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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 Universal Entertainment Corporation
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Serial No. 79153067
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Keith R. Obert of Ware Fressola Maguire & Barber
for Universal Entertainment Corporation.

Christine Martin, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.
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Before Quinn, Ritchie, and Lykos,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Universal Entertainment Corporation (“Applicant”) filed an application to register on the Principal Register the mark ULTRA STACK POSEIDON (in standard characters) (STACK disclaimed) for “gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game

machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid crystal displays” in International Class 28.¹

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 POSEIDON (in standard characters) for “gaming machines, namely, devices which accept a wager” in International Class 9,² as to be likely to cause confusion.

When the refusal to register was made final, Applicant appealed and requested reconsideration. When the Examining Attorney denied the request for reconsideration, the appeal was resumed. Applicant and the Examining Attorney filed briefs. We affirm the refusal.

Applicant argues that the marks are different, and that the Examining Attorney improperly focuses on the POSEIDON portion of its mark. As to the goods, Applicant asserts that only properly licensed buyers may purchase gaming machines and, therefore, its goods are not available to the general purchasing public. In this connection, Applicant further contends that the goods are expensive, and purchasers are sophisticated. In support of its arguments, Applicant introduced a TESS printout

¹ Application Serial No. 79153067, filed October 9, 2014 pursuant to Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a). *See generally* The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (“Madrid Protocol”) and Madrid Protocol Implementation Act of 2002, Pub. L. 107-273, 116 Stat. 1758, 1913-1921 (“MPIA”). For U.S. applications filed pursuant to Section 66(a) of the Trademark Act, a refusal to register is sometimes referred to as a “refusal of the request for extension of protection of the mark.”

² Registration No. 3823156, issued July 20, 2010; combined Sections 8 and 15 declaration accepted and acknowledged. Applicant claims ownership of Registration Nos. 4493148; 4503279; and 4527618.

showing Applicant's pending applications and live registrations of its ULTRA STACK formative marks, accompanied by copies of twelve ULTRA STACK formative registrations (Ex. A); one of Applicant's press releases (Ex. B); two articles about Applicant's ULTRA STOCK gaming devices (Exs. C and E); and an advertisement for Applicant's goods (Ex. D). (Response, 2/4/15). Applicant also filed a list of its worldwide applications and registrations of ULTRA STACK marks. (Ex. A, Response, 8/5/15).

The Examining Attorney maintains that the marks are similar, with both marks sharing the word POSEIDON. According to the Examining Attorney, Applicant has merely added this word to its product or house mark ULTRA STACK, which is not sufficient to distinguish the marks. Further, the goods are identical or otherwise closely related. In support of her arguments about the goods, the Examining Attorney introduced a dictionary definition of "slot machine," third-party registrations, and excerpts of third-party websites.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

As to the *du Pont* factor regarding the similarity of the goods, we must look to the goods as identified in the application and the cited registration. *See Stone Lion*

Capital Partners, LP v. Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011). Applicant's identification reads "gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid crystal displays"; Registrant's goods are identified as "gaming machines, namely, devices which accept a wager." Likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identifications of goods in the application and the cited registration. *See Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015).

If the cited registration describes goods broadly, and there is no limitation as to their nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009). Similarly, there may be a likelihood of confusion where an applicant identifies its goods so broadly that the identification encompasses the goods identified in the

registration of a similar mark. *See, e.g., In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007). In the present case, Applicant's broadly worded "gaming machines" are presumed to encompass all goods of the type identified, including Registrant's more narrowly identified "gaming machines, namely, devices which accept a wager." Further, the record includes a dictionary definition of "slot machine": "a machine used for gambling that starts when you put coins into it and pull a handle or press a button." (www.merriam-webster.com; Office action, 2/19/15). Thus, Applicant's "slot machines" are encompassed within Registrant's "gaming machines, namely, devices which accept a wager."³ *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). As worded in the respective identifications, the goods are legally identical in part and otherwise closely related, a point not disputed by Applicant.⁴

Given the legal identity of the goods in part, we presume that these goods travel through the same channels of trade to the same classes of customers, including all usual channels of trade and all normal potential purchasers for such goods. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there

³ The Examining Attorney submitted excerpts retrieved from third-party websites showing that a variety of gaming machines and devices may be offered under a single mark by a single source. Additionally, the Examining Attorney submitted copies of several use-based third-party registrations that individually cover, under the same mark, the types of goods involved herein; that is, the registrations cover a variety of gaming machines and devices, some of which are identified as being able to "accept a wager." "Third-party registrations which cover a number of differing goods and/or services, and which are based on use in commerce, although not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, may nevertheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source." *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd*, 864 F.2d 149 (Fed. Cir. 1988). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

⁴ Applicant's brief is entirely silent on the second *du Pont* factor involving the similarity of the goods.

are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

The legal identity in part between Applicant's goods and Registrant's goods, the presumed identical trade channels, and the presumed overlap in purchasers are *du Pont* factors that weigh heavily in favor of a finding of likelihood of confusion.

With respect to the *du Pont* factor dealing with the similarity of the marks, we must compare the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *In re E. I. du Pont de Nemours & Co.*, 177 USPQ at 567). "The proper test is not a side-by-side comparison of the marks, but instead 'whether the marks are sufficiently similar in terms of their commercial impression' such that persons who encounter the marks would be likely to assume a connection between the parties." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

In comparing the marks, we are mindful that where, as here, the goods are legally identical in part, the degree of similarity between the marks necessary to find

likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d at 1721; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007).

In comparing Applicant's mark ULTRA STACK POSEIDON to Registrant's mark POSEIDON, we recognize that purchasers in general are inclined to focus on the first word or portion in a trademark. *Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered"). See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. Nevertheless, likelihood of confusion is not necessarily avoided between two otherwise confusingly similar marks merely by adding a product or house mark. In the present case, Applicant has adopted the entirety of the registered mark POSEIDON and merely added wording, ULTRA STACK, which is in the nature of a product or house mark.⁵ The marks are obviously similar to the extent that both include POSEIDON. Purchasers familiar with both marks likely would perceive Registrant's mark as a shortened version of Applicant's mark, especially when encountered in the context of identical goods. Simply put, the mere addition of Applicant's product or house mark ULTRA STACK to POSEIDON is insufficient to

⁵ The Internet evidence and Applicant's U.S. registrations of record show that Applicant's marks begin with the wording ULTRA STACK.

distinguish the marks when used on identical goods. The entirety of Registrant's mark, POSEIDON, is identical to the POSEIDON portion of Applicant's mark, thereby resulting in marks that are similar in sound, appearance and meaning. Given the similarities, the marks engender overall commercial impressions that are similar. *See, e.g., In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion, noting that the marks are more similar than they are different and that the addition of applicant's "product mark," VANTAGE, to the registered mark would not avoid confusion); *In re Apparel Ventures, Inc.*, 229 USPQ 225, 226 (TTAB 1986) (holding applicant's mark, SPARKS BY SASSAFRAS (stylized), for clothing, and registrant's mark, SPARKS (stylized), for footwear, likely to cause confusion, noting that "[t]hose already familiar with registrant's use of its mark in connection with its goods, upon encountering applicant's mark on applicant's goods, could easily assume that 'sassafras' is some sort of house mark that may be used with only some of the 'SPARKS' goods"); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (holding CAREER IMAGE (stylized) for clothing and retail women's clothing store services, and CREST CAREER IMAGES (stylized) for uniforms, likely to cause confusion, noting that CAREER IMAGE would be perceived by consumers as a shortened form of CREST CAREER IMAGES); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (holding RICHARD PETTY'S ACCU TUNE and design for automotive service stations, and ACCU-TUNE for automotive testing equipment, likely to cause confusion). *See also Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 110

USPQ2d at 1161 (affirming Board's finding that applicant's mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, and that the noun LION was the dominant part of both parties' marks); *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260-61 (Fed. Cir. 2010) (affirming Board's finding that applicant's mark, ML, is likely to be perceived as a shortened version of registrant's mark, ML MARK LEES (stylized), when used on the same or closely related skin-care products); *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR'S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical."); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that, even though applicant's mark PACKARD TECHNOLOGIES (with "TECHNOLOGIES" disclaimed) does not incorporate every feature of opposer's HEWLETT PACKARD marks, a similar overall commercial impression is created).

The similarity between the marks is a factor weighing in favor of a finding of a likelihood of confusion.

Applicant also argues that its goods and those of Registrant are expensive and highly regulated, and are provided to sophisticated purchasers, namely highly trained, licensed professionals. Although that may be true, even if the initial purchasers are sophisticated, the relevant class of purchasers includes the ultimate end users, that is, the players of the games and patrons of casinos. *See In re Artic Electronics Co., Ltd.*, 220 USPQ 836, 837-38 (TTAB 1983) (although the initial

purchasers, that is, owners of arcades, are sophisticated and careful purchasers of arcade games and coin and bill changer equipment, in determining likelihood of confusion consideration must also be given to the ultimate users of the arcade games and coin and bill changers, namely the arcade's customers who are the end users of the goods). Thus, for purposes of the likelihood of confusion analysis under Section 2(d), the relevant consumers include ordinary consumers who are unlikely to exercise more than an ordinary degree of care in deciding to play or in choosing gaming devices. When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1162-63.

Be that as it may, for purposes of further considering Applicant's sophisticated purchaser argument, we will assume that gaming machines and devices that "accept a wager" would be offered to casinos and similar licensed establishments, and bought by sophisticated purchasers. The fact that these purchasers may be sophisticated or knowledgeable in a particular field such as legalized gambling, however, does not necessarily mean that they are immune to source confusion. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (indicating that "even sophisticated purchasers can be confused by very similar marks"). In any event, we find that the similarity between the marks and the partial identity of the goods sold thereunder outweigh any purportedly careful purchasing decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss*

Associates, Inc. v. HRL Associates, Inc., 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

In the present application, Applicant claimed ownership of three registrations for the marks ULTRA STACK DIAMOND, ULTRA STACK BISON and ULTRA STACK MERMAID, all for gaming machines and related goods. Further, the record includes evidence that Applicant owns a total of twelve live U.S. registrations of ULTRA STACK formative marks, all for a variety of gaming machines and devices. To the extent that any portion of Applicant's arguments may be construed in the context of a family of marks, although we have considered this evidence, it is not persuasive of a different result in the present case. *See In re Cynosure Inc.*, 90 USPQ2d 1644, 1646 (TTAB 2009) ("In an ex parte appeal, the focus of the likelihood-of-confusion analysis must be the mark applicant seeks to register, not other marks applicant may have used or registered. In other words, a family-of-marks argument is not available to an applicant seeking to overcome a likelihood-of-confusion refusal."); *In re U.S. Plywood-Champion Papers, Inc.*, 175 USPQ 445, 446 (TTAB 1972) ("Applicant's ownership and registration of marks other than the mark sought to be registered herein is immaterial and irrelevant to the specific issue before us, and cannot justify the registration of what could be a confusingly similar mark." (citations omitted)). *See also In re Shinnecock Smoke Shop*, 571 F.3d 1171, 91 USPQ2d 1218, 1221 (Fed. Cir. 2009) ("Applicant's allegations regarding similar marks are irrelevant because each application must be considered on its own merits."); *In re Nett Designs, Inc.*, 236 F.3d

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1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”).

We conclude that purchasers familiar with Registrant’s “gaming machines, namely, devices which accept a wager” sold under the mark POSEIDON would be likely to mistakenly believe, upon encountering Applicant’s mark ULTRA STACK POSEIDON for “gaming machines; gaming machines with multi-terminals; home video game machines; magnetic card operated arcade video game machines; arcade video game machines with multi-terminals; arcade video game machines; slot machines; coin-operated arcade video game machines; hand-held games with liquid crystal displays,” that the goods originated from or are associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.