

**THIS OPINION IS NOT A
PRECEDENT OF THE TTAB**

Mailed: May 8, 2012

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re 24/7 Eats, LLC

Serial No. 85066363

Michael A. Cornman of Ladas & Parry, LLC for 24/7 Eats, LLC

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Before Kuhlke, Wellington and Lykos, Administrative Trademark
Judges.

Opinion by Lykos, Administrative Trademark Judge:

24/7 Eats, LLC ("applicant") filed an application to
register the mark THE HIGHLINER in standard character format for
"restaurant services" in International Class 43.¹

The Trademark Examining Attorney refused registration of
applicant's mark under Section 2(d) of the Trademark Act of
1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark
so resembles the registered mark HIGHLINER COFFEE CO also in
standard character format for "cafe services; and carryout
restaurant services featuring coffee, candy and baked goods" in

International Class 42,² that when used on or in connection with applicant's identified services, it is likely to cause confusion or mistake or to deceive.

For the reasons discussed herein, the Board affirms the refusal to register.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a 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 USPQ2d 1201, 1203 (Fed. Cir. 2003). We discuss each of the *du Pont* factors as to which applicant or the examining attorney submitted argument or evidence or which we deem relevant.

Applicant in its appeal brief has focused primarily on the first *du Pont* factor - the appearance, sound, connotation and commercial impression of the marks. Before discussing this factor, however, we will briefly address applicant's argument regarding the relatedness of the parties' services. Applicant contends that the respective services are "distinct"

¹ Application Serial No. 85066363, filed June 18, 2010, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

² Registration No. 2575762, issued June 4, 2002, under Section 1(a) of the Trademark Act, claiming dates of first use and first use in commerce on February 1, 1999; Sections 8 and 15 affidavits acknowledged and accepted; renewed. The terms COFFEE CO are disclaimed.

(Applicant's Brief, p. 4) because they fall in two separate international classes.

The fact that the services fall in different international classes does not affect the likelihood of confusion analysis. The language in the recitation of services, not classification, controls our analysis. In this particular instance, the difference in classification of applicant's and registrant's services reflects the creation of a new International Class 43 to encompass restaurant services upon implementation of the Eighth Edition of the Nice Agreement on January 1, 2002. As such, registrant's services identified as "carryout restaurant services featuring coffee, candy and baked goods" are encompassed by applicant's more broadly identified and unrestricted provision of "restaurant services" such that they are legally identical. See *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1646 (TTAB 2008). Moreover, because the services are legally identical and unrestricted, they are presumed to move in the same channels of trade and to be sold to the same classes of consumers. See *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). See also *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992) (because there are no limitations as to channels of trade or classes of purchasers in either the

application or the cited registration, it is presumed that the services in the registration and the application move in all channels of trade normal for those services, and that the services are available to all classes of purchasers for the listed services). For these reasons, we find that the second and third *du Pont* factors weigh in favor of finding a likelihood of confusion.

Turning now to the first *du Pont* factor, the question 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 their entirety that confusion as to the source of the goods or services 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. *In re Jack B. Binion*, 93 USPQ2d 1531 (TTAB 2009); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant argues that the marks at issue are "strikingly disparate in meaning" and that this alone is sufficient to avoid a likelihood of confusion. Applicant's Brief, p. 3. More specifically, applicant contends that its mark THE HIGHLINER refers to "a 'thing' of some sort" by virtue of the inclusion of the word 'THE'" whereas registrant's mark HIGHLINER COFFEE CO instead refers to a "'company' in general and 'coffee company'

in particular." *Id.* Applicant further maintains that "a 'highliner' is not a 'company'" and that consumers familiar with High Line Park in the Chelsea neighborhood of New York City where applicant's restaurant is located would associate applicant's mark with that park. *Id.* By contrast, applicant contends that the term "highliner" as used in registrant's mark has the connotation of an Alaskan fishing vessel. See Request for Reconsideration, Exhibit A.

Applicant places a great deal of significance on the addition of the term "THE" in applicant's mark as engendering a distinct commercial impression when considered in relation to applicant's recited services. In making this argument, applicant relies on the following discussion from *In re MicroStrategy Incorporated*, Application Serial Nos. 75666992 and 75666993 (TTAB 2002), a non-precedential decision, involving applications to register the mark THE INTELLIGENCE COMPANY:

We find that, considering the mark in its entirety, it is not merely descriptive. Clearly, the terms "The" and "Company" have little or no trademark significance alone. However, THE INTELLIGENCE COMPANY, when considered in connection with applicant's identified goods and services, connotes a company with intelligence, i.e., defined as "the ability to learn or understand or to deal with new or trying situations." At most, it is suggestive of the purported qualities of its employees or the skill with which applicant renders its services, or suggestive of the quality of applicant's software.

Applicant uses this logic to argue that here the term "THE" connotes something "not immediately generic ...relating to *inter alia* (1) the High Line park, a recently opened park in the same neighborhood where Applicant has in fact now opened a restaurant; (2) an inhabitant or promoter of the High Line park; ..." Applicant's Brief, p. 7. Aside from the fact that non-precedential opinions are not binding upon the Board, this case is inapposite since it involved a descriptiveness refusal. Moreover, the analysis used by the Board in that decision provides little guidance regarding how to define the commercial impression of applicant's mark.

Applicant also relies on another non-precedential decision, *Star Networks, Inc., v. Sprint Communications Co. L.P.*, Cancellation. No. 22,034 and Opposition. No. 99,949 (TTAB 2001), for the proposition that the term "THE" is capable of distinguishing a mark. Applicant further points to *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1245, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) where the term "THE" was found to add "source-identifying significance" to the mark since consumers referred to applicant's RITZ mark as "The Ritz." In support thereof, applicant maintains that its mark THE HIGHLINER "relates to [a]pplicant's particular, singular and superior restaurant services" apart from other New York

entities incorporating the term "highline." Applicant's Brief, p. 8.

Both decisions, however, stand in contrast to the general principle that when comparing marks, the inclusion of the term "the" at the beginning of one of the marks will generally not affect or otherwise diminish the overall similarity between the marks. See *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009) (finding WAVE and THE WAVE "virtually identical" marks; "[t]he addition of the word 'The' at the beginning of the registered mark does not have any trademark significance."); *In re Narwood Prods. Inc.*, 223 USPQ 1034, 1034 (TTAB 1984) (finding THE MUSIC MAKERS and MUSIC-MAKERS "virtually identical" marks; the inclusion of the definite article "the" is "insignificant in determining likelihood of confusion"); *Dog House, Inc. v. Dawg House, Inc.*, 138 USPQ 466, 467 (TTAB 1963) (finding DAWG HOUSE and design and THE DOG HOUSE and design to be "substantially similar" marks). As previously stated by the Board in *United States National Bank of Oregon v. Midwest Savings and Loan Association*, 194 USPQ 232, 236 (TTAB 1977):

The definite article 'THE' likewise adds little distinguishing matter because the definite article most generally serves as a means to refer to a particular business entity or activity or division thereof, and it would be a natural tendency of customers in referring to opposer's services under the mark in question to utilize the article 'THE' in front of 'U-BANK' in view of their

uncertain memory or recollection of the many marks that they encounter in their everyday excursion into the marketplace.

Accord Jay-Zee, Inc. v. Hartfield-Zodys, Inc., 207 USPQ 269 (TTAB 1980) ("Since the psychological and marketing impact of petitioner's mark in its earlier version clearly was derived from the word 'IMAGE,' the omission of the word 'THE' (the definite article serving merely to emphasize 'IMAGE') from the later version did not interrupt the continuity of use"); *Bank of Am. Nat'l Trust & Savings Ass'n v. First Nat'l Bank of Allentown*, 220 USPQ 892, 896 (TTAB 1984) (finding TIMESAVER and THE TIMESAVER STATEMENT to be "confusingly similar" marks). In addition, we find that the applicant has not demonstrated that the word "THE" as used in applicant's mark has "elevated significance because of the well-known manner in which people refer to" applicant's restaurant services. *See Shen Mfg. Co. v. Ritz Hotel Ltd.*, 73 USPQ2d at 1356. While other entities in New York may incorporate the term "highline," this does not necessarily lead to the conclusion that applicant's own services have garnered a superior level of perception from consumers.

Next we address applicant's contention that because the word "highliner" has multiple meanings, the disclaimed matter "COFFEE CO" in registrant's mark is of equal importance. Relying on evidence from applicant's website showing the depiction of a fishing vessel, applicant maintains that the term

HIGHLINER in registrant's mark relates to fishing whereas applicant's mark connotes High Line Park in New York city. Applicant therefore maintains that "COFFEE CO" holds source identifying significance such that the commercial impression of the marks is distinct.

Disclaimed matter is typically less significant or less dominant when comparing marks. See *In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985). That is not to say that the disclaimed matter "COFFEE CO" in registrant's mark has been given no consideration. We find that the term HIGHLINER in registrant's mark is the dominant term because the phrase "COFFEE CO" has no other meaning other than describing the type of restaurant services provided - a café featuring coffee. Thus, the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

Considering all of the evidence of record, we conclude that the marks are similar in sight, sound, appearance and commercial impression, and that applicant's services, as identified, are legally equivalent to registrant's services such that they must be presumed to be sold through the same channels of trade to the same classes of purchasers. To the extent that there are any other relevant *du Pont* factors, we treat them as neutral.

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Weighing all of the relevant factors, we find a likelihood of confusion between applicant's mark and the cited registration.

Decision: The refusal to register pursuant to Section 2(d) is affirmed.