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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

*In re Catherine Hawkins*

Serial No. 85587596

Matthew H. Swyers of The Trademark Company, PLLC for Catherine Hawkins.

Juhi Kaveeshvar Patel, Trademark Examining Attorney, Law Office 108 (Andrew Lawrence, Managing Attorney).

Before Bucher, Ritchie, and Hightower, Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

On April 3, 2012, applicant applied to register the stylized mark below:

**SWEETPEATOAD**

for “handmade hats and scarves” in International Class 25.<sup>1</sup>


The examining attorney refused registration on the ground of a likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), with the following marks, all for goods in International Class 25:

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<sup>1</sup> Application Serial No. 85587596, claiming first use on January 30, 2009 and first use in commerce on March 2, 2009.

- SWEET PEA for “clothing, namely, robes, gowns, camisole, bloomers, pettidresses, pinafores, jumpers, slips and dresses”;<sup>2</sup>
- SWEET PEA for “clothing articles for women, men, and children, namely, shirts, pants, belts, underwear, gloves, neckties, scarves, sweaters, caps and hats, wind-resistant jackets, and sport coats”;<sup>3</sup> and

The image shows a handwritten logo for 'sweet pea'. The word 'sweet' is written in a cursive, lowercase font, and 'pea' is written below it in a similar style, also in lowercase. There is a small dot at the end of 'pea'.

-  for “Women’s, men’s and children’s clothing, outerwear and accessories, namely, sport shirts, knit shirts, sweaters, trousers, overcoats, rain coats, leather coats, jackets, swimwear, loungewear, pajamas, robes, suits, sport coats, dress trousers, dress shirts, neckwear, scarves, belts, and shoes.”<sup>4</sup>

All three of the cited registrations are owned by the same entity. (Collectively, we refer herein to the three cited registered marks as the “cited SWEET PEA marks” or the “cited registrations.”)

Applicant timely appealed. Applicant and the examining attorney both filed appeal briefs.

### Analysis

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of 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 Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key

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<sup>2</sup> Registration No. 2118843, issued December 9, 1997, renewed.

<sup>3</sup> Registration No. 2855632, issued June 22, 2004, Combined Declaration of Use and Incontestability under Sections 8 & 15 of the Trademark Act accepted and acknowledged.

<sup>4</sup> Registration No. 3108392, issued June 27, 2006, Combined Declaration of Use and Incontestability under Sections 8 & 15 of the Trademark Act accepted and acknowledged.

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, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). A single *du Pont* factor may be dispositive in a particular case. *In re Majestic Distilling Co.*, 65 USPQ2d at 1204 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997)).

We turn first to the similarity of the goods and the channels of trade, the second and third *du Pont* factors, respectively. Applicant’s goods are “handmade hats and scarves.” The goods in cited Registration No. 2855632 include “scarves, sweaters, caps and hats,” while the goods in cited Registration No. 3108392 include “scarves.” Applicant’s handmade hats and scarves are a subset of the more broadly identified hats and scarves identified in these two cited registrations.

The examining attorney submitted evidence of third-party websites that show dresses, camisoles, and robes, all of which are among the types of clothing identified in cited Registration No. 2118843, offered for sale alongside and under the same mark as hats and scarves.<sup>5</sup> The examining attorney also made of record numerous third-party registrations demonstrating the relatedness of the goods. *See, e.g.*, Registration No. 4195463 (hats, scarves, gowns, camisoles, and dresses), Registration No. 4073839 (hats, scarves, robes, and dresses), and Registration

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<sup>5</sup> *See, e.g.*, July 18, 2012 Office action, at 8-15 (scarves, hats, and dresses offered on same site under mark BANANA REPUBLIC), 19-23 and 29-30 (camisoles and scarves offered on same site under mark THE LIMITED), and 36-41 (robes, scarves, and hats offered on same site under mark VICTORIA’S SECRET).

No. 4192888 (hats, scarves, and dresses).<sup>6</sup> 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, 1786 (TTAB 1993).

Accordingly, we find the goods in the application and each of the cited registrations to be identical in part and otherwise related. Because the goods described in the application and the cited registrations are identical in part, we presume that the channels of trade and classes of purchasers are the same. *See Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) (“Given the in-part identical and in-part related nature of the parties’ goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade.”). In our likelihood of confusion analysis, these findings under the second and third *du Pont* factors support a finding of likely confusion.

We next consider the *du Pont* likelihood of confusion factor focusing on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression.” *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In comparing the marks, we are mindful that 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

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<sup>6</sup> August 28, 2012 final Office action, at 39-47.

in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Elects. Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992).

Both applicant's mark and the cited registrations share the initial phrase "sweet pea," the name of a widely cultivated flower.<sup>7</sup> We note at the outset that the low degree of stylization in applicant's mark, including the omission of spaces between the words, is insufficient to distinguish **SWEETPEATOAD** from the cited SWEET PEA marks.

However, we find that the additional word "toad" in applicant's mark does significantly distinguish the meaning of applicant's mark from that of the cited registrations. There is no record evidence connecting toads with sweet peas and thus reinforcing the impression created by that term. In fact, due to its unglamorous connotations, we find the contrast created by the juxtaposition of the word "toad" with the name of a flower to create a significantly different commercial impression from the cited registrations, which include no literal elements other than SWEET PEA.

Nor is there evidence of any other marks incorporating the term "toad" in association with clothing. In this context, we find this to be an arbitrary term that is inherently distinctive. Because the word "toad" has no laudatory, descriptive or

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<sup>7</sup> See dictionary definition attached to August 28, 2012 final Office action at 73.

even suggestive significance when used in connection with clothing, we find that consumers are not at all likely to view applicant's **SWEETPEATOAD** goods as a line extension of goods sold under the cited SWEET PEA marks.

This distinguishes the marks in this case from several of the cases cited by the examining attorney in which the addition of a word was held not to create a significantly different commercial impression.<sup>8</sup> For example, in *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004), applicant's mark was JOSE GASPAR GOLD for tequila and the cited registration was GASPAR'S ALE for beer and ale. Most relevant here, the added term "GOLD, in the context of tequila, describes either a characteristic of the good – its color – or a quality of the good commensurate with great value or merit." *Id.* at 1946. Similarly, in *SMS, Inc. v. Byn-Mar, Inc.*, 228 USPQ 219 (TTAB 1985), applicant applied to register the marks ALSO ANDREA and ANDREA SPORT for blouses, pants, skirts, and jackets, while the cited registered mark was ANDREA SIMONE for various items of women's clothing. The Board viewed the term "also" to suggest that applicant's goods were an additional line of women's apparel made or sponsored by the same source as the ANDREA SIMONE goods, while the disclaimed term "sport" suggested a line of sportswear from the same source. *Id.* at 220. Unlike "sport," the term "toad" has no known relationship to hats and scarves or to other types of clothing. *See also In re El Torito Rests. Inc.*, 9 USPQ2d 2002 (TTAB 1988) (holding MACHO COMBOS, with "combos" disclaimed, likely to be confused with **MACHO** for food items as

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<sup>8</sup> See examining attorney's brief at unnumbered pages 7-8.

a part of restaurant services). By contrast, on the record before us, there is no reason to believe that the word “TOAD” would be viewed as designating additional lines of clothing from the same source as the cited SWEET PEA marks.

Each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 139, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). In the case at bar, the mere fact that both marks contain the term “Sweet Pea” within them is not a sufficient basis for us to conclude that the marks are similar. Rather, we find that when these respective marks are considered in their entirety, the differences in the marks in appearance, sound and connotations far outweigh the points of similarity. Hence, considering the specific marks and goods before us, under the first *du Pont* factor, we find the overall commercial impression made by the mark **SWEETPEATOAD** to be sufficiently dissimilar from the cited SWEET PEA marks to render confusion unlikely even though the goods are in-part identical and in-part related. In this case, the dissimilarity of the marks is determinative. *See Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991).

*Decision:* The refusal to register is reversed.