


The Applicant acknowledges the Section 2(d) refusal based upon the Registrant's Marks- the word mark, "California Quivers" registered in classes 30, 32 and 40 for mixes, syrups, powders, beverages and rental service for infused beverage processing systems; and the logo mark "CQ California Quivers" and design also owned by the San Diego company, California Quivers.

The Examining Attorney has indicated that the word portion of the Applicant's Mark is dominant and therefore it is indistinguishable from the Registrant's Mark. The Applicant understands this position, but respectfully disagrees for the reasons present in this Response and Amendment.

The word portion of the Applicant's Mark is the made-up, fanciful word "Quivr" As a verb, the word "QUIVER" means to tremble or shake with a slight rapid motion. (Merriam-Webster). As a noun, the word "QUIVER" means an archer's portable case for holding arrows. (Merriam-Webster). A commonly used phrase is: "an arrow in the quiver" meaning one of a number of resources or strategies that can be drawn on or followed. "Quivr", the Applicant's fanciful, original word, is a derivation of the word "Quiver".

In comparing the applied-for Mark with the cited Registered mark, the Examining Attorney should reference that the pictorial representation in the Applicant's Mark is critical to the DuPont analysis. Here, the depiction of the arrowhead is certainly distinctive and makes a strong impression upon a consumer. Also, the purposeful misspelling of the word QUIVER as "QUIVR" is distinctive, arbitrary and impactful.

The Applicant's Mark and the Registrant's Marks are shown here for comparison purposes. The Registrant's Mark is a word mark however, the Registrant predominantly uses a Logo mark "CQ".

Applicant's Mark	Registrant's Marks
<ul style="list-style-type: none"> • QUIVR 	<ul style="list-style-type: none"> • CALIFORNIA QUIVERS • 

Sound. The Applicant emphasizes that the design element, namely, font and the circular arrow image shown above is accorded lesser weight as a design does not produce its own sound and consumers hearing the Mark would not be aware of its presence in the Mark. True, however, the sound of the Registrant's Marks are *completely* dissimilar to the sound of the Applicant's mark. "California" is a strong five syllable word that takes a full 2 seconds to speak. "Quiver" is non-existent since the Registrant uses "Quivers", the plural which looks and sounds completely different from "Quivr", in the singular. The Registrant's logo mark, "CQ", is a two letter abbreviation and most likely the mark known to the Registrant's consuming public.

Sight. Visually, the Registrant's branding image is very distinct, and the Applicant believes dominant over the word "QUIVR". The Registrant's Mark, "CQ", is visually very appealing and very memorable. It is entirely different from the Applicant's word mark. The play on the word QUIVR (defined above) is intriguing to a consumer and creates a powerful brand image that will remain in the mind of the consumer.

Summary. The Examining Attorney has refused registration of the applied-for Mark (Applicant's Mark) on the grounds that Applicant's Mark is likely to be confused with registration numbers 5,481,694 and 5,481,697 (the 694 and 697 Registration), for the word Mark "CALIFORNIA QUIVERS" for frozen, infused beverages.

The Examining Attorney concludes that the word "QUIVER" used in the Registrant's Mark and the word "QUIVR" used in the Applicant's design Mark have the same connotation irrespective of the Registrant's unique stylized design and that consumers are generally more inclined to focus on the words of a Mark as opposed to the design; and that the word "QUIVER" is the dominant portion of both the Applicant's Mark and the Registrant's 694 and 697 Marks, and that greater weight should be given to the word portion of the Applicant's Mark as this is the dominant and most significant portion of the Applicant's Mark.

For the following reasons, the Applicant respectfully disagrees with the Examining Attorney's arguments:

Descriptiveness. First, although the Examining Attorney has provided a statement that the word "QUIVERS/QUIVR" is the dominant source indicator in the applied-for and registered marks in this case because "California" is "descriptive wording." The Examiner states that descriptive wording is less dominant when comparing Marks. The Applicant disagrees with that conclusion in this context, the Registrant is using "CALIFORNIA QUIVERS" to connote that California quivers when he consumes the beverages because they are so refreshing. The writer interprets the mark to use the verb meaning of "Quivers" namely the act of shivering or trembling as one would do when one is cold. The descriptive connotation is different from the connotation achieved by the Applicant. The Applicant has invented his own unique word "Quivr" however, he is using neither verb definition of the word "Quiver"; he is using the noun definition, the tube

to hold arrows. The Applicant's Mark and the Registrant's Mark do not appear similarly, sound the same and convey the same commercial impression. The Applicant respectfully disagrees with the Examining Attorney's arguments.

The Applicant's Mark is distinctive for the following reasons:

- a) The spelling of QUIVR is unique;
- b) The font used is unique;
- c) The word QUIVR is not found in the English language. It is fanciful, made-up and arbitrary when applied to the goods.

The Applicant's Mark provides an integrated and unified impression to the consumer. Finally, the Applicant's Mark is distinctively unique in that it comprises several elements which together manifest the brand.

The meaning of the word is a unique and complex mark with many facets. The complexity of the Applicant's Mark renders it unique in terms of meaning and the message that is conveyed by the Applicant's Mark to the consumer as compared to the Registrant's 694 and 697 Marks. The use of the word "QUIVR" is arbitrary as applied to a canned beverage. Namely, arrows and the tube in which arrows are held have nothing to do with beverages. Thus, the connection made by the consuming public will be strong and lasting. The more arbitrary the connection between the Mark and the goods, the stronger the trademark.

For at least these reasons the Applicant respectfully submits that Applicant's Mark is sufficiently distinct in sight, sound and meaning from the Registrant's 694 and 697 Marks. As such, an ordinary consumer is not likely to confuse the source of goods with which the Applicant's Mark is used with the source of goods and services upon which the 694 and 697 Marks are used.

The Applicant's Mark is extremely dissimilar in sight, sound, connotation and commercial impression from the Registrant's 694 and 697 Marks.

Similarity of the Goods/Services and Channel of Trade. The Applicant would like to address the refusal of the Applicant's Mark for registration on the grounds that Applicant's Mark is likely to be confused with the Registrant's 694 and 697 Mark due to the relatedness of the goods and the similarity of the channels of trade of the Applicant and the Registrant. The Applicant submits that the channels of trade are completely distinct and that the goods and services are sufficiently distinct. The Applicant presents the following argument in support of Registration.

Distinct Use: The Office has expressed that the goods upon which the Applicant's Mark is used are sufficiently related and travel the same channels of trade as the goods and services provided by the Registrant's 694 and 697 registrations. The 694 and 694 registrations are registered in classes 30, 32 and 40 for mixes, syrups, powders, beverages and rental services for infused beverage processing systems. There is no indication that 694 and 697 are used for coffee. It appears that 694 and 697 are utilized for water-based beverages such as water infused with fruit and plants like herbs. The Applicant's Mark is used in Massachusetts. The 694 and 697 Marks are registered by a company from southern California. Accordingly, it appears that the goods/services are provided on opposite shores of the United States. We do not anticipate that there will be any confusion between the 694 and 697 Marks and Applicant's Mark. The Applicant uses his mark in connection with canned coffee. The Applicant is not selling alcoholic beverages, drink mixes and syrups for drinks. The Registrant is involved in supplying the coolers and dispensers for drinks at

display sites. The Registrant sells syrups and mixes for water-based drinks. Applicant sells canned coffee. Applicant does not promote or sell drink services.

The Registrant's 694 and 697 Mark is used for kiosks in the shopping malls and public forums. The Registrant is based in Southern California. San Diego, California is approximately 3,000 miles away from Massachusetts. The use of the 694 and 697 Mark and the use of the Applicant's Mark in the respective geographic areas is unlikely to cause any confusion among consumers as to the source or origin of the goods and services provided because the marks are used on opposite shores of the United States approximately 3,000 miles from each other.

For at least these reasons the Applicant respectfully submits that Applicant's Mark is used in connection with distinct goods in a unique channel of trade from the goods and services of the Registrants 694 and 697 Mark. As such, an ordinary consumer is not likely to confuse the source of goods with which the Applicant's Mark is used with the source of goods and services upon which the 694 and 697 Mark is used. Furthermore, the Applicant respectfully submits that Applicant's Mark is used very locally in Western Massachusetts, Greater Springfield, Massachusetts and the 694 and 697 Mark is used in California, approximately 3,000 miles away.

Please reconsider the grounds for rejection of the registration of the Applicant's Mark and allow the Applicant's Mark for Publication.

The marks have completely distinct appearances, distinct sounds audibly, they have very distinct meanings and are uniquely descriptive and of consequence source identifying significance. The marks create a very different overall commercial impression, as will be described below.

The Restatement (Third) of Unfair Competition § 21(a) (1995) states that the degree of resemblance between conflicting marks should be analyzed by a comparison of the overall impression created by the designations; pronunciation; translation of foreign words; and verbal translation of pictures; suggestions, connotations or

meanings of the designations. *See McCarthy on Trademarks and Unfair Competition*, § 23.04 (3rd ed., 23-48); *see also Sure-Fit Products Co. v. Saltzon Drapery Co.*, 254 F.2d 158 (1958) (court stating that “although similarity as to either sound, meaning, or appearance may be sufficient to indicate likelihood of confusion, it does not necessarily do so; all three factors must be examined.”). Furthermore, according to the anti-dissection rule “[c]onflicting composite marks are to be compared by looking at them as a whole, rather than breaking the marks up into their component parts for comparison.” *McCarthy on Trademarks and Unfair Competition*, § 23.15[1][a] (3rd Ed.). As stated by the Supreme Court, “[t]he commercial impression of a trademark is derived from it as a whole, not from its elements separated and considered in detail. For this reason it should be considered in its entirety.” *Estate of P.D. Beckwith, Inc. v. Commission of Patents*, 252 U.S. 538, 545-46 (1920). Therefore, “in analyzing the similarities of sight, sound and meaning between two marks, a court must look to the overall impression created by the marks and not merely compare individual features.” *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 3 USPQ2d 1442, 1445 (8th Cir. 1987).

Therefore, in assessing the similarities between marks in order to determine a likelihood of confusion as to the source of the marks, a comparison of the marks’ entirety must be made giving full consideration to the effects of similarities in sight, sound, and meaning on the reasonable consumer. Accordingly, an analysis regarding the effects of each of sight, sound, and meaning created by Applicant’s Mark and Registrant’s Mark on the reasonable consumer will now be conducted.

Applicant’s Mark consists of the one word in distinctive font “QUIVR” distinctively designed with an arrow image. The Applicant’s mark is designed to be intriguing and whimsical and to appeal to inquisitive people looking to try a new beverage. The Applicant believes that Applicant’s mark is visually distinctive and recognizable.

The Applicant’s graphic is important to the mark since it is designed to appeal to the demographic. Registrant’s Mark is a word mark, consisting of two words “CALIFORNIA QUIVERS”. There is no design component to 694. Based upon the information available on the

internet, the Registrant is using 697 which the “CQ” logo design. It is a distinctive design feature with the mark. The Registrant’s Mark and the Applicant’s Mark are completely dissimilar audibly and in sight.

Where a mark consists of more than one word, it is appropriate to determine which of the words is determined to be dominant.

In order to determine which portion is dominant, it has been held that “[w]here conflicting marks have both similarities and differences, these must be weighed against one another to see which predominates; one criterion for determining the dominant portion of the composite mark is whether the buyer would be more likely to remember and use one part of the mark as indicating the origin of services.” *Price Candy Co. v. Gold Medal Candy Co.*, 220 F2d 759 (1955). Additionally, it has been held that the “dominant portion of the mark is determined by judging the commercial impression of the mark on a buyer at first viewing, and the *manner of display of portions of the mark can be an important element in applying the test.*” *B. Rich’s Sons v. Frieda Originals, Inc.*, (TMT App. Bd. 1972) (*emphasis added*).

In the case at hand, the use of arrow design is material to appeal to the consumer and gives rise to the primary focus of the mark. The use of that design image creates an impact for the Applicant’s Mark such that the simple design element becomes the predominate feature of the mark. The Applicant is looking to attract the attention of beverage consumers. Consequently, due to the image, the Applicant’s Mark is completely distinct from Registrant’s Marks.

Therefore, Applicant submits that it is the image of Applicant’s mark that carries the impact and the overall commercial significance of the mark such that the element most impressed upon the typical consumer’s memory is the image which speaks to consumers.

Consequently, the consumer is likely to remember the design image of the Applicant’s Mark. It is interesting and different from other beverage brand images.

The Registrant’s mark 694 is a word mark with no distinctive design. The Registrant appears to be selling a wide variety of water-based beverages through live event kiosks. There is no indication that the Registrant’s mark is used on canned beverages. There is no evidence that Registrant is selling coffee drinks under its brand. (See Attached Exhibit).

The graphic portion of the Applicant's mark should be compared with Registrant's Mark when determining similarity and commercial impression. Therefore, when comparing Registrant's Mark with Applicant's Mark, the differences in sight are readily apparent even to the most casual observer. That is, the casual observer would immediately notice the use of the arrow image with the word "QUIVR." Accordingly, it would be unlikely there would be confusion as to the source of the goods promoted by the two marks when encountered by an ordinary observer.

Therefore, for all of the reasons stated above, Applicant respectfully submits that Applicant's Mark is sufficiently distinct in appearance from Registrant's Mark such that no likelihood of confusion as to source of the goods exists. Applicant respectfully submits that an ordinary consumer would not be confused as to the source of Applicant and Registrant's goods. Accordingly, Applicant requests reconsideration of the Examiner's refusal of Applicant's registration.

Channel of Trade. It appears from the Internet that Registrant is a beverage service providing water based, fruit and herb infused drink dispensers for meetings, gatherings and locations on request. The Registrant does not package its beverages in cans or bottles for retail or wholesale outlets. Accordingly, the channel of trade utilized by the Registrant, is completely distinct from Applicant's channel of trade. The Applicant is selling goods to retailers, grocery stores and convenience stores in Western Massachusetts. The Applicant does not sell its beverages at events, but for promotional trade show events. The Applicant does not sell drink service set ups like dispensers. Applicant is selling canned coffee drinks to stores. The Applicant contends that the Registrant's mark and the Applicant's mark would not be encountered by the same consumer in the same or similar retail outlet, since, the Applicant sells prepackaged canned coffee to retailers. We cannot assume that consumers would be searching for cannisters of fruit infused drinks for a conference in California and canned coffee at grocery stores in Western Massachusetts at the same time and encountered in the same retail search and become confused. We have no reason to believe that the Registrant's goods are sold online, although the beverage services are advertised online. The complete dissimilarity between the goods is adequate basis for the Applicant to conclude that there would be confusion as to the source of the goods.

Applicant's Mark and Registrant's Mark must be considered in their entirety.

Trademarks should be considered in their entirety; the way consumers encounter them. Their individual components or features should not be “dissected” or analyzed piecemeal. In re National Data Corp., 753 F.2d 1056, 224 U.S.P. Q. 749, 750-51 (Fed. Cir. 1985); In re Bed & Breakfast Registry, 791 F.2d 157, 229 U.S.P.Q. 818, 819 (Fed. Cir. 1986). This has been referred to as the “anti-dissection” rule. The basic rationale behind the anti-dissection rule is that average purchasers do not retain all the details of trademarks, but rather the impression that the mark creates in its entirety.

Applicant concedes that while the basic rule is that marks must be compared in their entirety and not dissected, “in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rationale reasons, more or less weight has been given to a particular feature of a mark provided that the ultimate conclusion rests on consideration of the marks in their entirety.” In re National Data Corp., 753 F.2d 1056, 224 U.S.P.Q. 749 (Fed. Cir. 1985); In re Dixie Restaurants, Inc., 105 F.3d 1405, 41 U.S.P.Q.2D 1531 (Fed. Cir. 1997).

While according a dominant portion of a mark more weight, in itself, is in accordance with the anti-dissection rule, it has been held to be a violation of the anti-dissection rule to focus on the dominant features of a mark and decide likely confusion solely upon that feature, ignoring all other elements of the mark. Massey Junior College, Inc. v. Fashion Institute of Technology, 492 F.2d 1399, 181 U.S.P.Q. 272 (C.C.P.A. 1974). It is similarly improper to find that one portion of a composite mark has no trademark significance, leading to a direct comparison between only that which remains. Spice Islands, Inc. v. Frank Tea & Spice, Co., 505 F.2d 1293, 184 U.S.P.Q. 35 (C.C.P.A. 1974); In re Electrolyte Laboratories, Inc., 913 F.2d 930, 16 U.S.P.Q. 2d 1239 (Fed. Cir. 1990).

No likelihood of confusion exists because the ultimate determination of likelihood of confusion rests in the probable customer reaction to the composite marks as a whole. The Applicant has imposed a design feature (the arrow image) and the unique spelling of “QUIVR”, which together render the distinctive connotation. There is for that reason no likelihood of confusion between the marks.

Thus, Applicant respectfully requests that the Office reconsider and withdraw its rejection. When one compares the marks as a whole, taking into account both the dominant and non-

dominant portions, no likelihood of confusion exists regardless of which portion is declared dominant.

The Registrant is selling coffee. The Applicant is selling beverage services of fruit and herb infused water-based drinks. They are NOT in the same industry. The Applicant is addressing the market of consumers of cold canned coffee beverages at retail outlets like grocery stores in New England. The Registrant's market is the event sponsor, the larger organizer not the consumer of the beverage.

In determining likelihood of confusion in the mind of an appreciable number of reasonably prudent buyers, the test is not whether confusion is probable among customers who are not knowledgeable. The reasonably prudent buyer cannot be totally indifferent to trademarks. International Ass'n of Mechanical & Aero. Workers v. Winship Green Nursing Ctr., 103 F.3d 196, 41 U.S.P.Q.2d 1251 (1st Cir. 1996) (confusion resulting from the consuming public's carelessness, indifference or ennui will not suffice) Thus, possible confusion of a person who has no interest in or who is not knowledgeable in the beverage industry is not relevant. Rather, only those individuals who are knowledgeable about the beverage industry make up the group of relevant consumers. We submit that these individuals will not be confused because the channel of trade is distinct (direct to Consumers and indirect to provider). The consumer knows what products they seek.

For the foregoing reasons, Applicant submits that consumer confusion between Applicant's Mark and the Registrant's Mark is highly unlikely. The application of Mukunda Feldman should be allowed. Applicant hereby respectfully requests reconsideration and allowance of the application. Please contact the undersigned with any additional questions or concerns. We appreciate your cooperation.

We believe this Response and Amendment places this Application in condition for allowance.

Exhibit

