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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 GlynnTech, Inc.

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Serial No. 76678920

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GlynnTech, Inc. Pro Se.

Toby E. Bulloff, Trademark Examining Attorney, Law Office  
117 (Loretta Beck, Managing Attorney).

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Before Quinn, Kuhlke and Walsh, Administrative Trademark  
Judges.

Opinion by Walsh, Administrative Trademark Judge:

GlynnTech, Inc. (applicant) has applied to register  
the mark OMNICOOKER in standard characters on the Principal  
Register for goods identified as "cookware, namely, metal  
cooking devices for use with frying pans, pots and grills"  
in International Class 21.<sup>1</sup>

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<sup>1</sup> Application Serial No. 76678920, filed June 29, 2007, claiming first  
use of the mark anywhere and first use of the mark in commerce on May  
16, 2007.

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The Examining Attorney has finally refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with Registration No. 3227764 on the Principal Register for the mark OMNIWARE in standard characters for goods identified as "cookware, namely pots and pans; cooking utensils, namely, whisks; spatulas; bakeware; baking dishes; cake pans; coffee pots not of precious metal; dishes; serving dishes; butter dishes; cups; canister sets; coasters, namely, coasters not of paper; cutting boards; teapots not of precious metal; trivets; spice racks; salt and pepper shakers" in International Class 21.<sup>2</sup> The registration issued on April 10, 2007. The registration claims first use of the mark anywhere and first use of the mark in commerce on September 1, 1992. The registration includes a claim of acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f).

Applicant also attempted to amend the application to the Supplemental Register under Trademark Act Section 23, 15 U.S.C. § 1091, in response to the refusal under Section 2(d). The Examining Attorney refused to accept that amendment. In its brief applicant continues to argue that

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<sup>2</sup> The registration also covers goods in International Class 8, but the Examining Attorney has based the refusal on the International Class 21 goods only.

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it is entitled to registration on the Supplemental Register, in the alternative. Consequently, we must address that refusal as well.

Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We affirm on all grounds.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion ..." 15 U.S.C. § 1052(d). In *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977), the Court set forth the factors to consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods of applicant and registrant. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Regarding the marks, in comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v.*

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*Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

Applicant argues that "... the overall sound and appearance of the two marks are different." Applicant's Brief at 3. Specifically, applicant argues principally that the second elements in the respective marks, "cooker" and "ware," differ in meaning and commercial impression and that "... the use of OMNI as a prefix in English words calls attention to the subsequent syllables." *Id.* at 4. Applicant also notes the dictionary meaning of "OMNI" meaning "all." Applicant finally argues that the differences in appearance, sound, meaning and commercial impression are sufficient to find no likelihood of confusion.

The Examining Attorney argues that OMNI, the first element in each of the marks, is distinctive and dominant in each of the marks and that "ware" and "cooker" are descriptive and insufficient to distinguish the marks.

We conclude that the marks are similar. In each of the marks OMNI is the first element, the more distinctive element and the dominant element. Here, as is often the case, it is the first element in the marks which makes the dominant impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at

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1690; *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (KIDWIPES and KID STUFF held similar, noting that KID is the first element in each mark and that this fact is "... a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.").

Furthermore, while applicant attempts to argue that "ware" and "cooker" are more important and dominant, we are not convinced. The Examining Attorney has provided definitions of "cooker" and "ware" showing their descriptive significance in relation to the relevant goods. In fact, the identifications of goods in both the application and cited registration refer to "cook**ware**." "Ware" retains its descriptive meaning whether used as a separate word or as a suffix as in the identifications and in applicant's mark. Therefore, we conclude that "cooker" and "ware" are not sufficient to distinguish the marks when we view the mark in their entireties. *In re National Data Corporation*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ("... in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has

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been given to a particular feature of a mark... Indeed, this type of analysis appears to be unavoidable.”).

Accordingly, though there are differences between the marks, we conclude that the similarities in appearance, sound, connotation and commercial impression are more important and that the marks are similar overall.

As to the goods, the goods of applicant and the registrant need not be identical to find a likelihood of confusion under Section 2(d). They need only be related in such a way that the circumstances surrounding their marketing would result in relevant purchasers mistakenly believing that the goods originate from the same source. *On-Line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in comparing the goods and the channels of trade we must consider the goods as identified in the application and registration. See *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 set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods,

the particular channels of trade or the class of purchasers to which the sales of goods 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.").

Applicant identifies its goods as "cookware, namely, metal cooking devices for use with frying pans, pots and grills." The goods in the cited registration are identified as "cookware, namely pots and pans; cooking utensils, namely, whisks; spatulas; bakeware; baking dishes; cake pans; coffee pots not of precious metal; dishes; serving dishes; butter dishes; cups; canister sets; coasters, namely, coasters not of paper; cutting boards; teapots not of precious metal; trivets; spice racks; salt and pepper shakers."

Applicant has not made any arguments specifically with respect to the goods. The Examining Attorney argues that the respective goods, as identified in the application and registration, are closely related. We conclude that the goods are closely related.

First, the respective identifications of goods indicate a close relationship between the goods. Simply put, the registrant's goods include pots and pans and

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applicant's goods are for use with pots and pans.

Applicant's specimen displays applicant's product in use showing that it is inserted into a pot or frying pan. It is a "plank" with a grill-like configuration.

The Examining has provided additional evidence to support the conclusion that the goods are related. Specifically, the Examining Attorney has provided several third-party registrations where the same mark has been registered for a variety of cookware, including the types of goods in both the application and the cited registration. For example, those registrations include:

Registration No. 3129063 for goods which include, among other things, "household and kitchen utensils consisting of cookware, namely, grilling planks, ... cooking pots and pans...";

Registration No. 3381771 for goods which include, among other things, "pots and pans, skillets, ... grills..."; and

Registration No. 3312634 for goods which include, among other things, "nonelectric cookware, namely, pots, pans, pot covers and lids, steamers griddles, grills, skillets, pressure cookers, covered and open roasters, and double boilers."

Attachments to Office Action of October 29, 2007.

These registrations, and the others submitted by the Examining Attorney, suggest that the respective goods are of a type which may emanate from the same source. *In re TSI Brands Inc.*, 67 USPQ2d 1657, 1659 (TTAB 2002); *In re*

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*Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Based on this record we conclude that the goods identified in the application and the goods identified in the cited registration are closely related.

Applicant has also argued that it is entitled to registration because the USPTO had previously permitted registration of the mark OMNI GRILL (Registration No. 2534147) as well as the OMNIWARE mark in the cited registration. Applicant's Response of April 28, 2008. In the Examining Attorney's brief, the Examining Attorney has objected to our consideration of this information because applicant failed to provide a copy of the referenced third-party registration in proper form citing *In re Fitch IBCA Inc.*, 64 USPQ2D 1058, 1059 n.2 (TTAB 2002) and other cases.

We overrule the Examining Attorney's objection and have considered the information regarding this third-party registration. Applicant noted the information regarding this registration in a response prior to appeal. In an action following that response also prior to appeal, the Examining Attorney failed to advise applicant of the requirements related to the filing of copies of third-party registrations. The Examining Attorney only noted the problem later in the appeal brief. Consequently applicant

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was denied timely notice and the opportunity to comply with the requirement. *In re Hayes*, 62 USPQ2d 1443, 1445 n.3 (TTAB 2002). Nonetheless, the only information applicant had provided to date is the registration number and the mark. Therefore, because the information is so limited it possesses limited probative value. More importantly, even if the record included a proper copy of the registration with complete information regarding the registration, contrary to applicant's suggestion, it would not dictate our determination in this case. We must decide each case based the record before us and its particular facts, not on determinations by examining attorneys in other applications. *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Accordingly we reject applicant's arguments based on the OMNI GRILL registration.

Finally, after considering all of the evidence and arguments presented here, including arguments we have not specifically discussed, we conclude that there is a likelihood of confusion between OMNICOOKER, when used in connection with "cookware, namely, metal cooking devices for use with frying pans, pots and grills" and OMNIWARE, when used in connection with "cookware, namely pots and pans; cooking utensils, namely, whisks; spatulas; bakeware; baking dishes; cake pans; coffee pots not of precious

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metal; dishes; serving dishes; butter dishes; cups; canister sets; coasters, namely, coasters not of paper; cutting boards; teapots not of precious metal; trivets; spice racks; salt and pepper shakers."

Before concluding we must address applicant's amendment to the Supplemental Register and the Examining Attorney's rejection of that amendment. It would not serve any useful purpose to recount the arguments regarding this issue. Applicant's purpose in filing the amendment was to overcome the refusal based on likelihood of confusion under Trademark Act Section 2(d). The premise underlying the amendment is in error. That is, our analysis and determination under Section 2(d) would be the exactly the same whether the application is one for the Supplemental Register or the Principal Register. In either event Registration No. 3227764 for the OMNIWARE mark would stand as a bar to the OMNICOOKER application based on a likelihood of confusion. Accordingly, we affirm the Examining Attorney's rejection of applicant's amendment to the Supplemental Register as a means to overcome the Section 2(d) refusal.

**Decision:** We affirm the refusal under Trademark Act Section 2(d) and the rejection of applicant's amendment to the Supplemental Register to overcome that refusal.