

THIS OPINION
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Sherwood Development Group LLC

Serial No. 77784128

Mark S. Bicks of Roylance, Abrams, Berdo & Goodman LLP for
Sherwood Development Group LLC.

Ada P. Han, Trademark Examining Attorney, Law Office 106
(Mary I. Sparrow, Managing Attorney).

Before Bucher, Wellington, and Kuczma,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Sherwood Development Group LLC, applicant, filed an
application to register the mark NOURISH KIDS (in standard
character form) on the Principal Register for goods
ultimately identified as:

Frozen, prepared or packaged meals consisting
primarily of meat, fish, poultry, vegetables,
processed fruit, and cheese and cracker combinations;
food package combinations consisting primarily of
dairy-based snack foods excluding ice cream, ice milk
and frozen yogurt; yogurt drinks in International
Class 29; and

Frozen, prepared or packaged meals consisting primarily of pasta or rice; food package combinations consisting primarily of bread, crackers and/or cookies; snack mix consisting primarily of crackers, pretzels, candied nuts and/or popped popcorn in International Class 30.¹

The examining attorney has refused registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark is likely to be confused with the previously registered mark NOURISH (in typed characters) that is the subject of two registrations (owned by the same entity) for the following goods:

Breakfast, lunch and dinner entrees, and snacks containing meat, fish and poultry, eggs, milk and milk products, namely, cream cheese spread, cheese spread, cottage cheese, sour cream used in conjunction with a weight management program, dried and cooked fruits and vegetables, jellies, sauces, namely, applesauce, snack dips and soups; protein based nutrient-dense snack bars in International Class 29;² and

Milkshakes and puddings used in conjunction with a weight management program, breakfast, lunch, dinner entrees, snacks and desserts, namely, cereals, cereal bars, namely, ready to eat, cereal derived food bars, muffins, breads, dessert bars, namely, brownies, coffee flavored dessert bars, chocolate crunch bars, peanut butter, caramel and mint chewy chocolate bars, fruit bars, nut bars, rice, sauces, namely, salsas and tomato sauces, gravies, salad dressings, frozen bars and ices, namely fudge bars, creamsicles and ice pops, food beverages with a coffee, tea or cocoa base, namely, coffee based beverages containing milk, cocoa

¹ Application Serial No. 77784128 is an intent-to-use application filed under Section 1(b) of the Trademark Act.

² Registration No. 3261204 issued July 10, 2007.

based beverages containing milk, iced teas in International Class 30.³

Registration has also been finally refused pursuant to Section 6(a) of the Trademark Act, 15 U.S.C. §1056(a), based on applicant's failure to comply with the requirement to disclaim the word KIDS because the term is merely descriptive of applicant's goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1).

Applicant appealed the final refusals. Briefs were filed, including a reply brief from applicant. For the following reasons, we affirm the refusals to register.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & 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). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods*,

³ Registration No. 3261209 issued July 10, 2007.

Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the *du Pont* factors regarding the goods, trade channels and classes of purchasers. In an *ex parte* appeal, likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration(s). *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.*, 190 USPQ 47, 48 (TTAB 1976).

Applicant's and registrant's goods in International Class 29 are legally identical, in part, because applicant's "frozen, prepared or packaged meals" are essentially the same as, and are encompassed by, registrant's "breakfast, lunch and dinner entrees." Both applicant's meals and registrant's entrees are identified as consisting primarily of "meat, fish and poultry." Registrant's identification of goods is not limited to the manner in which its entrees will be prepared and thus may be "frozen, prepared and packaged" in the same manner as applicant's meals. Likewise, applicant's "food package combinations consisting primarily of dairy-based snacks" is broad enough to include registrant's "milk products,

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namely, cream cheese spread, cheese spread, cottage cheese, sour cream used in conjunction with a weight management program." The primary ingredients of applicant's food package combinations are dairy-based snacks and may include many of the same dairy-based items listed in the registration.

As to International Class 30, applicant's "food package combinations consisting primarily of bread, crackers and/or cookies" are closely related, if not identical, to registrant's "cereal derived food bars, muffins, breads, dessert bars, namely, brownies, coffee flavored dessert bars, chocolate crunch bars, peanut butter, caramel and mint chewy chocolate bars, fruit bars, [and] nut bars." (The underlining is added for emphasis to underscore potentially identical goods). We further note that registrant prefaces certain goods in International Class 30 as "snacks and desserts" and the application lists a "snack mix consisting primarily of crackers, pretzels, candied nuts and/or popped popcorn."

We conclude that the application lists certain food products in International Class 29 that are identical to those identified in one of the two cited registrations. With respect to International Class 30, the applicant has some food products that are very closely related, if not

identical, to those identified in the other cited registration. Accordingly, this factor therefore weighs strongly in favor of finding a likelihood of confusion.

Because the goods in the application and the cited registrations are, in part, identical, we must presume that the channels of trade and classes of purchasers at least in part are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Even where the goods are not identical, they are very closely related food items and the common trade channels for these goods will be the same. For example, registrant's and applicant's goods, such as snack foods, desserts, cookies, etc., will be found in the same sections of the same grocery stores. Likewise, the classes of purchasers for these goods will also be the same, including the ordinary consumer exercising an ordinary amount of

care. To the extent that the registrant's goods may be directed to consumers interested in weight management or nutritionally balanced food items, we note that applicant's identification of goods does not contain any restrictions thereto and thus may also be geared to the same consumers with similar interests. Thus, the *du Pont* factors involving trade channels and classes of purchasers also favor a finding of likelihood of confusion.

This brings us to the similarity of the marks. We keep in mind that when marks would appear on identical goods, as they partially do here, the degree of similarity necessary to support a conclusion of likely confusion declines with respect to that class of goods (in this case, International Class 30). *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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). For example, merely descriptive matter may be accorded subordinate status relative to the more distinctive portions of a mark. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

Here, applicant has adopted the registered mark, NOURISH, and added the term KIDS. As a result, the essence of this appeal is a disagreement between applicant and the examining attorney regarding whether the addition of the term sufficiently distinguishes applicant's proposed mark, NOURISH KIDS, from the registered mark, NOURISH.

Applicant contends that the common element, NOURISH, is so suggestively weak in connection with food products that the addition of KIDS is sufficient for purposes of distinguishing the two marks. In support, applicant submitted copies of several third-party registrations and applications for marks that contain the term NOURISH and cover food-related goods or services. Applicant argues that in view of the weakness of NOURISH, it is the latter element KIDS that dominates its mark in terms of the commercial impression of the entire mark. Applicant argues that KIDS is not descriptive but only "suggestive" and, in

traversing the disclaimer requirement, argues that "mature thought and imagination and multi-step reasoning are necessary to make a connection between the meaning of NOURISH KIDS and the nature of applicant's goods." Brief, p. 13. In support of this latter point, applicant has submitted copies of third-party registrations and published applications for marks containing the term KIDS without a disclaimer thereof and covering food products. Ultimately, applicant urges the term KIDS should not be disclaimed and its mark as a whole is distinguishable from the registered mark.

The examining attorney responds in her brief that she "does not disagree that the term 'NOURISH' is weak and diluted on the trademark register for food related goods and services." Brief, p. 9. However, she takes issue with the significance of the third-party registrations and applications because they are not evidence of actual use in commerce. She also asserts that even weak marks are entitled to protection and applicant has "simply added the merely descriptive term 'KIDS' to the cited mark." Id. at p. 10. In support of this argument, and her disclaimer requirement, she submitted the dictionary definition of the term "kids," - "a young person; especially: CHILD - often used as a generalized reference to one especially younger

or less experienced..."⁴ In the context of applicant's goods and the mark as a whole, she argues that "kids" is "synonymous with 'children,' [and] merely describes features of applicant's food goods. Kids are the target consumer, the very individuals who will eat the products." Id. at p. 13. The examining attorney has also supplied copies of registrations containing a disclaimer of the term KIDS and covering food products.

In determining degree of similarity between the marks, we initially address the significance of the term KIDS. Based on the record, we agree with the examining attorney that KIDS is merely descriptive of applicant's identified goods because it informs the consumer that the food items are intended for consumption by children, e.g., in terms of portion-size, nutritional value, etc. The term is defined as being synonymous with "children" and the examining attorney has provided printouts from third-party websites indicating that the nutritional intake of "kids" is a matter of concern.⁵ Thus, consumers encountering applicant's food products will understand the term KIDS as

⁴ Merriam-Webster Online Dictionary. Printout attached to September 13, 2009 office action.

⁵ Attached to September 13, 2009 office action.

indicating that the food products are intended for children.

As to the dueling third-party registrations and applications where a disclaimer of KIDS was or was not required, these may be used as evidence, albeit not conclusive, of whether the term is descriptive. See, e.g., *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1797 n.1 (Fed. Cir. 1987). In this regard, the third-party registrations submitted by the examining attorney far outnumber those submitted by applicant. Moreover, with regard to many of the registrations submitted by applicant, the absence of a disclaimer of the term KID or KIDS may be readily explained based on USPTO examination policy to not require a disclaimer if an otherwise descriptive term is employed in a unitary fashion with other elements in the mark such that the mark as whole creates a commercial impression that is not descriptive and thus registrable. See Trademark Manual of Examining Procedure (TMEP) § 1213.05(a)-(g) ("Unitary Marks") (8th Ed. rev. October 2011). For example, in contrast to applicant's mark, the term KID is used in a unitary fashion in the following third-party registered

marks submitted by applicant: CAN DO KID (Reg. No. 3633112), CAP'N KID (Reg. No. 2942175), and the stylized mark at right (Reg. No. 2827226).



In view of the descriptive nature of the term KIDS, it must be disclaimed and, for purposes of determining the mark's overall commercial impression, it is less likely to be perceived as having source identifying significance. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1534. In other words, consumers viewing the mark NOURISH KIDS in connection with applicant's food products are likely to understand the term KIDS as merely describing a feature of applicant's food products, *i.e.*, they are intended for children's consumption; the same consumers will focus more attention on the initial, non-descriptive element, NOURISH. In addition, because the term NOURISH appears first, it is even more likely to be impressed upon the mind of a purchaser and will be remembered and used when calling for the goods. *See Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Indeed, consumers who are already familiar with registrant's use of the NOURISH on food products and encounter applicant's NOURISH KIDS mark on the same type of goods may mistakenly believe that the latter is simply an additional line of

registrant's goods designed or being touted for consumption by children.

As to applicant's argument that the registered mark NOURISH is "weak" and "diluted" and thus should be accorded a narrow scope of protection, we note that the two cited registrations are on the Principal register and must therefore be presumed valid and not descriptive. Trademark Act Section 7(b). In addition, the record is devoid of evidence showing any actual third-party use of marks containing the term NOURISH. Rather, as support for its contention that NOURISH is weak, applicant relies on four third-party registrations and on an application for marks containing the term NOURISH and covering food and/or beverages. The pending application has "no probative value other than as evidence that the application was filed" and has not been further considered. *Edwards Lifesciences Corp. v. Vigilanz Corp.*, 94 USPQ2d 1399, 1403 n.4 (TTAB 2010), citing, *In re Phillips Van Heusen Corp.*, 63 USPQ2d 1047, 1049 n.4 (TTAB 2002). We note that several of the registered marks employ the term NOURISH in a much longer phrase, e.g., NOURISH YOUR BODY AND MIND (Reg. No. 296588) and NOURISH ALL AREAS OF YOUR LIFE (Reg. No. 2784863). Nevertheless, in conjunction with the defined meaning of

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the term,⁶ we find that the term NOURISH has some suggestive connotation when used in connection with food products.

Although the registered mark NOURISH may be suggestive of food products, we disagree with applicant that the addition of the descriptive term KIDS suffices for purposes of distinguishing the marks, especially when considering that the two marks will be used on identical or closely related food products. Even allowing for some weakness of the registered mark, the marks remain confusingly similar. We have long held that even weak marks are entitled to protection against registration of similar marks for closely related goods and/or services. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Applicant, in its brief, repeatedly cites to two Board decisions in support of its argument that the marks NOURISH and NOURISH KIDS are not confusingly similar; however, the circumstances surrounding the marks in the cited decisions are significantly different from this proceeding. In *Rocket Trademarks Pty Ltd. v Phard S.p.A.*, 98 USPQ2d 1066 (TTAB 2011), the Board found the mark ZU ELEMENTS

⁶ Defined as "to provide with food or other substances necessary for life and growth." *The American Heritage Dictionary of the English Language* (4th Ed. 2000). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du*

(stylized) was not confusingly similar to ELEMENTS on identical clothing goods because the additional term, ZU, appeared first in the applicant's mark in a more prominent manner (it appeared in a larger font) and was arbitrary in connection with the goods. Likewise, in *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ 1313 (TTAB 2005), the Board found applicant's mark NORTON MCNAUGHTON ESSENTIALS not to be confusingly similar to opposer's mark ESSENTIALS, despite both marks being used on identical clothing goods. The Board based the decision on findings that the registered mark was highly suggestive of clothing and applicant's addition of its house mark was significant because it comprised a combination of arbitrary terms appearing first in the mark.

The facts before us in this matter are clearly distinguishable from those in *Rocket Trademarks* and *Knight Textile*. Here, applicant has merely added a descriptive term, as opposed to an arbitrary one, to a registered mark and seeks to register this proposed mark for identical and closely related goods. Moreover, in the two prior Board proceedings, the Board concluded that the registered marks, ELEMENTS and ESSENTIALS respectively, were highly

Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

suggestive terms in connection with relevant goods. Here, the record does not show that the term NOURISH is so highly suggestive.

When we consider the record and all relevant likelihood of confusion factors, we conclude that, when purchasers of registrant's and applicant's goods encounter the marks NOURISH and NOURISH KIDS, respectively, for the goods, they are likely to believe that the sources of these goods are in some way related or associated. As a result, there is a likelihood of confusion.

Disclaimer

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a). Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1) and, therefore, are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46 (CCPA 1975); *In re National Presto Industries, Inc.*, 197 USPQ 188 (TTAB 1977); and *In re Pendleton Tool Industries, Inc.*, 157 USPQ 114 (TTAB 1968).

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See *In re H.U.D.D.L.E.*, 216 USPQ 358 (TTAB 1982); *In re MBAssociates*, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Finally, "[a] mark can be descriptive if it describes the

intended users of the goods or services." *In re Planalytics, Inc.*, 70 USPQ2d 1453, 1454 (TTAB 2004).

With the above principles in mind and for reasons previously explained in this decision's likelihood of confusion discussion regarding the similarity of the marks, the term KIDS is merely descriptive as used in applicant's proposed mark and on the identified goods. Upon viewing the proposed mark on applicant's identified food products, consumers will immediately understand the term KIDS as describing a key feature of those goods, *i.e.*, that the food products are intended for consumption by children.

We disagree with applicant's argument that "the consumer would have to change or include the words NOURISH **FOR** KIDS or more accurately **NOURISHMENT FOR YOUR** KIDS or even **NOURISHMENT FOR YOU TO BUY FOR YOUR** KIDS or more appropriately, **NOURISHMENT FOR PARENTS OR GUARDIANS TO BUY AND PROVIDE TO** KIDS in order to immediately understand information concerning the Applicant's goods." Brief, pp. 13-14. (Boldness in original and used to emphasize additional words that applicant believes are necessary for the term KIDS to be found descriptive). Applicant apparently is under the mistaken impression that the mark must be grammatically correct and spell out to the consumer the exact nature of the goods in order for the term KIDS to

be determined merely descriptive. However, the test for whether a term is descriptive is not whether the consumer can guess what are the goods based on the mark. Rather, our analysis is based on a consumer being confronted with the mark in the context of applicant's identified food products. With this in mind, we decide whether that same consumer will understand KIDS as describing a significant attribute, function or property of the food products. Again, we conclude that consumers will perceive this term as describing a key feature of the identified goods and, accordingly, must be disclaimed.

DECISION: The refusal to register the mark under Section 2(d) of the Trademark Act is affirmed. We further affirm the refusal to register based on applicant's failure to comply with the requirement to disclaim the word KIDS.