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**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Mariner Seafood Marketing, Inc.

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Serial No. 76590006

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Cristina M. Offenberg of Silva, Thomas, Martland &  
Offenberg, LTD. for Mariner Seafood Marketing, Inc.

Raul Cordova, Trademark Examining Attorney, Law Office 114  
(K. Margaret Le, Managing Attorney).

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Before Grendel, Holtzman, and Drost, Administrative  
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On May 3, 2004, applicant Mariner Seafood Marketing,  
Inc. applied to register the mark shown below on the  
Principal Register for "frozen seafood; frozen fish; frozen  
flounder; cod, catfish, tilapia, grouper and snapper" in  
Class 29.<sup>1</sup> The application (Serial No. 76590006) is based

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<sup>1</sup> We note that there is a slight discrepancy between the  
identification of goods in the USPTO's electronic records shown  
above and the filing receipt that identifies the goods as "frozen  
seafood - frozen fish; frozen flounder; cod, catfish, tilapia,  
grouper and snapper." The difference does not change the outcome  
in this case.

on an intention to use the mark in commerce. Applicant has disclaimed the term "Select."

# MARINER SELECT

The examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, if it were used on the identified goods, would likely cause confusion with the marks MARINERS in typed or standard character form<sup>2</sup> and MARINERS and design shown below,<sup>3</sup> both for "frozen seafood" in Class 29. Both marks are owned by the same entity.



The examining attorney argues that the marks have the same commercial impression "because MARINERS and MARINER represent the salient feature in each mark, and the former is the pluralization of the latter rendering them legal equivalents. The differences consist of disclaimed

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<sup>2</sup> Registration No. 1,853,725, issued September 13, 1994, renewed.

<sup>3</sup> Registration No. 1,781,594, issued July 13, 1993, renewed.

language and a design feature in one of registrant's marks; however, these elements do not detract from the prominent portion of the marks, MARINER and MARINERS." Brief at unnumbered p. 3. Furthermore, the examining attorney found that the "focus of registrant's and applicant's goods are seafood products." Brief at 3. Applicant argues that there are differences in the similarities of the mark, the relatedness of the goods, the similarities of trade channels, the conditions under which and the buyers to whom sales are made, and the number of similar marks in use on similar goods.

After the examining attorney made the refusal final, this appeal followed.

The Federal Circuit and the Court of Customs and Patent Appeals have set out the factors that we should consider when there is a question of likelihood of confusion. In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential

characteristics of the goods [or services] and differences in the marks." Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We begin our analysis by looking at the relatedness of applicant's and registrant's goods. The registrant's goods are identified simply as "frozen seafood." "Seafood" is defined as "any fish or shellfish from the sea used for food."<sup>4</sup> Regardless of how applicant's identification of goods is punctuated, it is clear that it seeks registration of its mark for frozen fish, frozen flounder, cod, tilapia, grouper and snapper and these items would be included in registrant's goods identified as "frozen seafood."

Therefore, applicant's and registrant's goods are identical or, at a minimum, overlapping. "When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992).

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<sup>4</sup> *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., 213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Regarding the goods, the channels of trade, and the prospective purchasers, applicant makes several attempts to distinguish the goods.

The applicant uses the mark in wholesale frozen fish and specifically on the fish known as flounder; cod, catfish, tilapia, grouper and snapper [sold] to restaurants, hotels, and the like for use in preparation of meals to be prepared and sold by the restaurant or hotel. The registrant, to applicant's knowledge[,] is using its mark in connection with prepared frozen seafood as is sold in the supermarket for consumption by household shoppers. The marks are not in use on related goods.  
Brief at unnumbered p. 3.

The applicant is in the food service channel and the registrant is in the supermarket and grocery channels.  
Brief at unnumbered p. 4.

The consumers of registrant's products are homeowner[s], mom[s], your everyday grocery store consumer purchasing prepared frozen foods at the supermarket. The purchasers of applicant's good[s] are sophisticated chefs and food industry personnel who are selecting high quality frozen specialty seafood that will be used in his/her industry and prepare[d] by him/her for preparation in menus and recipes.  
Brief at unnumbered pp. 4-5.

There are several problems with applicant's arguments. The most obvious problem is that neither applicant's nor registrant's identification of goods is limited in any way. Therefore, we must consider the goods as they are set out in the identification of goods, i.e., frozen seafood.

Octocom Systems, Inc. v. Houston Computers Services Inc.,  
918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The

authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed"). See also Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods" or services).

Furthermore, inasmuch as applicant's specifically identified frozen fish would overlap with registrant's frozen seafood, we must assume that the purchasers and channels of trade are the same. "Moreover, neither the application nor the registration limits the channels of trade through which the goods move. In the absence of such a limitation we must assume that the goods move through the normal channels for such goods, and that with respect to these particular goods, these channels are the same." In re Sawyer of Napa Inc., 222 USPQ 923, 924 (TTAB 1983). See also Morton-Norwich Products, Inc. v. N. Siperstein, Inc., 222 USPQ 735, 736 (TTAB 1984) ("Since there is no

limitation in applicant's identification of goods, we must presume that applicant's paints move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers"); In re Elbaum, 211 USPQ 639, 640 (TTAB 1981) ("[W]here the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers"). Therefore, the goods, channels of trade, and purchasers must be deemed identical.<sup>5</sup>

Next, we compare the marks in their entireties as to their similarities and dissimilarities in their sound, appearance, meaning, and commercial impression. Applicant's mark is MARINER SELECT and registrant's marks are the typed word MARINERS and MARINERS and the design of an individual who could be described as a mariner or a

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<sup>5</sup> Even if applicant had limited its channels of trade, registrant's identification of goods is unrestricted and it would include sales at wholesale and retail.

fisherman. When we compare the marks MARINERS and MARINER SELECT, the only differences are the pluralization of the term "Mariner" and the addition of the word "Select" in applicant's mark. Regarding the plural form of the word "Mariner," we do not find that this slight difference in the words is a significant difference. Wilson v. Delauney, 245, 877, 114 USPQ 339, 341 (CCPA 1957) ("It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word "Zombie" and they will therefore be regarded here as the same mark"). The only other difference between the word marks is the addition of the disclaimed term "Select" in applicant's mark.<sup>6</sup> Disclaimed matter is often "less significant in creating the mark's commercial impression." In re Code Consultants, Inc., 60 USPQ2d 1699, 1702 (TTAB 2001). Furthermore, the descriptive word, "Select" would not have much trademark significance in this case. The examining attorney has included a definition of the term "select" as "of special quality or value; choice." See First Office Action, p. 2. In the context of frozen seafood, this would simply indicate that the seafood is of

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<sup>6</sup> Because registrant's mark is shown as a typed drawing, it may be displayed in a style that is identical to applicant's. Phillips Petroleum Co. v. C.J. Webb, Inc., 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971).

special quality or value. The Federal Circuit has held that such descriptive terms "may be given little weight in reaching a conclusion on the likelihood of confusion.'" Cunningham v. Laser Golf Corp., 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985).

When we compare the marks, MARINERS and MARINER SELECT, we find them to be similar in appearance, sound, connotation, and meaning. The marks MARINERS and MARINER SELECT contain the virtually identical term "Mariner" and they sound and look similar. Also, the addition of the term "Select" does not significantly change the commercial impression or meaning of the mark. The term "Select" would simply indicate that MARINER SELECT frozen seafood was a special selection of MARINERS frozen seafood. Furthermore, the design element in Registration No. 1,781,594 would not make the mark dissimilar to applicant's. The design consists of a nautical theme that includes a fisherman or mariner holding a stylized fish. The design reinforces the "mariner" word portion of the mark. Therefore, we conclude that the cited registrations are similar to applicant's MARINER SELECT mark.

We have reached this conclusion taking into consideration the fact that the word "Mariners" is hardly

an arbitrary term when applied to frozen seafood. We agree with applicant that "it is suggestive of the goods." Brief at unnumbered p. 3. However, we cannot agree with applicant's argument that the third-party registrations show that the term "Mariner" "is commonly used in the industry." Registrations are not evidence of use in an industry. AMF Inc. v. American Leisure Prods., Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them"). Furthermore, as "to strength of a mark, however, registration evidence may not be given any weight." Olde Tyme Foods Inc. v. Roundy's Inc., 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) (emphasis in original). Specifically, applicant points to two third-party registrations, No. 1,818,065 (MARINER JACK and ship wheel design for frozen seafood) and No. 1,174,418 (MARINERS COVE for clam chowder). Even if this were evidence of use, the existence of two registrations hardly demonstrates that the cited marks are weak.<sup>7</sup> Furthermore,

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<sup>7</sup> Applicant also submitted another registration for frozen and processed potatoes with its appeal brief. While this registration is hardly probative, it is also untimely. Furthermore, we will consider applicant's quotation from a website in its brief as additional argument of counsel and not new evidence.

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third-party registrations cannot be used to justify the registration of another confusingly similar mark. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987).

In this case, when the marks MARINER SELECT and MARINERS and MARINERS and design would be used on frozen seafood products, we are convinced that confusion is likely.

Decision: The examining attorney's refusal to register under Section 2(d) of the Trademark Act is affirmed.