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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Tyco Plastics Services AG

Serial No. 78431431

John P. Maldjian of Moser IP Law Group for Tyco Plastics Services AG.

Elizabeth J. Winter, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Bucher, Holtzman, and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Tyco Plastics Services AG filed a use-based application to register the mark PARTYPAL for a "disposable plastic plate containing a beverage holder."¹ Registration was refused under Section 2(d) of the Lanham Act, 15 U.S.C.

¹ Application Serial No. 78431431, filed June 8, 2004, claiming March 1, 2003 as its dates of first use anywhere and first use in commerce. While applicant disclaimed the exclusive right to use the word "Party," the examining attorney requested applicant to withdraw the disclaimer because PARTYPAL is a unitary mark. Applicant did not withdraw the disclaimer. We also note that the specimen filed with the application displays the mark as **PartyPal**.

§1057(d). The following marks owned by Pactiv Corporation were cited as bars to registration:

1. ZOO PALS and Design (shown below) for "disposable dinnerware, namely, paper plates";²



2. SPORTS PALS for "disposable dinnerware";³ and,
3. MERRY PALS for "disposable plates."⁴

The examining attorney submitted the following evidence in support of her refusal:

1. Dictionary definitions for the following terms:⁵
 - A. Tableware - "The dishes, glassware, and silverware used in setting a table for a meal";

² Registration No. 2,728,839, issued June 24, 2003.

³ Registration No. 2,809,547, issued January 27, 2004.

⁴ Registration No. 2,887,753, issued September 21, 2004.

⁵ The American Heritage Dictionary of the English Language (3rd ed. 1992). In her appeal brief, the examining attorney requested that we take judicial notice of these definitions. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USP'Q2d 1375, 1377 (TTAB 2006).

- B. Plate - "A shallow dish in which food is served or from which it is eaten";
 - C. Dinnerware - "The plates, serving bowls, platters and other tableware used in serving a meal";
2. Twenty-one (21) of one hundred sixteen (116) articles retrieved from the LexisNexis database in which plastic and paper plates were referenced in the same articles for the same purpose. The following are representative excerpts from the articles:
- A. "Serve food on plastic plates or strong paper plates; nobody wants to have a lap full of baked beans." Cox News Service, July 2, 2002;
 - B. "For eating ease and touch of style, use stoneware or colorful plastic plates instead of paper plates. (If you're serving a large group, paper may be the practical way to go.)" Essence, June, 2002; and,
 - C. "Paper plates and napkins are fine for most picnics; at the beach inexpensive, heavy plastic plates and cups from a store such as Target or Kmart won't blow away." News and Observer (Raleigh, North Carolina), May 22, 2002; and,
3. Web pages retrieved from a search on the Google search engine advertising the sale of paper and plastic plates for the same purpose. The following are representative web pages:
- A. Tablemate (tablemates.com) - "Tablemate's carries a wide variety of plastic and paper plates to compliment any of your party needs";
 - B. Solo Cup Company (solocup.com) advertises its SoloGrips plastic plates and Solo All Occasions paper plates;
 - C. Georgia-Pacific Dixie brand products (gp.com/dixiemain.asp) - the Dixie catalog

- includes cups, containers, plates, and bowls of both paper and plastic;
- D. Drugstore.com web page (drugstore.com) advertises Dixie paper and plastic products, including plates, cutlery, and cups;
 - E. Bulk Party Supplies web page (bulkpartysupplies.com) was promoting "Touch of Color" brand "Solid Color Paper and Plastic Tableware";
 - F. The Ultimate Party Supply web page (ultimatepartysupply.com) sells solid paper ware and solid plastic ware for parties and other celebrations;
 - G. The Party City web page (partycity.com) lists plastic tableware and paper tableware under catering supplies; and,
 - H. The Shopping.com and RestockIt.com websites list both paper plates and plastic plates under disposable dinnerware.

When the appeal was made final, applicant appealed. Applicant and the examining attorney both filed briefs. We affirm.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 Company, Inc.*, 315 F.3d 1311, 65 UPSQ2d 1201, 1203 (Fed. Cir. 2003). The relevant *du Pont* factors are discussed below.

A. The similarity or dissimilarity of the goods.

Applicant is seeking to register its mark PARTYPALS for a "disposable plastic plate containing a beverage holder." The registrant's marks are for the following products:

1. "disposable dinnerware, namely, paper plates";
2. "disposable dinnerware"; and,
3. "disposable plates."

The evidence submitted by the examining attorney demonstrates that applicant's disposable plastic plates and registrant's products are interchangeable. Moreover, since our determination of likelihood of confusion is based on the identification of goods as they are recited in the application and registrations without regard to what the evidence may show about the exact nature of the goods, registrant's "disposable dinnerware" and "disposable plates" are broad enough to encompass applicant's "disposable plastic plate containing a beverage holder." See, *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 UPSQ2d 1001 (Fed. Cir. 2002); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

In view of the foregoing, we find that applicant's "disposable plastic plate containing a beverage holder" and registrant's "disposable dinnerware," and "disposable plates" are similar, if not identical, products. Accordingly, the similarity or dissimilarity of the goods is a factor the weighs in favor of finding likelihood of confusion.

B. The similarity or dissimilarity of trade channels.

The channels of trade factor concerns how and to whom the respective products are sold and distributed. In other words, this factor focuses on whether the same class of persons are exposed to the marks at issue under circumstances likely to give rise to the mistaken belief that the products emanate from a single source. *Jeanne-Marc, Inc. v. Cluett, Peabody & Co., Inc.*, 221 UPSQ 58, 61 (TTAB 1984). The examining attorney's evidence demonstrates that not only are the applicant's plastic plates and registrant's dinnerware and plates interchangeable, but that the same retailers sell them.

As indicated *supra*, our determination of likelihood of confusion is based on the identification of goods as they are recited in the application and registration, and we do not read limitations into those descriptions. *See,*

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Hewlett-Packard Co. v. Packard Press Inc., supra; Octocom Systems Inc. v. Houston Computer Services Inc., supra; In re Elbaum, supra. Because there are no restrictions as to the channels of trade or classes of purchasers in either applicant's or registrant's description of goods, we consider applicant's and registrant's products as if they were being sold in all of the normal channels of trade and to all of the normal purchasers for such products.

Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Toys R Us v. Lamps R Us*, 219 USPQ 340, 343 (TTAB 1983). Ordinary consumers purchase applicant's "disposable plastic plate containing a beverage holder" and registrant's "disposable dinnerware, namely, paper plates," "disposable dinnerware," and "disposable plates." We find, therefore, that the channels of trade and classes of consumers are the same, and that this factor weighs in favor of finding that there is a likelihood of confusion.

C. Degree of consumer care.

Disposable plastic or paper plates are inexpensive⁶ and subject to frequent replacement. Under such circumstances,

⁶ "At one discount supermarket this package of 14 (11-inch Rinse & Reuse plates cost \$2.73 (19 cents each), a package of 15 (1

consumers would give little time and attention to the trademarks of such products. Accordingly, purchasers of such products have been held to a lesser standard of purchasing care. *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). This is a factor that, therefore, favors finding a likelihood of confusion.

D. The similarity or dissimilarity of the marks.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co., supra*. We note that as the degree of similarity of the goods of the parties increases, "the degree of similarity [of the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d

1/4-inch Solo rigid plastic plates cost \$2.37 (16 cents each) and a package of 24 "heavy-duty" (glossy) 10 1/4-inch Dixie paper plates cost \$2.43 (11 cents each)." Star Tribune (Minneapolis, Minnesota), December 27, 2001.

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1698, 1700 (Fed. Cir. 1992). In this case, the goods are closely related, if not identical.

In analyzing the similarity of the marks, it must be kept in mind that a side-by-side comparison of the marks is not the proper test because consumers are not exposed to the marks in that way. The proper emphasis is on the recollection of the average consumer, who normally retains a general rather than a specific impression of the marks. *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd unpublished*, No. 92-1086 (Fed. Cir., June 5, 1992). Because the products at issue are inexpensive and frequently replaced, consumers will only retain a general or vague recollection of the mark and, therefore, they are more likely to be confused when later encountering the same or similar product sold under a similar mark. *Cf. Tony Lama Co. v. Anthony Di Stefano*, 206 UPSQ 176, 185 (TTAB 1980). For this reason, applicant's detailed dissection of the marks at issue is an erroneous approach.

We find persuasive and logical the argument of the examining attorney that the applicant's mark and the registrant's marks engender the same commercial impression. The examining attorney made the following argument:

[R]egistrant's marks evoke an overall commercial impression of friendship or friends in various circumstances or states of mind. Specifically, MERRY PALS evokes thoughts of happy friends in the context of friends at play; SPORTS PALS suggests a vision of friends playing sports; and ZOO PALS call to mind friends or buddies at the zoo. When used in connection with the registrant's goods, these marks have a dual connotation. The marks suggest both where the goods can be used and that the goods are the consumer's friend or "pal". Because each of the marks refers to a different type of "pal," each mark implies that [registrant's] disposable dinnerware goods can be used in a particular venue, whether at a play date, at a neighborhood softball game, or at the zoo. Thus, the goods may be used for different types of friends or pals and venues, and as such are the purchaser's "pal" or helper.

Similarly, applicant's mark, PARTYPAL, is comprised of the term "PAL" preceded by a descriptive term, "party", which informs the potential buyer of the type of setting the goods may be used In addition, "PARTYPAL" evokes an image of your friend or buddy at a party and that applicant's goods are the consumer's "pal" or helper at the party. Thus, while applicant (sic) and registrant's marks are not identical, when considered in their entirety, they are highly similar because they include the virtually identical distinctive term preceded by a modifying term and, as a whole, suggest use for "pals" or friends in various settings. All marks also imply that the goods are the user's "pal" or helper. For these reasons, consumers may presume that the parties' marks identify different lines

of disposable dinnerware from the same source.⁷

Notwithstanding the differences in appearance and sound created by the use of different prefix words ("Merry," "Sports," "Zoo," and "Party"), the distinctive suffix word "Pal" (or "Pals") used in connection with disposable plates, conveys the identical meaning and engenders the same commercial impression, namely that the disposable dishes are easy to use because you can throw them away. See *Kabushiki Kaisha Hattori Seiko v. Satellite International*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff'd without opinion*, 979 F.2d 1216 (Fed. Cir. 1992) ("two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound or visual appearance or connotation") (emphasis in the original); *The Andrew Jergens Co. v. Sween Corp.*, 229 USPQ 394 (TTAB 1986) (KIND TOUCH and GENTLE TOUCH engender the same commercial impression); *Procter & Gamble Co. v. Conway*, 419 F.2d 1332, 64 UPSQ 301, 304 (CCPA 1970) (dissimilarities in sound and appearance are not necessarily controlling on the issue of likelihood of confusion because there may be confusion if the marks convey the same idea, stimulate the same mental reaction, or have the same meaning).

⁷ Examining Attorney's Brief, unnumbered pages 6-7.

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Having carefully considered both applicant's mark and registrant's marks in their entireties, we are of the opinion that the similarities of the marks in their connotation and commercial impression outweigh any dissimilarity in appearance and sound. Accordingly, we find that the similarity or dissimilarity of the marks is a factor that weighs in favor of finding likelihood of confusion.

In view of the foregoing, we believe that purchasers familiar with registrant's marks MERRY PALS, SPORTS PALS, and ZOO PALS and Design used in connection with disposable plates are likely to assume, upon encountering substantially similar, if not identical products, bearing the mark PARTYPAL, that the mark PARTYPAL is simply a variation of registrant's "Pals" marks used to designate a particular line of disposable plates. Accordingly, we conclude that there is a likelihood of confusion.

Decision: The refusal to register is affirmed.