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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re ER Marks, Inc.

Serial No. 76289638

Request for Reconsideration

Manny D. Pokotilow of Caesar, Rivise, Bernstein, Cohen &
Pokotilow, Ltd. for ER Marks, Inc.

Alex S. Keam, Trademark Examining Attorney, Law Office 114
(K. Margaret Le, Managing Attorney).

Before Seeherman, Hairston and Chapman, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge:

On August 9, 2004, the Board affirmed the Examining
Attorney's refusal to register applicant's mark shown below



for "credit card services" under Section 2(d) of the Trademark Act in view of the registered mark shown below



for "credit card services."

Applicant filed on August 24, 2004 (via certificate of mailing) a "motion for reconsideration or in the alternative to stay the proceedings at the Board." In support of its request for reconsideration, applicant contends that the Board's prior decision (at pages 6-8) erroneously "identified the [cited] registered mark as a stylized letter Q with the word CARD and it was error to determine that both the Applicant's [currently applied-for] mark and the cited registered mark are identical in sound and connotation and similar in appearance." (Applicant's motion for reconsideration, p. 2.) Applicant specifically argues that the cited registered mark is a design mark; that "an examination of the [cited] registered mark shows that it is not a stylized letter Q which is used in the [cited] registered mark. A careful examination of the design in the [cited] registered mark is a rectangular arrow followed by the word 'CARD'"; that in this case, it

is clear that applicant's mark would be pronounced "Q CARD," but "it is not so clear that the [cited] registered mark would be pronounced Q CARD" (applicant's motion for reconsideration, p. 4); and that, in fact, "it is doubtful most people would even recognize the square arrow as a 'Q.'" (Applicant's motion for reconsideration, pp. 4-5.)

In the alternative, applicant requests that the Board stay this appeal until its recently filed petition to cancel Registration No. 2071555 (Cancellation No. 92043631) has been finally decided.

Applicant's new arguments and cited cases regarding the nature of the involved cited registered mark are not persuasive. While applicant argues the cited mark will not be perceived as the letter "Q," applicant presented no evidence thereof. We adhere to the position that consumers will view the design element in the cited mark as a letter "Q."¹

In its request for reconsideration, applicant now places great reliance on the case of *In re Electrolyte Laboratories, Inc.*, 929 F.2d 645, 16 USPQ2d 1239 (Fed. Cir.

¹ Although this is not properly of record, we note that applicant submitted with its request for reconsideration photocopies of photographs of signs showing the cited registered mark appearing just below the word Quarles. This would reinforce our conclusion that purchasers would perceive the cited registered mark as "Q CARD."

1990) and cases cited therein. However, in that case, the Court recognized that stylized letter marks "partake of both visual and oral indicia, and both must be weighed in the context in which they occur." (16 USPQ2d at 1240.) In the context of the marks involved herein, because they consist of a stylized letter and the word CARD, the letter portion of the mark is likely to be vocalized as well as the word "CARD." Further, marks used in connection with credit card services are generally spoken, such as when sales people advise consumers which credit cards are accepted (e.g., MASTERCARD, AMERICAN EXPRESS CARD, DISCOVER CARD).

Applicant has not provided any persuasive reason why our August 9, 2004 decision regarding either the similarities of applicant's applied-for mark and the cited registered mark and/or the ultimate decision on likelihood of confusion was in error.

Applicant's alternative request that the Board stay this appeal is not well taken because there is no action the Board could suspend. That is, once the Board issued a final decision on the merits on August 9, 2004, this appeal was finally decided by the Board.² If applicant wanted

² As we noted in footnote 7 of our prior August 9, 2004 decision, (i) during the earlier prosecution of this application, applicant

to attempt to again seek cancellation of the cited registration in order for this application to go forward, applicant should have done so prior to the Board's issuance of a final decision. See Trademark Rule 2.142(g).

Applicant's request for reconsideration is denied.

Applicant's alternative request for suspension of the appeal at the Board is denied.

Applicant's time to appeal the Board's decision in this case is two months from the mailing date of this decision on the motion for reconsideration. See Trademark Rule 2.145(d)(1). See also, TBMP §1219.01 (2d ed. rev. 2004).

had filed a petition to cancel the cited registration (Registration No. 20715551 -- Cancellation No. 92040925), but applicant (as petitioner) withdrew the petition to cancel prior to answer being filed by respondent, and (ii) the first petition to cancel was based on a ground barred by Section 14(1) of the Trademark Act.