

ESTTA Tracking number: **ESTTA15785**

Filing date: **09/27/2004**

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

Proceeding	91160134
Party	Defendant Cirrus Capital S.A. Cirrus Capital S.A. 63/65 rue de Merl LUX Luxembourg, L-2164
Correspondence Address	CIRRUS CAPITAL S.A. 63/65 RUE DE MERL LUXEMBOURG LUXEMBOURG, L -2164
Submission	Motion for Summary Judgment
Filer's Name	Christopher Lucas
Filer's e-mail	c.lucas@cirrus-capital.com
Signature	/CLucas/
Date	09/27/2004
Attachments	CirrusCapitalSerial7820979summarydismissal.PDF (2 pages)

September 26th 2004

**Re Serial # 78/209 795 File 91160134 – PLEADING: SUMMARY DISMISSAL OF
OPPOSERS MOTION**

We kindly request the board to dismiss the opposers' motion and grant the Trademark on the following grounds:

Background

MasterCard is a large financial institution that engages in the interchange of funds by credit and debit payment cards. Cirrus Systems LLC is a technology provider for this ATM network and owner of the 'Cirrus' mark. Cirrus is the brand name that stands for the global MasterCard/Cirrus ATM Network. The Cirrus mark is a mark used more properly in the provision of access to deposit accounts through the ATM network.

Cirrus Capital is a limited partnership investment company. It has no retail activity with credit or debit cards. It has no commercial contact or activity with the public. It interacts through the financial markets on its own behalf in an investment capacity for the partners of its investment fund.

Cirrus Capital SA is a company incorporated in Luxembourg and in the light of this cannot be accused of developing a brand for its investment company with the purposeful confusion of the customers of the Cirrus ATM network or Mastercard. On this basis alone Cirrus Capital feels justified in rejecting any basis of similarity as alleged by The Opposer.

Points for objection to opposition

Difference in shape between the mark 'Cirrus' and 'Cirrus Capital' – The Cirrus mark is most often represented by the intersection of two Circles, with the single word 'Cirrus', in white color with mixed case text fully encompassed by the two circles.

Cirrus Capital is represented by a single Pentagon, with the words 'CIRRUS CAPITAL', in upper case text, in two colors, residing on both the periphery and exterior of the pentagon – not fully encompassed by the pentagon.

Blurring– As explained above, both Marks (and the copyright applying to both) remain distinctive and unique. The Pentagon of Cirrus Capital cannot be seen to be derived from two circles. Nor can the word Capital be derived from the word Cirrus. In their own right neither of these marks can be reasonably confused with the other. The products or services are sufficiently different to negate the possibility of blurring in the future.

Commercial Distinction – Cirrus Capital includes the word Capital. The word Capital is legally reserved in many countries for the business of investments. It would, for example, in Luxembourg not be allowed to be used for an ATM company.

MasterCard has a presence in Luxembourg, together with lawyers in the region and could have verified this with the CSSF, the regulator in that country.

Furthermore and specifically we believe there is no genuine issue for the opposer, as below:

No violation of copyright is possible – Cirrus Capital has obtained copyright for its logo. The copyright is for a logo that has exact resemblance to the logo in the Trademark application.

No deceptive practice - Use of the word 'Capital' in a majority of jurisdictions differentiates the business practice of investment management from that of an ATM provider.

No likelihood of confusion to the public – Cirrus Capital and Cirrus Systems LLC have very different potential markets. The commercial public accessing time deposits through their ATM card is clearly and legally differentiated in the US with that of High Net Worth (or “Qualified”) investors / partners in sophisticated investment products like hedge-funds.

The word Cirrus, in of itself is not inherently distinctive - Cirrus is a Latin term and was in widespread use in the fields of meteorology, zoology and botany, long before Cirrus Systems LLC existed (see Webster’s 1913 edition). In our opinion the word Cirrus is no more especially associated with ATMs or debit cards than it is with computer graphics cards. Notably, many millions of computer graphics cards are purchased from Cirrus Logic LLC – a consumer technology business. Any claim of ‘false suggestion of a connection’ with Cirrus Systems LLC should be proven by the opposer.

The word ‘Cirrus’ has not acquired exclusive secondary meaning – Any claim of the sort by Cirrus System LLC should be counter-balanced by the millions of personal computer users and retailers that refer to their ‘Cirrus Card’ in reference to a computer graphics card and not their ATM or debit card.

The word ‘Cirrus’ is not synonymous with investing – ‘Cirrus Capital’ is a qualified phrase in many jurisdictions – whereas ‘Cirrus’ is either unqualified or would be eligible to be disqualified if used in conjunction with the investment fund sector.

Proximity of product or service – No evidence has been presented by the opposer that Cirrus Systems LLC intends to enter into the promotion of hedge-fund partnerships. We have checked many of the widely available hedge fund databases on the internet and could not find any products sponsored by Cirrus Systems LLC. Given the items above it is likely they would need to qualify the word Cirrus with another word.

Commercial similarity – Cirrus Capital has never expressed any intention to offer the unqualified provision of financial services to the general public or to enter the ATM business.

No evidence of actual confusion – The Lanham act seeks to prevent consumer confusion where a seller is enabled to pass off his goods as the goods of another. Cirrus Capital has never intended to offer ATM services. The opposer should provide proof that there is a reasonable likelihood that reasonable people would be confused.

No comparison of product or services – This point has been elaborately argued several times.

Level of consumer sophistication – Cirrus Capital will only accept new partners into its fund that are also qualified investors, it is reasonable to assume that sophisticated investors can differentiate between a hedge fund and an ATM card.

No dilution – The federal trademark dilution act specifically exempts non-commercial uses of a mark from its coverage. Commercial is a term used for the normal course of trade or business. The recent coverage of hedge funds and hedge fund partnerships by the US attorney general is sufficient to back-up the claim that hedge funds are not yet part of the normal course of trade or business. They are certainly not available to everyone and specifically, the product of Cirrus Capital is in fact a partnership, which is rather different to the commercial activity of an ATM service provider.

Does not lessen the value of the Cirrus mark – The clear differentiation between the marks and the business activities means that the ‘Cirrus Capital’ mark does not lessen the value of the ‘Cirrus’ mark to promote ATM services and we request the board seriously considers the reasonableness of the opposers position.

Christopher Lucas, Director
For and on behalf of Cirrus Capital SA