therefore, for at least the foregoing reasons, Applicant requests that the refusal of the mark as being generic be withdrawn.

II. The EMENUS Mark has Acquired Distinctiveness

A. Legal Standard

"An evidentiary showing of secondary meaning, adequate to show that a mark has acquired distinctiveness indicating the origin of the goods, includes evidence of the trademark owner's methods of using the mark, supplemented by evidence of the effectiveness of such use to cause the purchasing public to identify the mark with the source of the product." *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125 (Fed. Cir. 1985). Evidence submitted in support of a showing of acquired distinctiveness must be considered in its totality. *Id.* at 1125, 1128; *Kellog Co. v. General Mills, Inc.*, 82 USPQ2d 1766 (TTAB 2007) [precedential] (affirming the examining

attorney's finding of acquired distinctiveness based on entirety of evidence); *In re The Black & Decker Corp.*, 81 USPQ2d 1841 (TTAB 2006) [precedential] (finding that mark had acquired distinctiveness based on "record in its totality.").

Here, Applicant has submitted significant evidence of its long term use of the EMENUS mark in connection with its platform as a service and the effectiveness of such use to cause the relevant purchasing public (i.e. industry professionals) to identify EMENUS as the source of Applicant's services. Rather than analyzing the evidence as whole, the Examiner simply considered and rejected the individual pieces of evidence submitted by Applicant without making any determination of their collective weight. The Examiner's piece-meal rejection of individual pieces of evidence is substantively incorrect and fails to consider the totality of the evidence.

B. EMENUS Has Long Term Use in Commerce

The Trademark Act provides that "proof of substantially exclusive and continuous use... in commerce for the five years before the date on which the claim of distinctiveness is made" may be accepted as prima facie evidence of acquired distinctiveness. 15 U.S.C. § 1052(f). Long term use of the mark in commerce is one relevant factor to consider in determining whether a mark has acquired distinctiveness. *See In re Uncle Sam Chem. Co.*, 229 USPQ 233, 235 (TTAB 1986) (finding §2(f) claim of acquired distinctiveness persuasive where applicant had submitted declaration of its president supporting sales figures and attesting to over eighteen years of substantially exclusive and continuous use).

Here, Applicant's EMENUS mark has been in substantially exclusive and continuous use by Applicant for over 10 years, which is significantly longer than the 5 year statutory period that creates a presumption of acquired distinctiveness. Applicant has submitted the Declaration of Michael J. Bennett, Senior Vice President of Global Marketing and Business Development of Central Dynamic,

LLC (May 4, 2017, Response to Office Action, TSDR pp. 2-59; hereinafter “Bennett”), attesting to the fact that Applicant has continuously used the EMENUS mark to promote its software services since September 2004. Bennett at ¶ 9. Consequently, similar to the Board’s decision in *In re Uncle Sam Chem. Co.*, Applicant’s extensive, long term use of the EMENUS mark, together with the evidence set forth below, heavily favors a finding of acquired distinctiveness.

The presumption of secondary meaning established by this extended period of continuous and exclusive use is further supported by the evidence of sales, advertising and marketing efforts and the resulting recognition of the mark as associated with Cendyn and its goods and services by relevant consumers in the relevant market, as set forth more fully below.

C. EMENUS Advertising and Sales

Applicant Cendyn is a cloud-based software and services provider for the hospitality industry and has been in business for over 20 years. Prior to developing its current cloud-based software as a service platform, Cendyn developed and sold versions of its specialized software tools that were deployed locally at the respective business location. With the advancement of technology, these tools are now delivered as software as a service platform. Bennett at ¶ 8.

EMENUS is the brand for an online, non-downloadable software that is marketed as part of Cendyn’s Hotel Sales Suite. Bennett at ¶ 12. The Hotel Sales Suite also includes software platforms that are branded as EP LITE (U.S. Registration No. 4,567,242), EPROPOSAL LITE (U.S. Registration No. 4,002,308), ELEADS (U.S. Registration No. 4,200,226), EPROPOSAL (U.S. Registration No. 3,936,088), and EBROCHURE (U.S. Registration No. 3,469,911).¹ *Id.* at 12-13. Applicant markets and promotes the Hotel Sales Suite under these marks as comprehensive

¹ EPROPOSAL and EBROCHURE are also the subject of co-pending ex-parte appeals. *See* Serial Nos. 86906682 and 86851901.

packages, with each of the individual software services presented to the relevant customers for providing specific functionality as part of its Suite. *Id.* at 14.

Applicant's various specialized software services including the Hotel Sales Suite and the EMENUS software are used by over 30,000 hotel clients worldwide. *Id.* at ¶ 15. Applicant's list of clients includes industry leaders such as Marriot, Hyatt, Hilton Worldwide, Hard Rock Hotel & Casino, Loews Hotels and Resorts, and Biltmore, among many others. *Id.* at ¶ 16. Consequently, the relevant consumers for Applicant's software services including EMENUS software are executives, managers, and other business decision makers at these hotels, resorts, casinos, etc. *Id.* at ¶ 17. These relevant consumers have significant experience within the hospitality industry and are relatively sophisticated because they are responsible for the specialized functions Applicant's software supports. *Id.* at ¶ 18. They are also familiar with the marketplace solutions available for their specialized needs. *Id.* The decision to purchase a particular software platform, such as EMENUS software platform, is made deliberately after evaluating various alternatives. *Id.* at ¶ 19.

For over 10 years, these relevant sophisticated consumers in the hospitality industry have been exposed continuously and exclusively to Applicant's software solutions, which includes EMENUS software platform that has been marketed by Applicant as part of the Hotel Sales Suite. *Id.* at ¶¶ 9, 20. Applicant has developed and promoted EMENUS software platform through trade shows, conferences, seminars, workshops, demonstrations, online advertising, press releases, etc. *Id.* at ¶ 23. Applicant attaches hereto examples of advertising/marketing materials used to promote EMENUS software platform and related Hotel Sales Suite. For example, Applicant submits examples of two slides taken from separate presentations that have been used conferences and trade shows to market EMENUS as part of a platform based solution. *See* Exhibits A1, A2. Applicant also submits various pictures of signage that has been used at presentations and trade shows to

promote the EMENUS software along with other Cendyn branded software. *See* Bennett Exhibits A3, A4, A5, A6, and A7. Applicant notes that the advertising materials in Exhibits A4 and A7 also include branding from Hilton Worldwide, which further illustrates that the marks shown are being used to promote goods/services within the specialized channel of trade for the hospitality industry.

As part of Hotel Sales Suite marketing budget of \$350,000, \$5,500 was spent for marketing EMENUSE software in 2016 and \$5,000 was allocated in 2017. Bennett at ¶ 28. In 2012, EMENUS generated over half-million dollars in revenue, and in the subsequent four year period, has consistently generated over \$900,000 in revenue. *Id.* at 22. Consequently, the advertising expenditures and significant sales volume, viewed in light of Applicant's 10+ year use of the mark, provide substantial support for a finding of acquired distinctiveness. Furthermore, the samples of advertisement provided demonstrate the trademark manner in which the mark is used to promote its related software services and the commercial impression created by such use.

D. EMENUS is Recognized by Relevant Consumers

Applicant's uninterrupted 10+ year use of the EMENUS mark to promote its industry leading software has resulted in widespread recognition of the EMENUS mark among all of the relevant consumers in the hospitality industry. Applicant is a Premier Google Partner, Oracle Platinum Partner, Amadeus Technology Partner, and a TripAdvisor Official Partner, and its software platforms are the most integrated in the hospitality industry. Bennett at ¶ 34. Relevant consumers throughout the hospitality industry recognize Cendyn as the source of the specialized software services promoted by its various marks, including the EMENUS mark. *Id.* at ¶ 37. Applicant has submitted the significant evidence of the EMENUS brand recognition in the marketplace among the relevant consumers. The Examiner has improperly reviewed each piece of evidence independently

and has applied improper reasoning in rejecting its weight or sufficiency. Applicant will address each in turn:

i. Declaration of Michael J. Bennett

In his Declaration, Mr. Bennett testifies under penalty of perjury that he worked as a marketing executive for 10 years prior to joining Cendyn. Bennett at ¶ 4. Mr. Bennett further states that “[a]s an executive in the hospitality industry for over 10 years prior to joining Cendyn, I was part of the relevant consumers for Cendyn’s goods/services, and I associated the ECONCIERGE, ESURVEY, ECONNECTIVITY, EPROPOSAL, EMENUS, and EBROCHURE marks only with Cendyn. No other providers were using these marks and the marks were known as Cendyn’s brands and not any category of goods or services.” Id at ¶ 36.

The Examiner discards Mr. Bennett’s declaration as “not persuasive” because “affidavits and declarations of an applicant’s employees, officers, and attorneys are usually self-serving and entitled to little weight.” However, while Mr. Bennett is presently employed by Applicant, he is providing testimony based on his personal knowledge and experience prior to becoming employed by Applicant. The facts set forth in Mr. Bennett’s declaration are highly relevant to a claim of acquired distinctiveness and are uncontroverted by any evidence of actual bias. Therefore, it is improper to reject Mr. Bennett’s declaration as self-serving simply because he is currently an employee for Applicant. Moreover, in the absence of any evidence of bias, the Board should consider and give weight to the uncontroverted facts set forth in a declaration. See *Kellog Co. v. General Mills, Inc.*, 82 USPQ2d 1766 (TTAB 2007) (precedential decision finding that facts set forth in trademark counsel’s declaration were relevant to claim of acquired distinctiveness in the absence of evidence of bias).

ii. May 4, 2017, Response to Office Action, TSDR pp. 30-38

This evidence consists of an article titled “5 Must-Haves for Next-Gen Catering.” The article includes a quote from Jennifer Reichenbach, President of Software Management, Inc., which states that Hilton Worldwide, which states that “Many hotels share customers and eMenus allows us to create a consistent framework in menus so customers see information in a familiar format...”

The Examiner does not find any fault with this evidence, but concludes that “a single third-party article featuring several of the applicant’s competitors is insufficient to establish the proposed mark has acquired distinctiveness.” However, as set forth more fully herein, the Examiner is viewing each piece of evidence in isolation and not giving any weight to any.

iii. May 4, 2017, Response to Office Action, TSDR pp. 40-43

This evidence is an article titled “Cendyn Adds Customer Order Center Online Food and Beverage Ordering to eMenus.” The article includes a quote from David Dvorak, Vice President of Catering and Convention Services for Starwood Hotels & Resorts, which states “eMenus and the Customer Order Center are clearly the future of Banquets and Catering and we are pleased to lead the industry in this technology.”

The Examiner discards this evidence because it “appears to be a paid for advertisement that appears in the cited publication because it is located in a news archive and the news originates from Boca Raton, the applicant’s physical address.” However, no matter the nature of the article, the most relevant portion of the article is a genuine quote from a hospitality industry professional that recognizes the EMENUS brand, which is probative of secondary meaning. The examining attorney offers no evidence to question the authenticity of the third person professional’s testimony in the quote. Thus, it is improper for the Examiner to discard this evidence as being self-serving.

iv. May 4, 2017, Response to Office Action, TSDR pp. 45-49

This evidence is an article titled “Cendyn Announces Digital Signature Interface with Sertifi for eProposal.” The article includes a quote from John Stojka, President of Sertifi, which states that “Sertifi is excited to partner with Cendyn’s eProposal software...” The article further explains that the integrated interface includes “eMenus – visually appealing electronic catering & banquet menus online ordering as well as eProposal integration.”

The Examiner discards this evidence because it “alludes to the proposed mark ‘EMENUS’ in passing and provides a hyperlink to the applicant’s website for additional details.” However, the article is relevant for at least two reasons. First, it includes a quote from a professional that serves the hospitality industry and is familiar with Applicant’s marks. Second, the list of marks in the article corroborates Mr. Bennett’s declaration with respect to the manner in which these marks are presented to the relevant consumers. That is, EMENUS is promoted as part of a Suite that includes other software platforms such as EPROPOSAL and EBROCHURE, which are also included in the article.

Thus, Applicant has clearly established by substantial evidence of over a 10 years of continuous and exclusive use, substantial sales and advertising and relevant consumer recognition of the mark as a brand of Applicant for the recited services. Registration on the principal register is warranted. Because the examining attorney found the mark generic, he did not offer registration on the supplemental register. In the event the Board finds that the evidence is not sufficient to establish acquired distinctiveness, Applicant alternatively requests an order for registration on the supplemental register.

CONCLUSION

The Examiner has failed to prove by clear and convincing evidence that Applicant's EMENUS mark is generic and the Board should therefore remove the genericness rejection and find that the mark is not generic for the specific PaaS services recited. Furthermore, the Examiner has failed to properly weigh the significant evidence of secondary meaning by analyzing and rejecting each piece of evidence individually and in isolation. Consideration of the composite effect of the full body of evidence, which includes advertising and sales volume, the examples of marketing materials, and the over 10 years of continuous and exclusive use of the EMENUS mark, clearly demonstrates that the EMENUS mark is recognized as the source of Applicant's specialized software services among the relevant, sophisticated professional consumers in the hospitality industry. The Board should therefore find that the EMENUS mark has acquired distinctiveness for the recited services and approve the mark for registration on the Principal Register.

Dated: July 9, 2018

Respectfully submitted,



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