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This Opinion is Not a
Precedent of the TTAB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Barrie House Coffee Co., Inc.

Serial No. 76678951

Myron Amer of Myron Amer, P.C. for Barrie House Coffee Co.,
Inc.

Jaclyn N. Kidwell, Trademark Examining Attorney, Law Office
112 (Angela Bishop Wilson, Managing Attorney).¹

Before Rogers, Bergsman and Wellington, Administrative
Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Applicant seeks to register the term MOCCA in standard
characters, on the Principal Register, as a mark for goods
ultimately identified as "a coffee product, namely coffee
beans, and not including ground-coffee derived coffee."

Two refusals to register the proposed mark resulted in this
appeal.

¹ Examining attorney Darryl Spruill, also of Law Office 112,
examined the application until it was reassigned to Jaclyn
Kidwell for preparation and filing of the appeal brief.

First, the examining attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C.

§ 1052(d), in view of the prior registration of the "MOCA" and design mark shown below for "coffee and coffee derivatives."²



Second, the examining attorney has refused registration under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that MOCCA is descriptive of applicant's identified goods. While applicant had attempted to amend the application to seek registration on the Supplemental Register, to overcome that refusal, the examining attorney refused such amendment because the application is based on intent-to-use and applicant has not filed an amendment to allege use.

² Registration no. 2757778, issued September 2, 2003. Registrant disclaimed the exclusive right to use the word "moca."

After the examining attorney explained that applicant could not amend the application to seek registration on the Supplemental Register, applicant twice requested that such amendment be deleted. See May 12, 2008 submission entitled Notice of Appeal and Appeal Brief³ and July 15, 2008 submission entitled Appeal Brief, the latter of which followed the examining attorney's denial of applicant's request for reconsideration. Even though the examining attorney clearly maintained a descriptiveness refusal throughout prosecution, and notwithstanding that applicant has acknowledged in its Reply Brief that the examining attorney's final refusal included a refusal under Section 2(e)(1), applicant nonetheless asserted in that same brief that the examining attorney made such refusal on the merits for the first time in the examining attorney's appeal brief. Applicant's contention is belied by the record and its request in its Reply Brief that we should "deem this basis of the refusal to have been waived" is denied.⁴

³ The Board paralegal also treated this submission as including a request for reconsideration, insofar as it was filed shortly after the examining attorney's final refusal and included an amendment to the identification responsive to a requirement included in the final refusal. Thus, the application was remanded to the examining attorney.

⁴ Although applicant's reply brief is not at all clear in its discussion of the issue, it is possible applicant is in some way attempting to draw a distinction between the examining attorney's refusal to allow applicant's amendment to the Supplemental

Before addressing the refusals, a word is in order about applicant's identification of goods. The examining attorney found applicant's original identification of "coffee and coffee products" indefinite. Applicant then amended the identification to "coffee and coffee products, namely, coffee beans," which the examining attorney found satisfactory. Nonetheless, when the examining attorney persisted in the refusal of registration under Section 2(d), applicant further amended the identification to "a coffee product, namely, coffee beans, and not including coffee," which, in applicant's view, "obviates any likelihood of confusion" with the mark in the cited registration.

The examining attorney's final refusal of registration acknowledged and addressed the further amended identification in regard to the Section 2(d) refusal, but did not find it to obviate such refusal. Moreover, the examining attorney noted that the amended identification could be read to "imply that no goods are being provided,"

Register (a point in which the applicant had already acquiesced by virtue of its two requests, prior to the reply brief, to delete such amendment), and the examining attorney's descriptiveness refusal on the merits. Such distinction, however, is of little significance, as the initial attempt to amend to the Supplemental Register followed issuance of a descriptiveness refusal on the merits and that refusal was maintained throughout, regardless of applicant's periodic discussions of the Supplemental Register.

and required clarification of the exclusionary language. Applicant then adopted the identification "a coffee product, namely coffee beans, and not including ground coffee-derived coffee," and the examining attorney acknowledged this in the Office action denying applicant reconsideration of the final refusal. Accordingly, we consider this the operative identification, notwithstanding that the examining attorney's brief recites the earlier version of the identification found to be indefinite. We consider the references in the brief to the earlier version of the identification to have resulted from a word processing error. In essence, then, the proposed mark is for coffee beans.⁵

Descriptiveness

Turning to the substantive refusals of registration, we consider first the refusal under Section 2(e)(1) because

⁵ The general and vague term "coffee product" only takes meaning when qualified by "namely, coffee beans." The significance of the subsequent exclusionary language is questionable. It could be read to exclude the beverage coffee, if derived from ground coffee; but that does not appear to make much sense, as it would appear that the beverage typically is made from ground coffee, rather than from whole beans and, moreover, the beverage coffee would not normally be encompassed by an identification of coffee beans. In the alternative, the exclusionary language could be read as an attempt to exclude ground coffee beans. Because it is clear from the record that applicant limited the identification in an attempt to avoid the Section 2(d) refusal, we conclude that applicant has at least limited the identification to coffee beans and, perhaps, even excluded ground coffee beans.

our determination regarding the asserted descriptiveness of the proposed mark may affect the strength accorded it in our analysis of likelihood of confusion. The question whether a proposed mark is merely descriptive is not determined by asking whether one can guess, from the mark itself, what the goods or services are, but rather by asking, when the mark is seen on or in connection with the goods or services, whether it immediately conveys information about their nature. See *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998).

Applicant's application to register MOCCA is based on its intent-to-use the proposed mark in commerce for the identified "coffee product, namely coffee beans, and not including ground-coffee derived coffee," or, put simply, coffee beans.

The examining attorney has put in the record the following dictionary definitions:

Mocha. "1. A rich, pungent Arabian coffee. 2. Coffee of high quality. 3. A flavoring made of coffee often mixed with chocolate." The American Heritage Dictionary

Mocha coffee. "a superior dark coffee made from beans from Arabia." www.thefreedictionary.com.⁶

⁶ These definitions are consistent with the definitions in Webster's Third New International Dictionary of the English Language (Unabridged), p. 1450 (1993) ("Arabica coffee") and in The Random House Dictionary of the English Language (Unabridged), p. 1235 (2nd ed. 1987) ("a choice variety of coffee"). As a general rule, the Board may take judicial notice of dictionary

In addition, the record includes reprints of various web pages from the Internet that describe mocha coffee beans, their geographic origin, and their distinctive flavor.⁷ Clearly, on the record at hand, there is no question that "mocha" is descriptive, if not generic, for coffee and coffee beans. Indeed, applicant has not presented any argument to the contrary. Moreover, its unsuccessful attempt to amend the application to seek registration on the Supplemental Register may be taken as an indication that applicant recognizes that its proposed mark MOCCA is merely a misspelling or the phonetic equivalent of the descriptive or generic term. However, as applicant has not amended its application to claim use of the mark in commerce, its proposed mark is ineligible for registration on the Supplemental Register.

As for registration of the misspelling of a descriptive or generic term on the Principal Register, the case law is clear that, unless the misspelling creates some

evidence. *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).

⁷ The record also includes a copy of a third-party registration for coffee that the Examining Attorney originally cited as a bar to registration, but subsequently withdrew: Registration No. 2698134 for the mark ABYSSINIAN MOCCA. The registrant disclaimed the exclusive right to use the word "Mocca."

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play on words or a unique presentation of the term, it is no more registrable than the descriptive or generic term itself. See *In re Bayer Aktiengesellschaft*, 488 F3d 960, 82 USPQ2d 1828 (Fed. Cir. 2007) (ASPIRINA descriptive for analgesic known by generic term "aspirin"); *In re Stanbel Inc.*, 16 USPQ2d 1469 (TTAB 1990) (ICE PAK for reusable ice substitute the equivalent of the generic "ice pack"); *Sebastian International Inc. v. Hask Toiletries Inc.*, 12 USPQ2d 2008 (TTAB 1989) (asserted mark SHPRITZ, registered under Section 2(f) and therefore acknowledged not to be distinctive, is phonetic equivalent of generic term SPRITZ); *In re Newport Fastener Company Inc.*, 5 USPQ2d 1064 (TTAB 1987) (TYLE TYE phonetic equivalent of "tile tie" and descriptive; registration permitted on supplemental register); *In re Hubbard Milling Co.*, 6 USPQ2d 1239 (TTAB 1987) (MINERAL-LYX a misspelling or phonetic equivalent of the term "mineral licks" and descriptive); and *In re Engineering Systems Corporation*, 2 USPQ2d 1075 (TTAB 1986) (DESIGN GRAPHIX a mere misspelling of "design graphics," a highly descriptive term). Compare with *In re Tea and Sympathy Inc.*, 88 USPQ2d 1062 (TTAB 2008) (THE FARMACY not merely descriptive because a play on "farm-fresh" characteristics of products); and *In re Grand Metropolitan Foodservice Inc.*, 30 USPQ2d 1974 (TTAB 1994) ("MuffFuns" not

descriptive; and third parties protected by disclaimer of "muffins").

There is nothing distinctive that results from applicant's substitution of a second letter "c" for the letter "h" in "mocha." The refusal of registration under Section 2(e)(1) is affirmed and we therefore turn to the refusal under Section 2(d).

Likelihood of Confusion

Our determination of the refusal under Section 2(d) must be 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). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). "The likelihood of confusion analysis considers all *DuPont* factors for which there is evidence of record but 'may focus ... on dispositive factors.'" *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) (citations omitted). In many cases, two dispositive considerations are the similarities of the marks and the similarities of the goods and services. See, e.g., *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"). Accordingly, we review the evidence of record and the arguments concerning the import of such evidence in light of such considerations.

As already noted, applicant's goods are coffee beans. The cited registered mark is registered for "coffee and coffee derivatives." While applicant has limited its identification to coffee beans (and perhaps to whole beans), the registration has no limiting language and the word "coffee" must be construed to include at least both ground coffee and coffee beans, and perhaps even brewed coffee. Accordingly, the involved goods are, in part, legally identical. Even if they were not, they are highly related, as shown by the evidence made of record by the examining attorney.

The examining attorney's evidence establishing the related nature of the goods includes numerous third party registrations, each covering a mark registered based on use in commerce, and each of which lists various coffee or coffee-derived products. For example, Registration no. 3264833 for the mark LASATERS COFFEE & TEA and design, includes the following identification: "Beverages made of coffee; caffeine-free coffee; coffee; coffee beans; coffee-

based beverage containing milk; ground coffee beans; prepared coffee and coffee-based beverages; roasted coffee beans." Many of the other registrations cover both coffee and coffee beans. These registrations are probative of the related nature of the goods involved in the instant case. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* in unpublished opinion 88-1444 (Fed. Cir. 11/14/1988). See also, *In re Infinity Broadcasting Corporation*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001). Also of record is a web page from the Internet showing a retailer that markets both whole bean and ground coffee.

In its initial appeal brief, applicant contends that "the caveat 'not including ground coffee-derived coffee,' ... raised an issue of product differentiation that should have been, but was not considered by the trademark attorney as obviating the likelihood of confusion." Applicant has not, however, explained what that product differentiation is and, as already noted, we do not find the exclusionary language particularly clear. Regardless of the intended effect of applicant's "caveat," we find the goods at least closely related.

With respect to the channels of trade and classes of consumers, applicant contends that "it has not been established that the respective goods are marketed in a way

... that would create the incorrect assumption that they originate from the same source." The law is clear, however, that when neither of the involved identifications contains limitations as to the classes of consumers or channels of trade for the identified goods, then the goods must be presumed to travel in all normal channels of trade to all customary consumers for such goods. 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.

Clearly, coffee and coffee beans, which may in fact be the same product, would be likely to be marketed to the same class of consumers and we must presume that they would be marketed in the same channels of trade. There is nothing in the identifications which would allow us to reach a contrary conclusion.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont*

De Nemours & Co., supra. The marks are similar in terms of sight, sound, meaning and commercial impression to the extent that they both include a phonetic equivalent of the word "Mocha" (*i.e.*, MOCCA or MOCA). However, the marks are different because the registered mark includes the drawing of a stylized man. Thus, the issue before us is whether the absence of the drawing in applicant's mark is sufficient to distinguish it from opposer's mark. For the reasons stated below, we find that the differences in the marks outweigh the similarities.

This issue is similar to the issue we face when a house mark is added to otherwise similar product marks. There is no *per se* rule that if two product marks (*e.g.*, MOCA and MOCCA) are confusingly similar, the addition of a house mark (*e.g.*, the drawing of the stylized man) would not be sufficient to differentiate the marks. *New England Fish Co. v. Herwin Co.*, 511 F.2d 562, 184 USPQ 817, 819 (CCPA 1975). In such cases, we must consider the entire marks, including the presence of the house mark in light of the evidence of record.

The Board has previously described the different effects the addition (or subtraction) of a house mark can have in the likelihood of confusion analysis:

[S]uch addition may actually be an aggravation of the likelihood of confusion as opposed to an aid in distinguishing the marks so as to avoid source confusion. On the other hand, where there are some recognizable differences in the asserted conflicting product marks or the product marks in question are highly suggestive or merely descriptive or play upon commonly used or registered terms, the addition of housemark and/or other material to the assertedly conflicting product mark has been determined sufficient to render the marks as a whole sufficiently distinguishable.

In re Christian Dior, S.A., 225 USPQ 533, 534 (TTAB 1985) (citations omitted) (applicant's LE CACHET DE DIOR confusingly similar to CACHET because applicant failed to prove that the word "cachet" was highly suggestive, descriptive or commonly used or registered). See also *Nike Inc. v. WNBA Enterprises LLC*, 85 USPQ2d 1187, 1201-1202 (TTAB 2007) (S and a star design for athletic bags and clothing is likely to cause confusion with S STARTER and star design for identical products). Compare with *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313 (TTAB 2005); and *In re S. D. Fabrics, Inc.*, 223 USPQ 54, 55 (TTAB 1984) ("designers/fabric" and design for retail store services in the field of fabrics, wall hangings, buttons and accessories is not likely to cause confusion with DAN RIVER DESIGNER FABRICS and design for textile fabrics).

In *Knight*, the Board found that the word "essentials" was highly suggestive when used in connection with clothing. As evidence of the highly suggestive nature of the word "essentials," the Board relied on a dictionary definition of "essentials" as connoting that "the clothing items sold under the marks are basic and indispensable components of, or 'essentials' of, one's wardrobe," as well as 23 third-party registrations, owned by 21 different entities, that include the word "essentials" as part of the mark. *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d at 1316.

In this case, we have already determined that the words at issue, MOCCA and MOCA, are highly descriptive, if not generic, when used in connection with coffee, coffee derivatives and coffee beans. Based on this evidence, we find that purchasers will be able to distinguish the marks because the common elements are so highly descriptive that consumers will perceive the terms MOCCA and MOCA as ordinary descriptive speech, not as trademarks. Hence our finding that MOCCA is descriptive or generic, coupled with registrant's disclaimer of the exclusive right to use "Moca" is significant in this case. That a descriptive or generic term is given little weight in the likelihood of confusion analysis reflects marketplace reality because

consumers give little source indicating significance to descriptive terms. There is no reason to believe, and there is no evidence on the point, that consumers are likely to perceive the word MOCA in the registered mark as anything other than a type, not a brand, of coffee. To hold otherwise gives registrant the exclusive right to use the word "Moca" when it is a privilege that it holds in common with all others, including applicant.

In view of the foregoing, we find that the marks are not similar in terms of their appearance, sound, meaning and commercial impression.

Having considered the evidence of record as it pertains to the relevant likelihood of confusion factors, we find that confusion is unlikely to result from the contemporaneous use of opposer's MOCA and design mark and applicant's MOCCA mark, even though the marks are used on closely related products that move in the same channels of trade and are sold to the same classes of consumers. We find that dissimilarity of the marks, simply outweighs the evidence as to the other factors. *See Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1889), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

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

The refusal under Section 2(e)(1) of the Trademark Act is affirmed and therefore registration to applicant is refused.

Rogers, Administrative Trademark Judge, dissenting in part:

I concur in the majority's determination that applicant's proposed mark is merely descriptive and therefore not registrable on the Principal Register. In contrast, I disagree with the majority's conclusion that the Section 2(d) refusal should be reversed.

"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, 1700 (Fed. Cir. 1992). In this case, the goods are "virtually identical," at least insofar as applicant has not established that there is any discernible difference between registrant's coffee and applicant's coffee beans.⁸ Under such circumstances, the similarity between MOCCA and MOCA is significant.

The cited registration includes a disclaimer of MOCA, and includes a statement that none of the lining or

⁸ "Coffee" is a general term that can be used in conversation to refer to brewed coffee, ground coffee, whole coffee beans, and perhaps other variations on the term.

stippling in the mark is intended to indicate use of color in the mark.⁹ Notwithstanding the disclaimer of the MOCA element in the registered mark, it is still a significant element of the mark. *See In re RSI Systems LLC*, 88 USPQ2d 1445 (TTAB 2008). In *RSI Systems*, applicant sought registration of the mark set forth below, but included a voluntary disclaimer of RSI.



In finding a likelihood of confusion between applicant's mark and the previously registered mark RSI, for goods related to those of the applicant, the Board noted:

"the filing of a disclaimer with the Patent and Trademark Office does not remove the disclaimed matter from the purview of determination of likelihood of confusion." *Shell Oil*, 26 USPQ2d at 1689. *See also In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("The technicality of a disclaimer in National's application to register its mark has no legal effect on the issue of likelihood of confusion"). Applicant has not shown that the term RSI would not be the dominant term in the mark. ... Finally, the addition of the sphere in applicant's mark does not significantly change the pronunciation, meaning, or commercial impression of the mark.

⁹ A web page (www.moca.roma.it) made of record by the examining attorney shows the mark in color, and the face is presented in flesh-tone, the lips and hat in bright colors. However, since the registration does not include a claim as to any particular colors, these can be changed at any time.

RSI Systems, 88 USPQ2d at 1448.

Similarly, in the case at hand, the addition of the stylized face in the registered mark does not change the pronunciation, meaning or commercial impression of that mark. See, too, *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581 (TTAB 2007), wherein the Board affirmed a Section 2(d) refusal and discounted applicant's contention that a star design was a more dominant element than the words in its mark, one of which was disclaimed. As the Board noted, "consumers are more likely to refer to applicant's services as 1st USA rather than as the real estate brokerage with the star design." *Id.* at 1587. Likewise, consumers are more likely to refer to registrant's goods as MOCA than as the coffee with the smiling face design. While the majority concludes that consumers are likely to perceive the MOCA element in registrant's mark as indicating a type, rather than a brand, of coffee, evidence of record suggests the contrary. A reprint of an Internet web page featuring registrant's products was made of record by the examining attorney. The address for the page is www.moca.roma.it, i.e., it features the word MOCA. The registered mark appears on the page, but so does a repeating image of the stylized word MOCA in

an oval. And the page shows three packages of coffee, one of which bears the registered mark and the other two of which show only the stylized MOCA in an oval. This evidence shows that consumers are more likely to refer to registrant's products as the MOCA brand of coffee products.¹⁰

While I recognize that registrant has disclaimed MOCA, the term is not removed from the registered mark and must be considered in the comparison of the registered mark with applicant's mark. Further, as explained in the RSI Systems decision, the mere existence of the disclaimer does not mean that the term MOCA cannot be the dominant, or at least a significant, element in the composite mark.

As for the comparison of the terms MOCA and MOCCA, there is no sound basis for applicant's contentions that the additional letter in applicant's mark results in a term with a likely difference in pronunciation and creates a significant visual difference. Applicant contends the examining attorney's conclusion that the terms would be

¹⁰ By making this observation I do not suggest that the owner of the registered mark necessarily has rights in MOCA alone, but I do conclude that consumers are not likely to perceive of the term MOCA on registrant's products as indicating only a type of coffee. In fact, each of the three packages of coffee shown as MOCA coffee on the web page are differentiated by the terms Roburbar, Barcrema and Bar Classic, which appear to designate different types of MOCA brand coffee.

pronounced the same is speculative. It is true that there is no way to predict how consumers will articulate a term, but applicant's contention that they will be pronounced differently is no less speculative than the contrary conclusion of the examining attorney. While applicant has put into the record a dictionary "pronunciation key" that shows how the letter "a" can have different pronunciations, this does not demonstrate why a double "c" would be pronounced differently than a single "c." "To cut to the quick, even when 'properly' pronounced, the two marks are, at a minimum, similar in sound." See *E.I. du Pont de Nemours and Co. v. Sunlyra International Inc.*, 35 USPQ2d 1787, 1789 (TTAB 1995). And the visual difference attributable to the additional letter "c" is likely to be overlooked by many consumers. *Id.* ("...the two marks are as similar as possible without being identical.").

As for the connotations of MOCA and MOCCA, applicant contends in its reply brief that the absence of MOCA from the dictionary "belies the Trademark Attorney's contention that the marks in issue have the same connotation." I disagree, and conclude that both terms would likely be viewed by consumers as misspellings of the term "mocha."

Here, the Board is presented with substantially similar marks used for legally identical or at least closely related

goods. As was the case in *RSI Systems*, the marks in this case have the same pronunciation, meaning and commercial impression. Under these circumstances, the mere weakness of applicant's mark and of the disclaimed portion of the registered mark does not dictate that the registered mark is entitled to so limited a scope of protection that a virtually identical mark for legally identical or closely related goods can be registered. "[E]ven weak marks are entitled to protection against registration of similar marks" for identical goods. *In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982). See also *In re The Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978) (ERASE for a laundry soil and stain remover held confusingly similar to STAIN ERASER, registered on the Supplemental Register, for a stain remover).

Finally, if there were any doubt on the question of likelihood of confusion, the law favors registrant. *In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes*, 487 F.2d 918, 179 USPQ 729, 729-30 (CCPA 1973) ("If there be doubt on the issue of likelihood of confusion, the familiar rule in trademark cases, which this court has consistently applied since its creation in 1929, is that it must be resolved against the newcomer or in favor of the prior user or registrant. The rule is usually applied in inter partes cases but it applies equally to ex

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parte rejections"). See also, *In re Hyper Shoppes*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988) citing *In re Pneumatiques*, and *In re Digital Research Inc.*, 4 USPQ2d 1242 (TTAB 1987), citing *In re Pneumatiques* (Board affirmed refusal to register applicant's marks because they were descriptive and because of likelihood of confusion with registered mark, noting it was a close case but doubt was to be resolved in favor of registrant).

Accordingly, I would affirm the refusal of registration under Section 2(d).