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*Decision Mailed:
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GDH/gdh*

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Full Service Deli Distributors, Inc.

Serial No. 77084059

Kit M. Stetina of Stetina Brunda Garred & Brucker for Full Service Deli Distributors, Inc.

Stephen Aquila, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Hohein, Drost and Walsh, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Full Service Deli Distributors, Inc. has filed an application to register on the Principal Register in standard character form the mark "SMOKEYS HOUSE OF BARBEQUE" for "wearing apparel, namely, shirts, T-shirts, shorts and aprons" in International Class 27; "food preparations, namely, salad dressing, barbeque sauce, marinade, ketchup and hot sauce" in International Class 30; and "restaurant services" in International Class 43.¹

¹ Ser. No. 77084059, filed on January 16, 2007, which is based on an allegation of a bona fide intention to use such mark in commerce. The word "BARBEQUE" is disclaimed with respect to the goods in International Class 30 and the services in International Class 43.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods and services, so resembles the mark "SMOKEY'S ORIGINAL RIB PIT BAR-B-QUE" and design, as reproduced below,



which is registered on the Principal Register for "restaurant services; catering services; [and] take-out restaurant services" in International Class 43,² as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

² Reg. No. 3,214,980, issued on March 6, 2007, which sets forth a date of first use anywhere of November 14, 2003 and a date of first use in commerce of December 9, 2003. The words "ORIGINAL RIB PIT BAR-B-QUE" are disclaimed; the colors yellow, brown and orange are claimed as features of the mark; and the mark is described as follows: "The mark consists of three brown logs with yellow and orange flames coming from them; the top log being in a horizontal position with the wording Smokey's written above it in yellow letters with a brown outline, and the wording Original Rib Pit written across the log in yellow letters; and the bottom two logs in a criss-crossed position with the wording Bar-B-Que written across them in yellow letters with a brown outline."

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). See also In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods and/or services at issue and the similarity or dissimilarity of the respective marks in their entirety.³ See also In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

Turning first to consideration of the similarity or dissimilarity in the goods and services at issue, applicant in its brief states that confusion is not likely because "the goods and services related to the respective marks are ... different." Such statement, however, essentially ignores the fact that registrant's restaurant services, catering services and take-out restaurant services are on their face legally identical in part and plainly are otherwise commercially related to applicant's restaurant services. Nonetheless, applicant asserts that "the goods and services offered in connection with the respective marks ... mitigates a likelihood of confusion," contending in

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks." 192 USPQ at 29.

particular that the collateral goods associated with its restaurant services, namely, wearing apparel (i.e., shirts, T-shirts, shorts and aprons) and food preparations (i.e., salad dressing, barbeque sauce, marinade, ketchup and hot sauce) constitute "different markets" and that "there has been no indication that the ... [registrant] is going to expand into [those] different markets." Applicant therefore insists that "[a]bsent evidence of such a plan or intention, it is less likely that the ... [registrant] will expand into the markets currently associated with the ... [applicant's mark], which tends to mitigate a likelihood of confusion."

However, as pointed out in his brief, the Examining Attorney notes that not only do applicant and registrant "provide identical 'restaurant services,'" but the record demonstrates that applicant's "goods are closely related to restaurant services." Specifically, as the Examining Attorney correctly observes, it is well settled that the goods and services at issue need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient instead that the respective goods and services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 156, 223 USPQ 1289, 1290

(Fed. Cir. 1984); Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Here, contrary to applicant's assertion that wearing apparel and food preparations constitute different markets which are not related to restaurant services, there is evidence in the record which, the Examining Attorney maintains, "demonstrates that it is extremely common for barbeque restaurants to sell t-shirts and sauces to promote or cash in on their brand." We concur that the evidence of record is sufficient to show that applicant's goods are commercially related to registrant's restaurant services, such that, like the respective services at issue, their marketing under similar marks would be likely to cause confusion as to origin or affiliation.

Specifically, the Examining Attorney maintains that the evidence of record establishes that "[b]arbeque restaurants ... frequently market clothing items such as 't-shirts' and ... [food preparations such as] 'barbeque sauce.'" Such contention finds support in the website excerpts made of record by the Examining Attorney, which show that the service marks used in connection with certain barbeque restaurants, including some establishments which like registrant provide catering services, are also used as marks for various collateral products such as t-shirts and/or barbeque sauce. Examples thereof include: (i) "Oklahoma Joe's" barbeque restaurant, which offers t-shirts bearing such mark; (ii) "MO'S" barbeque restaurant, which in addition to offering catering services under such mark, sells "MO'S" t-shirts and a

variety of "MO'S" barbeque sauces; (iii) "Piggy Pat's" barbeque restaurant, which besides including catering services also sells its own brand of t-shirts, sweatshirts, polo shirts and barbeque sauces; (iv) "PIG -N- WHISTLE" barbeque restaurant, which likewise offers catering services and its own brand of t-shirts and barbeque sauce; (v) "DINOSAUR BAR B QUE" restaurant, which offers catering services as well as t-shirts and ladies' tank tops; (vi) "Dirty Ernies Rib Pit" barbeque restaurant, which sells its own brand of t-shirts; (vii) "BACK FORTY Texas BBQ" restaurant, which offers catering services and a variety of barbeque sauces; (viii) "Bennett's Pit Bar-B-Que" restaurant, which sells t-shirts bearing such mark and "Bennett's Famous Bar-B-Que Sauce"; (ix) "Famous Dave's" barbeque restaurant, which offers its own brand of barbeque sauce; (x) "SCOTTY'S BEACHSIDE BBQ" restaurant, which sells "Scotty's" hats, polo shirts and barbeque sauce; and (xi) "Rendezvous" barbeque restaurant, which offers t-shirts and barbeque sauce. Moreover, lest there could be any doubt, the record also contains an excerpt from registrant's website showing that, as indicated by the cited mark, registrant operates a barbeque restaurant which includes catering services.

Thus, not only are registrant's restaurant services, catering services and take-out restaurant services legally identical in part to applicant's restaurant services and are otherwise commercially related thereto, but in view of the above, it is plain that consumers would also consider applicant's items of wearing apparel and various food preparations to be related to

or collateral products of registrant's restaurant and catering services if such goods and services were to be marketed under similar marks. See, e.g., In re Phillips-Van Heusen Corp., 228 USPQ 949, 951 (TTAB 1986) ["[c]onsidering that items of clothing (especially shirts, which are included within applicant's identification) appear to represent a particularly natural area for the "collateral product" use of commercial trademarks, as demonstrated by the record herein," likelihood of confusion was found between use of the mark "21 CLUB" for men's, boys', girls', and women's shirts and the mark "THE '21' CLUB" for restaurant services].

Turning, therefore, to the respective marks, applicant extensively argues in its brief that there is no likelihood of confusion because of numerous differences between the marks in sound, appearance, connotation and commercial impression. Among other things, applicant notes that not only does the registrant's mark contain "a design portion" which is not present in applicant's mark, but the manner of display of the design portion is such that "the log having the words 'RIB PIT' in [a] large, bold font is the dominant portion of the [registrant's] mark" since "upon viewing the mark, that portion is likely to make the greatest impression on the buyer." Specifically, applicant insists that:

Relative to the other words comprising the mark, the words "RIB PIT" are boldly displayed in the largest font in the center of the mark. As such, a consumer who views the mark is immediately drawn to the words. "RIB PIT." Furthermore, the words "RIB PIT" are displayed across the central log disposed horizontally across the mark. The log

provides a dark background against which the light lettering of "RIB PIT" is prominently displayed. In this manner, the sharp contrast of the bright lettering across the dark log creates an indelible image in the mind of a potential consumer. As such, this portion of the mark makes the greatest impression on the buyer. The remaining logs and wording are located on the periphery of the central log, which tends to decrease the importance of such wording. Furthermore, the peripheral wording is positioned over a light background. As such, the peripheral wording tends to be washed out by the light background.

In contrast to registrant's mark, applicant stresses that its mark "does not include the words 'RIB PIT' centrally displayed against a dark log extending horizontally across the mark"; that its mark, "[i]n fact, ... does not include the words 'RIB PIT' at all"; and that therefore applicant's mark "does not include the dominant portion of the ... [registrant's mark]; namely, a centrally displayed log with the words 'RIB PIT' prominently displayed across the log." Consequently, since the assertedly dominant portion of the registrant's mark is not included in applicant's mark, applicant contends that "confusion between the marks is less likely."

In addition, applicant argues that "the difference in wording between registrant's "SMOKEY'S ORIGINAL RIB PIT BAR-B-QUE" and design mark and applicant's "SMOKEYS HOUSE OF BARBEQUE" mark "further distinguishes the appearances of the two marks, as well as creates a phonetic distinction," all of which "weighs against a finding of likelihood of confusion." Among other things, applicant points out such detailed differences as the fact that none of the words in registrant's mark are exactly

duplicated in applicant's mark. Specifically, applicant observes that the words "ORIGINAL," "RIB" and "PIT" in registrant's mark do not appear in its mark, just as the words "HOUSE" and "OF" in its mark do not appear in registrant's mark. In addition, although conceding that "the words may be phonetically similar," applicant points out that the words "SMOKEY'S" and "BAR-B-QUE" in registrant's mark "are visually different" from the words "SMOKEYS" and "BARBEQUE" in its mark, given that the former "includes an apostrophe between the 'y' and the 's,' whereas ... [the latter] does not include an apostrophe" and the former "includes two hyphens, one on either side of the 'b' in the middle of the mark," while the latter "does not include any hyphens." Further, applicant notes, its mark "includes an 'e' between the 'b' and the 'q,' whereas the ... [registrant's mark] does not." According to applicant, "[a]ny one of these differences may be used by the purchasing public to distinguish" the marks at issue visually. Phonetically, applicant adds that its mark "is comprised of four words having a total of seven syllables" while registrant's mark "is comprised of five words having a total of eleven syllables." Thus, when such marks are pronounced, applicant maintains that "[t]he difference in sound weighs against a likelihood of confusion."

We agree with the Examining Attorney, however, that when considered in their entirety, the respective marks are sufficiently similar in sound, appearance, connotation and commercial impression as to be likely to cause confusion when used in connection with legally identical restaurant services and

related collateral products. While applicant is correct that differences are apparent from its meticulous side-by-side comparison of the respective marks, such a comparison is not the proper test to be used in determining the issue of likelihood of confusion inasmuch as it is not the ordinary way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is accordingly on the recollection of the average purchaser, who normally retains a general rather than a specific impression of marks. See, e.g., *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); *In re United Service Distributors, Inc.*, 229 USPQ 237, 239 (TTAB 1986); *In re Solar Energy Corp.*, 217 USPQ 743, 745 (TTAB 1983); *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Moreover, while the marks at issue must be considered, as noted above, in their entirety, including consideration of any descriptive and/or generic matter therein, our principal reviewing court has indicated that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, "there is nothing improper in stating that, for rational 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 USPQ 749, 751 (Fed. Cir. 1985). For instance, according to the court, "[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark" Id. Additionally, as a general rule, the Examining Attorney correctly states in his brief that "consumers are more inclined to focus on the first word, prefix or syllable in any trademark or service mark," citing Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005); and Presto Products Inc. V. Nice-Pak Products Inc., 9 USPQ2d 1895, 1897 (TTAB 1988). Furthermore, the Examining Attorney properly points out that "[w]hen a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services" and, therefore, "the word portion is normally accorded greater weight in determining likelihood of confusing." See, e.g., In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987); and In re Drug Research Reports, Inc., 200 USPQ 554, 556 (TTAB 1978).

With the above principles in mind, we concur with the Examining Attorney that, when the marks at issue are considered in their entirety, the terms "SMOKEYS" and its equivalent "SMOKEY'S" respectively constitute the dominant portions of applicant's and registrant's marks. As the Examining Attorney points out in his brief, "[t]he presence or absence of the

apostrophe" in such words "has no impact on the overall commercial impression of the words or the similarity of the marks." Moreover, as he accurately observes, "[t]he literal portion of applicant's and registrant's marks consists of the word 'Smokey(')s' followed by a phrase describing the establishment and closing with the word 'Barbeque' (or a phonetic equivalent thereof)." Further, the Examining Attorney persuasively notes that not only are the terms "SMOKEYS" and "SMOKEY'S" "highly similar" in appearance and identical in sound and connotation, but each respectively constitutes the first word of applicant's and registrant's marks and is followed by wording, namely "HOUSE OF BARBEQUE" and "ORIGINAL RIB PIT BAR-B-QUE," which at a minimum is highly suggestive, if not descriptive, of the associated restaurant services and an establishment which serves as the source for such collateral products as items of wearing apparel and food preparations.⁴ Thus, as the Examining Attorney properly points out:

The similarity extends beyond the first word Both marks ... go on to describe the [barbeque] establishment in their center portion. Registrant's "Original Rib Pit" center portion is descriptive of the restaurant and disclaimed. The central portion of applicant's mark, the wording

⁴ For instance, we judicially notice in this regard that, in relevant part, The American Heritage Dictionary of the English Language (4th ed. 2000) defines "house" as a noun signifying "a facility, such as a theater or restaurant, that provides entertainment or food for the public." It is well settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953); *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); and *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852, 860 n.7 (TTAB 1981).

"house of," is highly suggestive of an enclosed indoor area (e.g., a restaurant), and is often used in reference to restaurants. "House of" conveys to consumers the impression of a space typical of eating establishments and contributes less significance to the commercial impression of applicant's mark than the first word, ... ["Smokeys"].

Continuing, the Examining Attorney correctly notes that "[t]he closing portions of each mark are also highly similar" in that the word "BARBEQUE" in applicant's mark and the word "BAR-B-QUE" in registrant's mark "are identical in sound, similar in appearance, and indistinguishable in meaning," such that "consumers would have difficulty distinguishing the two marks." Finally, while registrant's mark, unlike applicant's mark, contains a background design, the Examining Attorney properly observes that, as noted previously, it is the literal or word portion of registrant's mark which "is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services" and thus, inasmuch as there appears to be nothing particularly distinguishing about a flaming log design for pit-cooked barbequed foods, it is indeed the word portion of registrant's mark which is entitled to "greater weight in determining likelihood of confusion."

Accordingly, weighing all the relevant *du Pont* factors, we conclude that consumers who are familiar or otherwise acquainted with registrant's "SMOKEY'S ORIGINAL RIB PIT BAR-B-QUE" and design mark for "restaurant services; catering services; [and] take-out restaurant services" would be likely to believe, upon encountering applicant's substantially similar "SMOKEYS

HOUSE OF BARBEQUE" mark for such legally identical in part and otherwise commercially related services as "restaurant services" and such collateral products as both "wearing apparel, namely, shirts, T-shirts, shorts and aprons" and "food preparations, namely, salad dressing, barbeque sauce, marinade, ketchup and hot sauce," that the respective goods and services emanate from, or are sponsored by or affiliated with, the same source.

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