

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: October 13, 2011

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re G&F Manufacturing, Inc.

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Serial No. 77632210

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for G&K Manufacturing, Inc.

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(Michael Hamilton, Managing Attorney).

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Before Grendel, Cataldo and Ritchie,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

G&F Manufacturing, Inc. has filed an application on  
the Principal Register to register the mark shown below for  
"swimming pool heat pumps" in International Class 11.<sup>1</sup>

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<sup>1</sup> Application Serial No. 77632210 was filed on December 12, 2008, based upon applicant's assertion of May 24, 2002 as a date of first use of the mark in commerce. "SWIMMING POOL HEAT PUMPS" is disclaimed apart from the mark as shown. Color is not claimed as a feature of the mark. The mark consists of the word "GULF" placed over a wave symbol, with the word "STREAM" to the right of the wave symbol. The words "GULF" and "STREAM" use stylized lettering, and the words "SWIMMING POOL HEAT PUMPS" are



Registration has been finally refused pursuant to Trademark Act §2(d), 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark GULFSTREAM, registered on the Principal Register in typed or standard characters<sup>2</sup> for "whirlpool baths and related accessories, namely pumps, jets, heaters, trim and tub skirts" in International Class 11<sup>3</sup> as to be likely, if used on or in connection with the identified goods, to cause confusion, to cause mistake, or to deceive. Applicant and the examining attorney have filed main briefs on the issue under appeal. In addition, applicant filed a reply brief.

#### **Likelihood of Confusion**

Our determination under Trademark Act §2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood

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juxtapositioned to the upper right of the words "GULF" and "STREAM".

<sup>2</sup> Trademark Rule 2.52(a) was amended in 2003 to refer to "typed drawings" as "standard character" drawings. See Trademark Rule 2.52(a); 37 C.F.R. 2.52(a).

<sup>3</sup> Registration No. 1939229 issued on December 5, 1995. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

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 *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 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); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999), and cases cited therein.

We review the relevant *du Pont* factors as they apply to this case.

#### The Marks

We turn to the similarities or dissimilarities between applicant’s mark and the mark in the cited registration. In coming to our determination, we must compare the marks in their entireties as to appearance, sound, connotation

and commercial impression. See *Palm Bay Imports*, 73 USPQ2d at 1691-2. In considering the involved marks, we have taken into account applicant's reliance upon the summary of results of its search of the Google Internet search engine for articles containing various permutations of the term GULFSTREAM and a printed screen shot from the third-party Internet web site GulfstreamPlastics.com. Applicant submitted such evidence in support of its contention that "many organizations in Florida, where the gulfstream approaches the land utilize 'gulfstream' in their names, including businesses and private clubs".<sup>4</sup> For the following reasons, we find applicant's evidence unpersuasive.

First, the results summaries are truncated to such an extent that they contain insufficient information upon which we may ascertain the nature of the use, if any, of the term GULFSTREAM therein. Truncated results from search engines are entitled to little weight. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1833 (Fed. Cir. 2007):

Bayer asserts that the list of GOOGLE search result summaries is of lesser probative value than evidence that provides the context within which a term is used. We agree. Search engine results—which provide little context to discern how a term is actually used on the webpage that can be accessed through the search result link—

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<sup>4</sup> September 14, 2009 response to Office action, page 3.

may be insufficient to determine the nature of the use of a term or the relevance of the search results to registration considerations.

Similarly, in this case the proffered Google search summaries do not provide sufficient context for us to discern the extent to which the use of GULFSTREAM is trademark use or otherwise is relevant to our determination of the strength of the cited GULFSTREAM mark.

Second, even with the limited context provided in the search summaries, it is clear that most trademark uses of GULFSTREAM are in connection with goods or services unrelated to the goods at issue herein, while the remainder are not trademark use, but merely use in context, (e.g. articles concerning the Atlantic Ocean current known as the Gulf Stream).

We accordingly find that, on the record in this case, the mark in the cited registration is entitled to more than a narrow scope of protection, particularly in the field of "whirlpool baths and related accessories, namely pumps, jets, heaters, trim and tub skirts." See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpub.*, (Appeal No. 92-1086, Federal Circuit, June 5, 1992). Cf. *In re Broadway Chicken, Inc.*, 38 USPQ2d 1559 (TTAB 1996).

Turning then to the mark in the involved application,



we observe that the mark consists of the distinctive term GULFSTREAM, the disclaimed wording SWIMMING POOL HEAT PUMPS, and the stylized design of a wave. There is no evidence of record that GULFSTREAM describes a function, feature or characteristic of the goods in the application. At worst, the term would appear to be somewhat suggestive of applicant's "swimming pool heat pumps." The disclaimed wording SWIMMING POOL HEAT PUMPS clearly is generic as applied to goods so identified, and thus appears to be devoid of source indicating ability. As for the wave design, it simply serves to connect and reinforce the terms comprising GULFSTREAM. As a result, it contributes relatively little to the overall impression of the mark than the wording. This further is the case inasmuch as when a mark comprises both a word and a design, the word is normally accorded greater weight because it would be used by purchasers to request the goods or services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

For these reasons, we consider the word GULFSTREAM to be the dominant feature of the applied-for mark. It is a well-established principle 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 the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

To state the obvious, this wording is identical to registrant's GULFSTREAM mark. In cases such as this, a likelihood of confusion has frequently been found. *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design is similar to the mark CONCEPT). *See also In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (E-CELL is similar to the mark E). Thus, the importance of applicant's incorporation of registrant's mark depends greatly on the degree of suggestiveness of that mark as well as elements of the marks that are not shared. As discussed above, there is not sufficient evidence to indicate that GULFSTREAM or any similar mark is used by anyone else or that the mark may somehow be

considered weak in connection with the recited goods in the subject application and cited registration. As further discussed above, the additional wording in applicant's mark is generic and the design contributes relatively little to the overall commercial impression thereof.

In light of the foregoing, we find that the similarities between applicant's mark and the mark in the cited registration in appearance, sound, connotation, and overall commercial impression outweigh the dissimilarities.

The Goods

Turning to our consideration of the recited goods, we must determine whether consumers are likely to mistakenly believe that they emanate from a common source. It is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, as a result of similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).



Registrant's recited goods are "whirlpool baths and related accessories, namely pumps, jets, heaters, trim and tub skirts." These goods appear to be related on their face to applicant's "swimming pool heat pumps" inasmuch both include pumps for aquatic use. Furthermore, registrant's broadly identified whirlpool bath pumps may include heat pumps for whirlpool baths. Thus, as identified, applicant's goods appear to be related to those of registrant.

In addition, the examining attorney has made of record use-based, third-party registrations which show that various entities have adopted a single mark for goods of the type that are identified in both applicant's application and the cited registration. The following examples are illustrative:

Registration No. 3706949 for "water pumps for spas, baths, whirlpools and swimming pools";

Registration No. 3135349 for, *inter alia*, " ... machinery, namely, gas water pumps and diesel water pumps for spas, baths, whirlpools, swimming pools and draining flood water";

Registration No. 3123348 for, *inter alia*, "pumps, parts and fittings therefore for use in swimming pools, spas, hot tubs, whirlpools, and other bodies of water; underwater swimming pool cleaning machines for cleaning the surface of a swimming pool"; and

Registration No. 3039318 for, *inter alia*, " ... pumps, namely, compressed air pumps, water pumps

for spas, baths, whirlpools, swimming pools, water filtering units.”

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1786. In this case, the evidence of record supports a finding that the same marks are used to identify goods, namely various types of pumps, used in connection with swimming pools and whirlpools.

Thus, based upon the recitations thereof and the evidence of record, we find that applicant’s goods are related to the goods in the cited registration and, in addition, may be encountered under the same mark.

Channels of Trade

Neither applicant’s goods nor those of registrant recites any restrictions as to the channels of trade in which they are distributed or the classes of purchasers to whom they are marketed. It is settled that in making our determination regarding the channels of trade, we must look to the goods as identified in the involved application and cited registration. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787

(Fed. Cir. 1990); and *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). In this case, there are no restrictions recited either in the involved application or cited registration as to channels of trade. Thus, both applicant's and registrant's goods are presumed to move in all normal channels of trade therefor and be available to all normal classes of potential consumers. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). As a result, we find unpersuasive applicant's arguments and evidence directed toward the purported channels of trade for its goods and those of registrant.

Conditions of Sale

Applicant contends that its goods are expensive and would not be purchased casually, but only by consumers exercising care. Even assuming arguendo that purchases of such goods would involve a careful, deliberate decision, this does not mean that the purchasers are immune from confusion as to the origin of the respective goods, especially when, as we view the present case, the similar nature of the marks and the relatedness of the goods outweigh any sophisticated purchasing decision. See *HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir.

1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). See also *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible.").

Actual Confusion

The last *du Pont* factor discussed by applicant and the examining attorney is that of the lack of instances of actual confusion. Applicant asserts that its mark has coexisted with the mark in the cited registration for eight years, and that applicant is not aware of any instances of confusion between them.

We do not accord significant weight to applicant's contention that there have been no instances of actual confusion despite use of the respective marks for eight years. The Federal Circuit has addressed the question of the weight to be given to an assertion of no actual confusion by an applicant in an *ex parte* proceeding:

With regard to the seventh DuPont factor, we agree with the Board that Majestic's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. See *In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's

corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). A showing of actual confusion would of course be highly probative, if not conclusive, of a high likelihood of confusion. The opposite is not true, however. The lack of evidence of actual confusion carries little weight, [citation omitted], especially in an ex parte context.

*In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003).

Accordingly, while examples of actual confusion may point toward a finding of a likelihood of confusion, an absence of such evidence is not as compelling in support of a finding of no likelihood of confusion. Thus, we cannot conclude from the lack of instances of actual confusion that confusion is not likely to occur.

Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See *In re Majestic Distilling Co.* 65 USPQ2d 1205. See also *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

Finally, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's*

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*Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289  
(Fed. Cir. 1984).

**Decision:** Based upon the foregoing, and in particular, considering the similarity between applicant's mark and the mark in the cited registration, as well as the relationship between the goods recited therein, the refusal to register under Trademark Act § 2(d) is affirmed.