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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Gateway Foods, Inc.

Serial No. 77930551

Benjamin Aydindzhyan of Ourfalian & Ourfalian for Gateway Foods, Inc.

Anne Gustason, Trademark Examining Attorney, Law Office 117 (J. Brett Golden, Managing Attorney).

Before Quinn, Kuhlke and Bergsman,  
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Gateway Foods, Inc. filed, on February 8, 2010, an intent-to-use application to register the mark AL COURA (in standard characters) for "canned processed olives, olive oil, olive paste, processed olives, tahini, [and] grape leaves" (in International Class 29).

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to applicant's goods, so resembles the previously registered mark EL KOURA (in

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standard characters) for "extra virgin olive oil" (in International Class 29)<sup>1</sup> as to be likely to cause confusion. The examining attorney also issued a final refusal based on applicant's failure to comply with a requirement to furnish an English translation, if any, of its mark.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs.

Before turning to the likelihood of confusion refusal, we turn our attention to the translation requirement. In the first Office action, the examining attorney required applicant to submit an English translation of applicant's mark. In its response, applicant did not specifically respond to the requirement for a translation; although applicant pointed to differences between the marks' connotations, it did not identify the meaning of its mark (or the meaning of registrant's mark).<sup>2</sup> In the next Office action, the examining attorney made the requirement final, in addition to making final the Section 2(d) refusal. Applicant's brief is entirely silent on the translation requirement, and applicant did not make an argument based on any purported difference between the marks in terms of meaning. The examining attorney, in her brief, merely noted applicant's failure to address the translation requirement.

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<sup>1</sup>Registration No. 2750041, issued August 12, 2003; Section 8 affidavit accepted.

<sup>2</sup>There is no translation statement in the cited registration.

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An application to register a mark that includes non-English wording must include an English translation of that wording. Trademark Rule 2.32(a)(9). See TMEP § 809 (8<sup>th</sup> ed. 2011). In response to the examining attorney's requirement to submit a translation, applicant was completely silent. So as to be clear, neither applicant's response to the first Office action or the appeal brief even mentions, let alone addresses the requirement.

In view of applicant's complete failure to comply with the requirement for a translation (or alternatively, at a minimum, to indicate that there is no translation of the involved mark), this requirement is affirmed.

We now turn to the issue of likelihood of confusion. Applicant concedes that the marks are "somewhat phonetically similar" (Brief, p. 5), but goes on to argue that the marks are spelled differently, thereby resulting in marks that are dissimilar. Applicant also contends that the goods are different inasmuch as applicant's identification includes goods not listed in the cited registration. Based on these arguments, applicant asserts that the likelihood of confusion between the marks is *de minimis*.

The examining attorney maintains that the marks are similar, and that the goods overlap to the extent that both identifications in the application and cited registration

include "olive oil," or otherwise are closely related. In support of the refusal the examining attorney introduced excerpts of third-party websites.

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). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first turn to consider the second du Pont factor regarding the similarity/dissimilarity between the goods. It is not necessary that the respective goods be competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient 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, because of the similarity of the marks, give rise to the mistaken belief that they originated from the same producer. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). The issue is not whether consumers

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would confuse the goods themselves, but rather whether they would be confused as to the source of the goods. We recognize that there is no *per se* rule requiring a finding of likelihood of confusion when both types of goods are food items.

*Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 927, 198 USPQ 151 (CCPA 1978).

We make our comparison of the goods, including between the respective channels of trade and classes of purchasers, based on the goods as they are identified in the application and the cited registration. *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's identification of goods includes "olive oil" and registrant's identification includes "extra virgin olive oil." The record shows that extra virgin olive oil is olive oil derived from the first pressing of unblemished olives. Applicant's "olive oil" is worded broadly enough to encompass "extra virgin olive oil." Thus, for purposes of our likelihood of confusion analysis, these goods are legally identical. In the context of this analysis, it is sufficient if likelihood of confusion is found with respect to use of the mark on *any* item that comes within the identification of goods in the application and registration. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); and *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1398 (TTAB 2007).

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Because the goods identified in the application and the cited registration are in-part identical, we must presume that the channels of trade and classes of purchasers are the same. *See 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.”); and *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.”). Further, we note that there are no limitations in either applicant’s or registrant’s identification of goods. Accordingly, we must presume that the goods, as identified, are marketed in all normal trade channels for such goods and to all normal classes of purchasers for such goods. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Thus, given that the identifications are identical to the extent that both include olive oil, the goods would move through the same trade channels (e.g., grocery stores, online retailers, and the like) and would be purchased by the same classes of purchasers, including ordinary consumers. Because of the relatively inexpensive nature of olive oil and the other listed food items, and the

fact that such staples may be subject to frequent replacement and impulse purchase, the likelihood of confusion is increased. See *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.").

Lest there be any doubt on this point, the examining attorney's Internet evidence shows that online retailers routinely sell a variety of olive oils, often under the same mark.

We find that the *du Pont* factors of in-part identical goods, presumed identical trade channels and purchasers, and conditions of sale all weigh heavily in favor of a finding of likelihood of confusion.

We next direct our attention to the *du Pont* factor of the similarity/dissimilarity between the marks. Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992). We must compare the marks in their entireties as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports*,

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*Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1960 (Fed. Cir. 2005), quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567. The test, under the first *du Pont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

In this case, applicant's mark AL COURA and registrant's mark EL KOURA are very similar in sound. Although applicant argues that the marks sound differently, there is no correct pronunciation of mark, and the two marks, whether carefully or hurriedly spoken, still sound alike. See *In re 1st USA Realty Professionals Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007).

As to appearance, although the marks are spelled differently, the marks look alike; both include a space, and differ by only two letters. There is no evidence relating to the meanings of the marks, and consumers may perceive the marks as being arbitrary when used on the goods. Given the

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similarities in sound and appearance, the marks engender overall commercial impressions that are similar.

The similarity between the marks weighs in favor of a finding of a likelihood of confusion.

In sum, the relevant *du Pont* factors weigh in favor of affirming the refusal. Contrary to applicant's position, the similarities between the marks and the identity in part between the goods persuade us that the likelihood of confusion is more than just *de minimis*. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1688, 1689 (Fed. Cir. 1993). We conclude that consumers familiar with registrant's extra virgin olive oil sold under the mark EL KOURA would be likely to mistakenly believe, upon encountering applicant's mark AL COURA for olive oil, that the goods originated with or are somehow associated with or sponsored by the same entity.

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