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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Island Grove Winery, LLC

Serial No. 85036344

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Island Grove Winery, LLC.

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(John Lincoski, Managing Attorney).

Before Quinn, Grendel and Kuczma,
Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Island Grove Winery, LLC filed, on May 12, 2010, an intent-
to-use application to register the mark ISLAND GROVE WINE
COMPANY (in standard characters) (WINE COMPANY disclaimed) for
"wine" (in International Class 33).

The 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 ISLAND GROVE (in
standard characters) for "dipping sauces; hot sauce; marinades;

salsa; sauces" (in International Class 30)¹ as to be likely to cause confusion.

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

Applicant argues that the marks are different, and that the goods, comprising alcoholic beverages and condiments, differ in functionality, are not complementary, and travel in different trade channels. Applicant also points to its targeted customers, namely wine drinkers who, according to applicant, are more sophisticated than average consumers. Applicant submitted copies of third-party registrations, and an excerpt of its website and product brochure.

The examining attorney maintains that the marks are nearly identical and the goods are closely related. In support of the refusal the examining attorney introduced copies of several third-party registrations, as well as excerpts of third-party websites, to show that the goods are related.

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

¹ Registration No. 3586515, issued March 10, 2009.

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 direct our attention to the *du Pont* factor of the similarity/dissimilarity between the marks. We must compare the marks in their entirety as to appearance, sound, connotation and commercial impression to determine the similarity or dissimilarity between them. *Palm Bay Imports, 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.

It is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the

marks in their entirety."). With respect to applicant's mark, the descriptive/generic words WINE COMPANY have been disclaimed; clearly that portion of the mark plays a subordinate role to the distinctive first portion, ISLAND GROVE and, thus, we have given less weight to the descriptive/generic portion. See *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (disclaimed word "café" is less significant when comparing marks). Further, purchasers in general are inclined to focus on the first word or portion in a trademark, especially where the first portion is followed by a highly descriptive or generic term (as is the case of WINE COMPANY). *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.

The dominant portion, ISLAND GROVE, of applicant's mark is identical to the entirety of registrant's mark in sound, appearance and meaning. Applicant has adopted the entirety of registrant's mark and merely added the highly descriptive or generic designation WINE COMPANY to it. This addition falls far short in sufficiently distinguishing the two marks. See, e.g., *In re Computer Sys. Ctr. Inc.*, 5 USPQ2d 1378, 1381 (TTAB 1987) (holding CSC ADVANCED BUSINESS SYSTEMS for retail computer store

services and computer maintenance and repair services in connection therewith, and CSC for various computer-related services, likely to cause confusion, noting that "the inclusion of 'ADVANCED BUSINESS SYSTEMS' as a feature of applicant's mark is not likely to help customers...distinguish the source of each party's service"); and *In re Equitable Bancorporation*, 229 USPQ 709, 711 (TTAB 1986) (holding RESPONSE and RESPONSE CARD (CARD disclaimed), both for banking services, likely to cause confusion, noting that "the addition of descriptive matter to one of two otherwise similar, nondescriptive marks will not serve to avoid a likelihood of confusion").

In discussing the dominant portion of the marks, we recognize, of course, that the marks ultimately must be compared in their entireties. When this comparison is made, we find that the marks ISLAND GROVE and ISLAND GROVE WINE COMPANY are similar in sound, appearance and meaning. Because of the similarities between the marks, the marks engender similar overall commercial impressions. The similarity between the marks weighs in favor of a finding of likelihood of confusion.

We next turn to consider the second *du Pont* factor regarding the similarity/dissimilarity between the goods. It is well settled that the goods of the parties need not be identical or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. It is

sufficient that the respective goods of the parties 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 originate from the same source.

See Hilson Research, Inc. v. Society for Human Resource Management, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). The issue, of course, is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of the goods. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984). We acknowledge that there is no *per se* rule requiring a finding of likelihood of confusion when both types of goods are food (and/or beverage) items. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 927, 198 USPQ 151 (CCPA 1978).

With respect to the relatedness of the goods, the examining attorney introduced several use-based third-party registrations, each showing a single mark registered for both types of goods involved herein. "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).

The examining attorney also submitted printouts of excerpts from several third-party websites showing that the same retailer (mostly wineries) sells both types of goods, namely wines and sauces, under the same mark.

The examining attorney's evidence persuades us that the goods are sufficiently related. In an effort to discount this evidence, applicant submitted two third-party registrations to show that "many companies have registered the same mark on a wide variety of goods." (Brief, p. 12). In this connection, applicant points to the fact that, for example, COCA-COLA is registered for both syrups and board games, goods which, applicant asserts, are not related for purposes of likelihood of confusion. Suffice it to say that none of the third-party marks relied upon by the examining attorney is in the same category as the COCA-COLA mark under which such a wide variety of goods would be marketed.

Insofar as the trade channels and classes of purchasers are concerned, 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). As shown by the examining attorney's evidence, these trade channels for wines and sauces would include wineries. Further, these goods would be purchased by the same classes of purchasers, including ordinary consumers. Because of the relatively inexpensive nature of wines and sauces,² and the fact that such food and beverage items 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.").

Applicant's claim that its customers are sophisticated is not supported by any evidence. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001) (no evidence from which to conclude that wine in general is necessarily expensive or that purchasers of wine are necessarily sophisticated); and *In re Bercut-Vandervoort & Co.*, 229 USPQ 763 (TTAB 1986) (rejecting

² Applicant's "wine" is not limited to any specific price point, so we must presume that it includes relatively inexpensive wine.

the applicant's arguments regarding the high cost and quality of its wine and sophistication of its purchasers, where application identified goods merely as "wine"). Even assuming that consumers of applicant's wine are sophisticated in making their purchasing decisions, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving similar marks and related goods. See *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers...are not infallible."). See also *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988). We find that the similarities between the marks and the goods sold thereunder outweigh any sophisticated 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).

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

Applicant's claim that there has been no actual confusion, despite over fifteen years of contemporaneous use, is entitled to little probative value. See *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) ("uncorroborated statements of no known instances of actual confusion are of little evidentiary value"). See also *In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965), especially in an *ex parte* context. Moreover, the record is devoid of any evidence relating to the extent of use of applicant's and registrant's marks (e.g., sales volume) and, thus, whether there have been meaningful opportunities for instances of actual confusion to have occurred in the marketplace. The fact that both have headquarters in the same state does not establish this fact. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Accordingly, the *du Pont* factor of the length of time during and conditions under

which there has been contemporaneous use without evidence of actual confusion is considered neutral.

In sum, the relevant *du Pont* factors weigh in favor of affirming the refusal. We conclude that consumers familiar with registrant's sauces sold under the mark ISLAND GROVE would be likely to believe, upon encountering applicant's mark ISLAND GROVE WINE COMPANY for wine, that the goods originated with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.