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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Annabelle's Natural Ice Cream & Yogurt, Inc.

Serial No. 85152285

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101 (Ronald R. Sussman, Managing Attorney).

Before Grendel, Bergsman, and Wolfson, Administrative
Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Annabelle's Natural Ice Cream & Yogurt, Inc.
filed, on October 14, 2010, an application to register the
mark shown below for "ice cream" in International Class 30.



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Applicant has disclaimed "NATURAL ICE CREAM" apart from the mark as shown. Applicant asserts June 10, 1982, as the date of first use of the mark in commerce.

The trademark examining attorney has refused registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), having determined that registration would lead to a likelihood of confusion in view of Reg. No. 1579285 for the mark ANNABELLE'S for "confectionery, namely candy" in International Class 30.¹

When the refusal was made final, applicant appealed. The appeal has been fully briefed. We affirm.

I. Evidentiary Issue

Initially, we note that the trademark examining attorney has introduced copies of Internet web pages from the following websites:

http://www.dovechocolate.com/products_chocolate_p1.html

<http://www.m-ms.com/us/about/products/icecream/>

<http://www.m-ms.com/us/about/products/milkchocolatemms/>

<http://www.weightwatchers.com/shop/categoryshowcase.aspx?pageid=10564617navid-moreww>

These websites (dovechocolate.com, m-ms.com, and weightwatchers.com) display candy, chocolate and ice cream food items. With respect to the first three websites,

¹ Registered January 23, 1990; Section 8 (10-year) accepted; Section 9 granted; renewed.

applicant argues that because the companies that sell these goods--"Nestle" and "Mars"²--also sell goods that are clearly unrelated to candy or ice cream (respectively, "baby food, dog food, frozen pizzas, etc." and "dog and cat food, rice, tea, etc."³) there is no basis for finding candy and ice cream to be related. The trademark examining attorney objects to applicant's argument on the ground that "this evidence...is not of record and cannot be verified."⁴

Suffice it to say that assertions in briefs are not recognized as evidence. *In re Simulations Publications, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975); *In re Vesoyuzny Ordena Trudovogo Krasnogo Znameni*, 219 USPQ 69, 70 (TTAB 1983). See also *Spin Physics, Inc. v. Matsushita Electric Co.*, 168 USPQ 605, 607 (TTAB 1970) (the arguments and opinion of counsel are insufficient to overcome the facts). We decline to strike applicant's arguments, and simply consider the facts as they are shown by the record regarding the goods and/or services offered by Nestle and Mars.

As for the evidence from weightwatchers.com, applicant argues that "The 'WeightWaters' [sic] program offers just about every edible thing known to the American consumer,

² *Applicant's Brief*, p. 5.

³ *Id.*

including such diverse products as chicken, rice, cakes, (see for example the box in the upper left hand corner of each website page)."⁵ Again, the trademark examining attorney objects to this "evidence" as not being of record, but it is merely argument to be accorded whatever weight it deserves. In this case, we note that the "box in the upper left hand corner" shows that Weight Watchers offers, at the least, "sweet baked goods and candies," "chilled ready meals," dairy products such as "ice cream bars," "Smart Ones," "breads," "scales," and other "endorsed products."

II. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on a likelihood of confusion. See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); see also *Palm Bay Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind

⁴ Trademark Examining Attorney's Brief, p. 5 (unnumbered).

⁵ Applicant's Brief, p. 6.

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that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

III. Discussion

A. Similarity or Dissimilarity of the Marks in Their Entireties

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. In comparing the marks, the test 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 so that confusion as to the source of those goods or services offered under the respective marks is likely to result. *Coach Services Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438

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(TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). In this case, the average purchaser is a general consumer who purchases ice cream and/or candy.

Applicant's mark ANNABELLE'S NATURAL ICE CREAM and design incorporates registrant's entire mark ANNABELLE'S. While the mere fact that the marks share this common element does not compel us to find that the marks are similar, it is a factor in comparing the overall commercial impressions engendered by the marks as perceived by consumers. Likelihood of confusion has frequently been found where one mark incorporates the entirety of another mark. *Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL for gin and BENGAL LANCER for nonalcoholic club soda, quinine water and ginger ale); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUG for toy doll carriages and LITTLE LADY for doll clothing).

The term "Annabelle's" is the dominant portion of applicant's mark because the words "ice cream" and "natural" are descriptive, if not generic, when used in

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connection with ice cream, and the design, being of a girl, an ice cream cone, and a cow, reinforces the impression of ice cream made by a person (real or fictional) named "Annabelle." It is a well-established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, 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 a consideration of the marks in their entireties. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Further, as ice cream is a consumer product that is often ordered at specialty stores where the consumer selects the particular flavor he or she desires, it is the name ANNABELLE'S by which applicant's natural ice cream will be called for and referred to, and it is therefore the name ANNABELLE'S which has the stronger source-identifying significance and will be most likely remembered. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) ("[I]f one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods

or services."). Consumers are likely to sound out applicant's mark as ANNABELLE'S.

Applicant argues that the design of the cow in applicant's mark is incongruous with candy, and that the words "ice cream" in applicant's mark helps consumers to distinguish the goods, unlike "a descriptive term such as 'yummy', which may be equally applicable to both candy and ice cream."⁶ As to any perceived incongruity in the design, we disagree with applicant's conclusion. The cow depicted in the design suggests milk, an ingredient used in both ice cream and confectionery such as caramel, a "chewy candy made from milk, butter, and sugar".⁷

Applicant cites to *In re Farmfresh Catfish Co.*, 231 USPQ 495 (TTAB 1986), in support of its argument that the presence of the words "ice cream" overcomes a likelihood of confusion. In that case, the applicant successfully registered the mark CATFISH BOBBERS for "fish" over the mark BOBBER for "restaurant services." However, the Board did not base its reversal on the presence of the word

⁶ *Applicant's Brief*, p. 8.

⁷ *Academic Press Dictionary of Science and Technology* (1992). Retrieved from <http://www.credoreference.com/entry/apdst/caramel>. The Board may take judicial notice of dictionary definitions, including definitions or entries from references that are the electronic equivalent of a print reference work. See *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed.

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"catfish" in that mark but rather on the fact that "catfish bobber" was suggestive of the nugget, bob-like shape of the applicant's goods (a "bob" is a type of fishing float), while "bobber" was arbitrary with respect to restaurant services. Likewise, applicant's reliance on *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477 (TTAB 1987) is misplaced. In that case, applicant successfully registered STEVE'S and design (of dancing hot dogs) for "restaurant services" over a registration for the mark STEVE'S for "ice cream for consumption on or off the premises." While acknowledging that the marks were distinguishable because of the design portion of applicant's mark, the Board also relied upon the fact that numerous third-party businesses used "Steve's" or a related term as all or part of their trade names in related fields, resulting in a purchasing public that was conditioned to distinguish between these businesses based on small distinctions between the marks. Here, we have no such evidence.

Applicant's mark ANNABELLE'S NATURAL ICE CREAM and design is substantially similar to registrant's mark ANNABELLE'S because consumers will not place any source-


Cir. 1983); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 n.1 (TTAB 2009); *see also* TBMP § 1208.04 (3d ed. 2011).

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indicating value on the terms "natural" or "ice cream"; they will associate the design with the name "Annabelle's"; and ANNABELLE'S is the dominant portion of the mark. Consumers are likely to perceive ANNABELLE'S NATURAL ICE CREAM and design as the ice cream line of ANNABELLE'S products. This *du Pont* factor favors a finding of likelihood of confusion.

B. Similarity or Dissimilarity of the Parties' Goods



Applicant uses its mark  on "ice cream." Registrant's mark ANNABELLE'S has been registered for "confectionery, namely candy."

Consumers have come to recognize that these types of foods are often sold together under a single mark. To illustrate, the examining attorney provided copies of web pages from the following websites:

1. At www.wegmans.com, a visitor to the website will see an advertisement for ice cream bars sold under the mark SNICKERS as well as candy bars sold under the same mark; and an advertisement for vanilla ice cream sandwiches sold under the mark NESTLE as well as bell-shaped chocolates sold under the mark NESTLE CRUNCH JINGLES.

2. At www.dovechocolate.com, a visitor to the website will see "DOVE® PRODUCTS" followed by pictures of chocolate bars sold under the mark DOVE as well as ice cream containers and ice cream bars sold under the mark DOVE.
3. At www.m-ms.com, a visitor to the website will see "M&M'S BRAND ICE CREAM PRODUCTS" followed by pictures of the packaging for ice cream sandwiches, ice cream cones, and ice cream cake, as well as "M&M'S MILK CHOCOLATE" brand candies.

In addition, the trademark examining attorney has submitted copies of five third-party registrations that identify both "ice cream" and "candy" in the identification of goods. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Applicant argues that the small number of registrations found by the trademark examining attorney shows that these goods are rarely the subject of a single registration. However, while the number is small, they nonetheless tend to demonstrate the relatedness of the goods. Applicant further argues that the goods included in the registrations are not limited to candy and ice cream,

but include other goods that bear no relation to either candy or ice cream. Applicant also makes this argument with respect to the webpages submitted by the trademark examining attorney; applicant argues that the trademark examining attorney's "selective" copying of the website pages does not reveal the fact that Wegmans, on whose website the SNICKERS products were found, is a large, multi-dimensional grocery store that offers "literally tens of thousands of different products,"⁸ or that "Nestle" and "M&M's" offer goods other than ice cream and candy that are entirely unrelated thereto, such as dog food. Applicant's argument misses the point. The Wegmans website shows that SNICKERS sells both ice cream and candy under the SNICKERS mark. Moreover, that "Nestle" and "M&M's" may sell a wide variety of products does not negate the fact that those companies sell both ice cream and candy under the NESTLE and M&M marks.

Applicant's contention that ice cream or candy are unrelated goods is not supported by the record. The court's decision in *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978), cited by applicant for the holding that the mark ZINGERS for cakes is not confusingly similar to the mark RED ZINGER

⁸ *Appeal Brief*, p. 4.

for herb tea, turned as much on the court's finding that the term "zinger" was weak and that the marks were not confusingly similar, as it did on its finding that the Board had not committed reversible error in deciding that no "per se" rule exists that all food items are related goods. *Interstate Brands*, 198 USPQ at 152. In sum, the registrations and website evidence are probative to the extent they show consumers may encounter ice cream and candy under the same mark.

Based on the cited registrations and the evidence of record suggesting that both candy and ice cream may emanate from a single source, we find that applicant's ice cream is closely related to the goods "confectionery, namely candy," recited in the cited registration. This *du Pont* factor favors a finding of likelihood of confusion.

III. Applicant's Prior Registration

Applicant contends that the Office has already determined that there is no likelihood of confusion between its mark and the mark in the cited registration, because applicant owned a registration for the exact mark and goods that has since expired due to applicant's inadvertent failure to file a Section 8 affidavit or declaration. Applicant contends that the Office must show the presence of changed circumstances in order to deny registration to

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its mark at this time. The Office bears no such burden. Each case presents its own facts, and on this record we find confusion likely. While it is unfortunate that applicant's prior registration was not maintained, our precedent is clear; a cancelled or expired registration has no probative value other than to show that it once issued and is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. *In Re Ginc UK Limited*, 90 USPQ2d 1472, 1480 (TTAB 2007); *see also, In re Hunter Publishing Company*, 204 USPQ 957, 963 (TTAB 1979) (cancellation "destroys the Section [7(b)] presumptions and makes the question of registrability 'a new ball game' which must be predicated on current thought."); *Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("a cancelled registration does not provide constructive notice of anything."). Moreover, to the extent the cited registration was issued in error, we will not repeat the error by permitting a confusingly similar mark to register again. *See In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) ("The Board must decide each case on its own merits").

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IV. Conclusion

We have carefully considered the entire record, including all arguments and the evidence submitted. We find that the marks are similar and the goods are closely related. Use of applicant's mark in association with "ice cream" is likely to cause confusion with the mark in the cited registration.

Decision: The refusal to register under Trademark Act § 2(d) is affirmed.