

From: Golden, Laura

Sent: 9/23/2014 4:28:37 PM

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Subject: U.S. TRADEMARK APPLICATION NO. 79130383 - PLASTICINE IMAGINE THE FUN! -
BKYZ500208US - Request for Reconsideration Denied - Return to TTAB - Message 1 of 7

Attachment Information:

Count: 14

Files: playdoh1-1.jpg, playdoh1-2.jpg, playdoh2-1.jpg, playdoh2-2.jpg, playdoh3-1.jpg, playdoh3-2.jpg,
playdoh3-3.jpg, hearthson2-1.jpg, hearthson2-2.jpg, hearthson2-3.jpg, hearthson2-4.jpg, hearthson2-
5.jpg, hearthson3-1.jpg, 79130383.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

U.S. APPLICATION SERIAL NO. 79130383 MARK: PLASTICINE IMAGINE THE FUN!	
CORRESPONDENT ADDRESS: COLLEEN FLYNN GOSS FAY SHARPE LLP 1228 EUCLID AVENUETHE HALLE BUILDING, 5T H FLOOR CLEVELAND, OH 44115	GENERAL TRADEMARK INFORMATION: http://www.uspto.gov/trademarks/index.jsp VIEW YOUR APPLICATION FILE
APPLICANT: Flair Leisure Products Plc	
CORRESPONDENT'S REFERENCE/DOCKET NO: BKYZ500208US CORRESPONDENT E-MAIL ADDRESS: uspto@faysharpe.com	

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE: 9/23/2014

INTERNATIONAL REGISTRATION NO. 1160877

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. *See* 37 C.F.R. §2.64(b); TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a). While the Request for Reconsideration does address the requirements for an amended identification of goods and amended description of the mark, the likelihood of confusion refusal made final in the Office action dated March 5, 2014 is maintained and continues to be final. *See* TMEP §§715.03(a)(2)(B), (a)(2)(E), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the likelihood of confusion issue in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied relative to this refusal.

The filing of a request for reconsideration does not extend the time for filing a proper response to a final Office action or an appeal with the Trademark Trial and Appeal Board (Board), which runs from the date the final Office action was issued/mailed. *See* 37 C.F.R. §2.64(b); TMEP §715.03, (a)(2)(B), (a)(2)(E), (c).

If time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to comply with and/or overcome any outstanding final requirement(s) and/or refusal(s) and/or to file an appeal with the Board. TMEP §715.03(a)(2)(B), (c). However, if applicant has already filed a timely notice of appeal with the Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

SECTION 2(d) REFUSAL – LIKELIHOOD OF CONFUSION

For the reasons set forth below, the refusal under Trademark Act Section 2(d) is now maintained and continued with respect to U.S. Registration No(s). 4272346. *See* 15 U.S.C. §1052(d); 37 C.F.R. §2.64(a).

In its Request for Reconsideration, applicant first argues that the differences between the marks are sufficient to preclude a likelihood of confusion. However, the entirety of registrant's mark is incorporated into applicant's mark in a way that it is a separable element of applicant's mark and stands alone, despite the additional wording and the design element. It is common for companies to use a slogan with a brand name, as well as the same slogan independently without their brand name. Because slogans are able to stand alone as a trademark, consumers would assume that the parties using the same slogan for related goods or services are related to one another.

Indeed, the TTAB has found the same to be true previously, even where there are slight variances in the slogans. *See, e.g., Pita Jungle -- Tempe, Inc. v. Pita Pal Foods, LP*, 2014 TTAB LEXIS 307 (Trademark Trial

& App. Bd. July 24, 2014) (finding PITA PAL THE ART OF HEALTHY EATING & Design confusingly similar to THE ART OF EATING HEALTHY, noting that “More importantly, Applicant’s slogan THE ART OF HEALTHY EATING is separable and distinct from PITA PAL and the star design, as it appears on a different line than PITA PAL and the star and is a unitary phrase.”); *In re Keystone Homes, Inc.*, 2009 TTAB LEXIS 38 (Trademark Trial & App. Bd. Jan. 21, 2009) (upholding a refusal to register the mark KEYSTONE DREAM. BUILD. LIVE. & Design based on a likelihood of confusion with the mark DREAM. BUILD. LIVE.); *In re Westmed Med. Group, P.C.*, 2013 TTAB LEXIS 84 (Trademark Trial & App. Bd. Feb. 20, 2013) (affirming a refusal to register the mark THE FUTURE OF HEALTHCARE TODAY under Trademark Act Section 2(d) based on a prior registration for THE SMART MED CARD THE FUTURE OF HEALTHCARE TODAY! & Design).

When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods and/or services offered under applicant’s and registrant’s marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 1053, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *Edom Labs., Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012); TMEP §1207.01(b). In this case, despite the additional elements present in applicant’s mark, the marks are still sufficiently similar in their entireties that confusion as to the source of the goods and/or services offered under applicant’s and registrant’s marks is likely to result.

Applicant further argues that the case law generally deals with similarities in the first wording, as well as a descriptive or laudatory term added to a distinctive true. While it is true that the marks would be confusingly similar in those situations, confusing similarity is certainly not limited to such situations. As noted above, the Board has previously found in multiple instances that the combination of a brand name, slogan, and design is confusingly similar to the slogan alone. Further, a likelihood of confusion has been found even where the marks are less similar. *See, e.g.*,

In re Home Instead, Inc., 2013 TTAB LEXIS 526 (Trademark Trial & App. Bd. Sept. 26, 2013) (affirming a refusal to register the mark CARE: CHANGING AGING THROUGH RESEARCH AND EDUCATION based on a prior registration for CHANGING AGING); *In re InterNetwork, LLC*, 2013 TTAB LEXIS 342 (Trademark Trial & App. Bd. June 12, 2013) (affirming the refusal to register three co-pending applications for the BLURT BLURT IT OUT! & Design mark based on a likelihood of confusion with a prior registration for BLURTIT). Just as in each of these cases, an individualized comparison of the relevant marks and the relatedness of the goods and services in this case results in a likelihood of confusion finding.

Applicant then argues that the wording IMAGINE THE FUN is descriptive and weak as applied to toys, based on the fact that toys are fun. However, this fact does not render the mark descriptive in a trademark sense, nor weak on the Register. In this case, the wording is identical, and registrant’s mark

is the only registered mark to include the phrase IMAGINE THE FUN. Therefore, applicant's arguments regarding the weakness of the mark are inapposite.

Finally, applicant argues that there is no basis for the refusal in all classes. In response to the same, the examining attorney notes that the listed Class 08 goods are often sold in kits with modeling clay, and these sets are sold in the same toy stores that sell registrant's goods. Furthermore, the listed Class 16 goods, including art supplies and modelling clay, are also sold at the same toy stores that sell registrant's goods. Attached is additional evidence of the same.

In conclusion, based on the totality of the DuPont factors, and particularly in light of the similarity between the marks and the relatedness of the goods and services, there is a likelihood of confusion between applicant's PLASTICINE IMAGINE THE FUN! & Design mark, for use with *Hand tools and hand implements for use in modelling and in working modelling material, namely plastic and wooden modelling tools for cutting, trimming, shaping and forming modelling material*, in Class 08; *Craft paper; craft paper articles and cardboard articles namely, pictures; printed matter, namely, magazines and leaflets relating to modeling and crafts; books in the field of modelling and crafts; paint brushes; modelling clay; instructional and teaching materials in the field of modelling and crafts*, in Class 16; and *Toys, games and playthings, namely, hobby and modelling sets, comprised of modelling material, shape cutters, shaping tools, molds, play mats, plastic rollers, picture trays, and picture cards*, in Class 28; and registrant's IMAGINE THE FUN mark, for use with *Retail services through direct solicitation by salespersons directed to end-users featuring toys, balls and toy sports equipment*, in Class 35. For these reasons, the refusal to register applicant's mark based on a likelihood of confusion with the mark in U.S. Registration No. 4272346 is maintained and continued.

/Laura Golden/

Examining Attorney

Law Office 103

(571) 272-3928

laura.golden@uspto.gov



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PLAY-DOH SWEET CREATIONS FAVORITE FOOD KIT



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\$5.99

APPROX. RETAIL

AGES: 3 & UP

ITEM: 20611

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PRODUCT DESCRIPTION:

So many sweets, so little time! This brightly colored playset lets you create your own bakery! Make loads of pretend sweet "treats," including "cupcakes," "donuts" -- even "gingerbread men!" Use the colorful compound to mold, twist and shape dozens of "goodies". You can even use the presser to "frost" the "cake" on the play mat and decorate the "cupcakes!" And the handy container lets you store all of your sweet "treat" pieces inside! Includes container and lid, 2 "cupcake" holders, presser, roller, knife with ring, play mat, 3 molds and 4 one-ounce bars of PLAY-DOH compound. * Bakery playset lets you create lots of pretend sweet treats -- and even lets you put the "icing" on the "cake!" * Includes container and lid, 2 "cupcake" holders, presser, roller, knife with ring, play mat, 3 molds and 4 one-ounce bars of PLAY-DOH compound. * Ages 3 and up. Parents Notice: Contains wheat. Non toxic.



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PLAY-DOH SWEET SHOPPE CANDY CYCLONE



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\$21.99

APPROX. RETAIL

AGES: 3 YEARS & UP

ITEM: 39649

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PRODUCT DESCRIPTION:

Create lots of PLAY-DOH gumballs and candies with the CANDY CYCLONE playset! Pick your favorite colors, load them up, and crank the machine. Then watch as lots of round, colorful PLAY-DOH gumballs roll down the ramp! You can keep cranking out fantasy gumballs over and over again, or use them to make lots of other PLAY-DOH candy creations! Sweet!

Create Colorful PLAY-DOH Gumballs and So Much More!

Make super sweet-looking creations with your very own PLAY-DOH gumball machine! The CANDY CYCLONE playset comes with everything you need to create your own colorful PLAY-DOH gumballs and so much more! With four cans of PLAY-DOH modeling compound, you can pick your favorite or mix colors to make all kinds of swirly sweet combinations. When you've cranked out lots and lots of wacky gumballs, you can use them to create PLAY-DOH licorice, lollipops and other sweet-looking treats!

Includes: CANDY CYCLONE playset with base, ramp, globe, crank and stamper, licorice presser, plastic knife, 2 dishes, 4 lollipop sticks, instructions and 4 cans of PLAY-DOH Brand Modeling Compound.

Ages: 3 and up.

Notice to parents: Contains wheat. Non-toxic.



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PLAY-DOH SWEET SHOPPE FROSTING FUN BAKERY PLAYSET



\$14.99

APPROX. RETAIL

AGES: 3 YEARS & UP

ITEM: A0318

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PRODUCT DESCRIPTION:

Now you can decorate realistic-looking treats like never before, using PLAY-DOH PLUS Compound! With the FROSTING FUN BAKERY playset, you can create amazing-looking PLAY-DOH cakes and cupcakes with realistic-looking frosting-like details! Stamp out four different cake creations and then decorate with PLAY-DOH PLUS frosting! It's a whole new way to decorate!

Realistic-looking PLAY-DOH treats!

With the FROSTING FUN BAKERY playset and PLAY-DOH PLUS compound, you can create amazing-looking PLAY-DOH cakes and cupcakes with realistic-looking frosting detail! With classic PLAY-DOH compound, you can make a pretend cake layer at the Cake Stamping Station. Next, move your creation to the Frosting Station. With PLAY-DOH PLUS compound, you can add pretend frosting and add all sorts of decorations and details to your creations! Use different tips on the extruder to create lots of different swirls, hearts and other details!

Playset: 2-piece extruder, shelf, tray, cake stand, turntable, display dome, 4 cake cutters, 4 extruder tips, cupcake liner, cake server, plate, plastic knife, fork, 2 cans of PLAY-DOH Brand Modeling Compound and 2 cans of PLAY-DOH PLUS compound.

Features:

Make realistic-looking PLAY-DOH cookie and cupcake creations!
Frost and decorate with PLAY-DOH PLUS compound!
A whole new way to decorate!
PLUS UP YOUR CREATIONS!

Ages 3 and up.

Adult assembly required.

Product and colors may vary.

Fun to play with, but not to eat.

NOTICE TO PARENTS: CONTAINS WHEAT. NONTOXIC.

CONFORMS TO ASTM D-4236.

PLAY-DOH is a trademark of Hasbro.



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1 star

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DESCRIPTION

With these incredibly fun craft kits, kids turn colorful clay into cute little treasure boxes made to look like delicious Cupcakes or Cakes. Creamy clay in pastry bags lets them

