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**This Opinion is Not
Citable as Precedent
of the TTAB**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nantucket Harvest Co., Inc.

Serial No. 76475899

Elliott A. Salter of Salter & Michaelson for Nantucket
Harvest Company, Inc.

Daniel F. Capshaw, Trademark Examining Attorney, Law Office
110 (Chris Pedersen, Managing Attorney).

Before Seeherman, Rogers and Drost,
Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

Nantucket Harvest Company, Inc. [applicant] has
applied to register on the Principal Register the mark
NANTUCKET OFF-SHORE for goods ultimately limited to and
identified as "spices, seasonings, sauces, seasoning rubs,
and seasoning sauces for barbecued foods and for use on
cooked food products," in Class 30.¹ The application is
based on asserted use of the mark in commerce and includes

¹ Applicant deleted goods and services in other classes.

a disclaimer of rights to the term "Nantucket" apart from use in conjunction with the applied-for mark.

The examining attorney ultimately issued a final refusal of registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the existence of Registration No. 1470810 for the mark OFF SHORE for "seafood" in Class 29.² Applicant requested reconsideration, but the request was denied. Applicant then filed its notice of appeal. Applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See In re E.I. du Pont de Nemours and Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks and the related nature of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

² The registration issued December 29, 1987 on the Principal Register. The USPTO has accepted registrant's affidavit of continued use of the mark, filed under Section 8 of the Trademark Act, and acknowledged its affidavit of incontestability filed under Section 15 of the Act. See 15 U.S.C. §§ 1058 and 1065.

In support of his refusal, and in regard to the involved marks, the examining attorney argues that OFF SHORE and NANTUCKET OFF-SHORE are highly similar because applicant has taken the entirety of the registered mark and merely added the disclaimed and geographically descriptive term NANTUCKET.³ The examining attorney analogizes the case at hand to the cases of Henry Siegel Co. v. M & R Int'l Mfg. Co., 4 USPQ2d 1154 (TTAB 1987), wherein the Board granted a petition for cancellation of L.A. CHIC, based on petitioner's prior use of CHIC for complementary clothing items, because purchasers familiar with petitioner's mark would conclude that respondent's mark was a variation of the former used to designate a line of clothing made in Los Angeles or of a style prevalent there; and In re Collegian Sportswear Inc., 224 USPQ 174 (TTAB 1984), wherein the Board affirmed a refusal to register COLLEGIAN OF CALIFORNIA (stylized), in view of the prior registration of COLLEGIENNE (stylized) for goods legally identical (in part), because the marks were found "strikingly similar in appearance and pronunciation and virtually identical in meaning," such that customers familiar with registrant's

³ The record reveals that, although applicant is not located on Nantucket Island, its business was founded there and it has retained the island's name as part of its business name and mark. The examining attorney, aware of this, accepted the applicant's disclaimer of "Nantucket."

goods might conclude applicant's products were a new line from registrant featuring California or West Coast styles.

While in the *Henry Siegel* case there was evidence offered to support respondent's contention that petitioner's CHIC mark was descriptive or, at best, weak and entitled to a narrow scope of protection, see 4 USPQ2d at 1157-58, in this case the examining attorney asserts that the cited mark OFF SHORE is distinctive and there is no evidence that it is commonly used or registered.⁴ Thus, he concludes it is entitled to a broad scope of protection.

As to the involved goods, the examining attorney argues they are related because they are complementary, insofar as spices, seasonings and sauces may be used in preparing seafood; that applicant's own website shows it sells seafood, and not just spices, seasonings, etc.; and that applicant's specimens show that applicant markets not just any spices and seasonings, but products formulated for use on or with seafood. In addition, the examining

⁴ We note, too, that in the *Collegian Sportswear* case a dissenting opinion relied on the existence of many third-party registrations for marks for clothing that featured "collegiate," "college," "collegeset," and similar terms, so that the author of the dissenting opinion found the addition of the term OF CALIFORNIA to COLLEGIAN sufficient to distinguish that mark from COLLEGIENNE. *Collegian Sportswear*, 224 USPQ at 177. In this case, however, applicant has not, as the examining attorney notes, put in any evidence of third-party uses or registrations of OFF SHORE.

attorney has placed in the record reprints from five internet web sites showing that seafood and spices or seasonings can be obtained from a single source, as well as six registrations based on use of the registered marks in commerce, covering both seafood and spices or seasonings. As the examining attorney correctly notes, third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type that may emanate from a single source. See In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993). See also, In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), aff'd as not citable precedent 88-1444 (Fed. Cir. Nov. 14, 1988).

Applicant admits that the term NANTUCKET is geographically descriptive but argues that the term cannot be ignored in comparing the marks, because Nantucket is an upscale resort destination and lends a certain "cachet" to applicant's mark and goods, and because such an association with that island makes it that much more important to give due weight to the NANTUCKET portion of the mark. Applicant also argues that NANTUCKET OFF-SHORE is applicant's house mark, not merely a product mark and it is, therefore, considered stronger by the USPTO and less likely to cause

confusion. In support of this proposition, applicant cites to a decision, by a federal district court, denying a preliminary injunction in a case involving allegations of, among other claims, infringement and unfair competition. See Pristine Industries Inc. v. Hallmark Cards Inc., 753 F.Supp. 140, 18 USPQ2d 1214 (S.D.N.Y. 1990).

The *Pristine* decision provides little support for applicant's argument. First, it is a federal district court case, applying the law of the Court of Appeals for the Second Circuit, to the question whether to grant a preliminary injunction in an infringement proceeding, rather than the case law involved in determining whether a mark is entitled to registration. Second, it is entirely distinguishable on its facts. In *Pristine*, the plaintiff owned a federal registration for the word mark HOTDOGGER, and used it in conjunction with an anthropomorphic hot dog character, for its skiing apparel and other outdoor clothing, while the defendant was making an anthropomorphic hot dog Christmas ornament named the "hotdogger" but using as its marks for this product both its house mark HALLMARK and its mark for a line of collectible Christmas ornaments, KEEPSAKE COLLECTION. Further, plaintiff's clothing items and defendant's Christmas ornament were not complementary

items or otherwise related. In short, these facts are not analogous to the situation presented in this appeal.

Applicant also has argued that NANTUCKET OFFSHORE is its house mark. Generally, the addition of a house mark or trade name to one of two otherwise confusingly similar marks will not avoid the likelihood of confusion. *Siegel*, 4 USPQ2d at 1160, and First International Services Corp. v. Chuckles Inc., 5 USPQ2d 1628, 1632 (TTAB 1988) ("It has frequently been held that the addition of a trade name or house mark or other such matter to one of two otherwise similar marks will not serve to avoid a likelihood of confusion."). The exceptions to this rule occur when there are recognizable differences between the conflicting product marks so that the addition of the house mark is sufficient to render the marks as a whole distinguishable, or the product mark is merely descriptive, or commonly used or registered, and would not be regarded as an indication of source. *Siegel*, 4 USPQ2d at 1160. Although technically applicant does not seek to simply add its house mark to the registrant's mark, in that its house mark includes the "product mark," we think the applicant's situation should be governed by the same general rule and exceptions discussed above. Because neither of the exceptions apply, in that OFFSHORE is virtually identical in both marks, and

registrant's mark OFF SHORE is not descriptive, applicant's use of the additional element NANTUCKET cannot serve to differentiate the composite from the cited mark OFF SHORE. In short, while we do not disregard the NANTUCKET term in applicant's mark, notwithstanding that applicant has conceded it is geographically descriptive and has disclaimed it⁵, we do not find it to be a distinctive house mark in its own right or sufficient, when coupled with OFF-SHORE, to create a significantly different commercial impression than that of the cited mark.

As in Henry Siegel and Collegian, this appeal presents a case whereby prospective consumers will view one mark as denominating a particular line of products related to the goods identified by a similar mark, i.e., prospective consumers of registrant's seafood, encountering applicant's spices and seasonings, will conclude that applicant's products are a line of spices or seasonings sponsored by or authorized by registrant and in the Nantucket style, for use with registrant's seafood.⁶ Under these circumstances,

⁵ In its request for reconsideration, applicant suggested that it might withdraw the disclaimer and assert Section 2(f) acquired distinctiveness as to Nantucket, but it did not do so.

⁶ The record includes web pages of applicant's (or of vendors who sell applicant's products) that reveal applicant has a "Nantucket rub" for seasoning seafood, and a "Nantucket inspired BBQ sauce." And there are some other web sites where the usage could be

it does not matter whether NANTUCKET carries with it a certain cachet, for that would not prevent consumers from drawing the association between applicant's and registrant's products.

We are not persuaded that we should reach a different conclusion by applicant's argument that spices and seasonings are niche products in the "food industry" and seafood is a more broad-based product category. Applicant has admitted that its goods are "food-related and could be used with seafood." Nor are we persuaded by applicant's argument that the products have apparently been in contemporaneous use for 14 years without any instances of actual confusion being brought to applicant's attention. We have no evidence on the ways in which the involved products have been marketed and whether there have been any meaningful opportunities for confusion. Nor have we had the opportunity to hear from registrant about its experience.

Even if we were to conclude that likelihood of confusion is not certain, any doubt about the question must be resolved in favor of registrant. See Kimberly-Clark

viewed as an attempt at trademark use or to indicate Nantucket style dining (or both).

Ser No. 76475899

Corp. v. H. Douglas Enterprises, Ltd., 774 F.2d 1144, 227
USPQ 541 (Fed. Cir. 1985).

Decision: The refusal of registration under Section
2(d) is affirmed.