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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Product Innovations Research LLC*

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Serial No. 77912065

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Charles W. Blount, III of Underwood Perkins PC for Product Innovations Research LLC.

Laura G. Kovalsky, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney).

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Before Kuhlke, Wellington and Greenbaum, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Product Innovations Research LLC, filed an application to register on the Principal Register the mark HAUTE MESS in standard characters for goods identified as “haicare and hair styling products, namely, hair shampoo, dry hair shampoo, hair conditioner, dry hair conditioner, hair styling spray and preparations,” in International Class 3.<sup>1</sup>

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<sup>1</sup> Application Serial No. 77912065, filed on January 14, 2010, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when used with its identified goods, so resembles the registered mark HOT MESS in standard characters for "Cosmetic sun-tanning preparations; Cosmetic suntan lotions; Indoor sun tanning preparations; Scented body lotions and creams; Self-tanning preparations; Sun tan gel; Sun tan lotion; Sun tan oil; Sun-block lotions; Sun-tanning oils; Sun-tanning oils and lotions; Sun-tanning preparations; Suntan creams; Tanning and after-sun milks, gels and oils; Tanning creams; Tanning gels; Tanning milks; Tanning oils," in International Class 3<sup>2</sup> as to be likely to cause confusion, mistake or deception.

When the refusal was made final, applicant appealed and filed a Request for Reconsideration. On May 30, 2013, the examining attorney denied the Request for Reconsideration. Thereafter, the appeal was resumed and briefs have been filed.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (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, two key considerations are the similarities between the marks and the similarities between the goods or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to a consideration of the goods, channels of trade and class of purchasers. We must make our determinations under these factors based on the goods as they are recited in the registrations and application. *In re Dixie*

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<sup>2</sup> Registration No. 3788681, issued on May 11, 2010.

*Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); and *In re Elbaum*, 211 USPQ 639 (TTAB 1981). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

The record shows that applicant's hair care products and registrant's skin care products are related to the extent that consumers may see the respective products marketed under the same trademark. For example, the examining attorney submitted printouts from third-party websites showing use of the same mark for sun care skin creams and lotions, and shampoo. *See, e.g.,* November 8, 2012 Office Action (NATURES-GATE <http://natures-gate.com>; AUBREY <http://www.aubrey-organics.com>; and AVEENO <http://www.aveeno.com>). In addition, she submitted several third-party registrations which serve to suggest that the listed goods are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). *See, e.g.,* April 5, 2012 Office Action (Reg. No. 4015117 for the mark EARTHLY BODY for *inter alia* skin care preparations, namely, creams, lotions; tanning preparations; hair care preparations, namely, shampoo, conditioners; Reg. No. 3977845 for the mark GIDDY for *inter alia* skin cream, sun tanning preparations, sun screen preparations, shampoos, hair conditioners, hair rinses; and Reg. No. 4012874 for the mark NEUMA and design for *inter alia* hair care preparations, hair shampoo, hair conditioners, skin moisturizing creams, skin moisturizer with sun protection

factor, self-tanning lotion, sun screen preparations). Overall we find the goods to be related.

Considering the channels of trade and classes of purchasers, because there are no limitations as to channels of trade or classes of purchasers in either the application or cited registration, we must presume that applicant's and registrant's goods will be sold in the channels of trade and will be bought by the classes of purchasers normal for these goods. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). *See also Octocom Systems*, 16 USPQ2d at 1787. The examining attorney submitted printouts from several online retail stores specializing in personal care products providing links to skin care and hair care products on the same page and offering the products at the same online store. We find that the channels of trade and classes of consumers overlap.

Applicant argues that the goods are unrelated because they will not be used in conjunction with each other. However, the examining attorney has not relied on a theory that the goods are related because they are complementary. Rather, the examining attorney relies on the theory that the marketing of these types of goods (same types of goods being offered and/or registered under a single mark) is such that consumers will believe that they come from a single source. Indeed, the respective goods need only be "related in some manner and/or if the circumstances surrounding their marketing [be] such that they could give rise to the mistaken belief that [the goods and/or services] emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed.

Cir. 2012) *quoting 7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007). Applicant relies on *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) in which the Board found that vodka infused with caffeine and wine were not related. However, in that case the record only included printouts from websites offering vodka and wine but did not include examples of the respective goods marketed under the same mark. In this case, as noted above, the record includes such examples, in addition to third-party registrations.

In view of the above, the *du Pont* factors of the similarity of the goods, the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

With regard to the conditions of sale, again, because we are bound by the description of goods in the application and registration and because the description of goods are not restricted as to price or channel of trade, the goods at issue must include inexpensive as well as more expensive personal care products and all channels of trade and classes of consumers, including professionals and the general public. The standard of care for our analysis is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004).

As a general proposition, inexpensive goods may be purchased with less care, which increases the likelihood of confusion. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care”) (citations omitted). Moreover, even if purchasers are sophisticated or

knowledgeable in a particular field that does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *Imagineering Inc. v. Van Klassens Inc.*, 53 F.3d 1260, 1265, 34 USPQ2d 1526, 1530 (Fed. Cir. 1995). Thus, we find this factor also favors likely confusion.

We next consider the marks HAUTE MESS and HOT MESS and compare them “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567.

It is the examining attorney’s position that HAUTE MESS is phonetically similar to HOT MESS in that the term HAUTE “is often mispronounced as the phonetic equivalent of ‘HOT’.” Ex. Att. Br. p. 10. In support of this assertion the examining attorney submitted printouts from three fashion blogs that advise readers that HAUTE COUTURE is pronounced “oat ku tour (not ‘hot Kutcher!’)” (*Glamazon Diaries*, *Cocokouture* and *Glitter on the Ceiling* websites attached to May 30, 2013 Office Action). Applicant argues that HAUTE and HOT “have verifiable pronunciations that are demonstrably different from each other.” App. Br. p. 9. Further, applicant contends that the principal that there is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark is generally only applied “where at least one of the marks in question is fanciful, and therefore a ‘correct’ pronunciation is unverifiable, and/or where the phonetic difference in the marks would be almost unnoticeable even if

pronounced correctly.” Id. While we recognize the difference in sound when applicant’s mark is pronounced correctly, the record does support a finding that despite the verifiable pronunciation, potential consumers may still pronounce HAUTE as HOT. Thus, we must still consider the marks to be similar in sound.

The marks have obvious dissimilarities and similarities in appearance, but the key elements in this case are the elements of meaning and overall commercial impression. Applicant argues that its mark “creates an obvious double entendre by contrasting the exclusive, high-fashion connotation of the word ‘haute’ with the image of dishevelment connoted by the term ‘hot mess’ ... [and] [b]ecause no such double meaning is present in the Cited Mark, the two marks create very different connotations in the mind of the consumer.” App. Br. p. 4. The examining attorney maintains that the differences in meanings do not overcome the fact that the marks share one meaning and combined with the other similarities the marks are more similar than dissimilar.

We find the differences in meaning in the context of the relevant goods to be significant despite the shared meaning. There is no dispute that “HOT MESS” is a well-known expression referring to a certain state appearance or behavior. Req. for Recon. May 7, 2010 p. 2 (“Examiner has acknowledged the meaning of the expression ‘hot mess’ as a reference to a state of appearance or behavior. The expression has a distinctly negative connotation, as evidenced by its use to describe celebrities who have been photographed or otherwise recorded in unflattering, embarrassing conduct or appearance.”); and May 30, 2013 Office Action p. 3

(“Applicant acknowledged that the expression HOT MESS refers to a state of disarray or dishevelment, whether in appearance or behavior.”). By contrast, the term HAUTE means fashionable or high-class as in HAUTE COUTURE (Merriam-Webster.com (2012) attached to October 3, 2012 Response). The obvious double entendre in applicant’s mark creates a very different meaning and humorous play on words wholly absent from registrant’s mark. In addition, registrant’s mark HOT MESS used in connection with its skin care creams directed to tanning and sun protection evokes the literal meaning of HOT (sun) and MESS (creams), or, as applicant states, “draws associations to the heat of the sun or a tanning lamp” (App. Br. p. 7) -- meanings that are wholly absent from applicant’s mark used in connection with the hair care products. While both marks may reference the slang meaning of HOT MESS, in the context of their respective goods, the shared phrase has a very different commercial impression due to each of their separate and distinct secondary meanings.

The Board has previously found that even the use of an identical mark is not likely to cause confusion if, because of the goods or services involved, the marks convey different meanings. *In re Sears, Roebuck and Co.*, 2 USPQ2d 1312 (TTAB 1987) (no likelihood of confusion between CROSS-OVER for bras and CROSSOVER for ladies’ sportswear, namely, tops, shorts and pants); *In British Bulldog, Ltd.*, 224 USPQ 854 (TTAB 1984) (no likelihood of confusion between PLAYERS for men’s underwear and PLAYERS for shoes); and *In re Sydel Lingerie Co., Inc.*, 197 USPQ



629 (TTAB 1977) (no likelihood of confusion between BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's suits, coats and trousers).

Accordingly, we find that the marks have differences in connotation and are different in overall commercial impression. Moreover, we find this factor to be pivotal in that even considering the other *du Pont* factors, this factor of the dissimilarities of the marks outweighs the other factors. *See Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive").

As has often been said, each case must be determined on the particular facts. Under the facts of this case, because of the very different commercial impressions due to the different secondary meanings in each mark resulting, in part, due to the differences in the respective goods, we find that confusion is not likely.

**Decision:** The refusal to register is reversed.