

<p><b>This Opinion is Not a Precedent of the TTAB</b></p>
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Mailed: August 7, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Pacific Resorts Investments Limited*

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Serial No. 85668227

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for Pacific Resorts Investments Limited.

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Susan Hayash, Managing Attorney.

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Before Quinn, Bergsman and Masiello,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Pacific Resorts Investments Limited (“Applicant”) seeks registration on the  
Principal Register of the mark GINGER-EZE (in standard characters) for

Dietary herbal supplement containing ginger; tablet  
containing ginger to help with symptoms of motion  
sickness, nausea, and stomach queasiness; capsule  
containing ginger to help with symptoms of motion  
sickness, nausea, and stomach queasiness; dietary  
supplement containing ginger formulated for sublingual  
delivery to help with symptoms of motion sickness,

nausea, and stomach queasiness, in International Class 5.<sup>1</sup>

The Trademark Examining Attorney has 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 is likely to cause confusion with the previously registered mark GINGEASE, in standard character form, for "dietary and nutritional supplements," in Class 5.<sup>2</sup>

#### I. Preliminary Issue

Applicant attached evidence to its reply brief. Trademark Rule 2.142(d) provides that the record should be complete prior to the filing of an appeal:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

We will not treat the evidence attached to Applicant's reply brief as being of record if such evidence was not made of record during the prosecution of the application.

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<sup>1</sup> Application Serial No. 85668227 was filed on July 3, 2012, based upon applicant's allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. On November 18, 2013, Applicant filed an Amendment to Allege Use.

<sup>2</sup> Registration No. 3760792, issued March 16, 2010.

## II. Likelihood of Confusion

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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). 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, 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. Similarity or dissimilarity and nature of the goods; established, likely to continue channels of trade; and classes of consumers.

Because Registrant’s “dietary and nutritional supplements” have no limitations or restrictions, it is presumed that Registrant’s goods encompass all goods of the type described, move in all channels of trade normal for those goods, and that they are available to all classes of purchasers for those goods. *See Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Accordingly, Registrant’s dietary supplements encompass Applicant’s “dietary herbal supplement containing ginger” and “dietary supplement containing ginger formulated for sublingual delivery to help with symptoms of motion sickness, nausea, and stomach queasiness.” Thus,

the goods are in part legally identical for purposes of the likelihood of confusion analysis.

Because the goods described in the application and the cited registration are in part legally identical, we must presume that the channels of trade and classes of purchasers are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there 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). *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).

B. Similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that where, as here, the goods are in part legally identical, the degree of similarity 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*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

Moreover, “[t]he 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*, 101 USPQ2d at 1721. *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Applicant’s mark is GINGER-EZE and Registrant’s mark is GINGEASE. While the marks are not identical, they have the same meaning and engender the same commercial impression (*i.e.*, ease pain with ginger). In this regard, we note the following evidence:

1. The word “ease” is defined, *inter alia*, as “freedom from labor, pain or physical annoyance.”<sup>3</sup>

2. “Ging” is an abbreviation for “ginger.”<sup>4</sup>

3. Internet advertisements attached to the December 9, 2013 Office action. The following web pages are illustrative:

a. Ahalife.com advertising Applicant’s GINGER-EZE supplements “to ease nausea, relieve joint pain, ease migraines, reduce cold and flu symptoms.”

b. Vitaminshop.com advertising Lacto-Zyme Dairy-Eze as a “Soothing Herbal Relief Blend to ease occasional digestive discomforts and help strengthen overall digestion.”

c. AppleHealthFoods.net advertising Bell Labs Snoring & Sleep Apnea Eze to “[h]elp ease the suffering associated with snoring and sleep apnea.”

The marks sound similar because they both begin with “GING” as the first syllable, and the last syllable will be pronounced as “ēz.” In finding that the marks sound similar, we are aware that a trademark owner cannot control how its mark will be pronounced and, therefore, there is not necessarily one, correct pronunciation. *See StonCor Grp., Inc. v. Specialty Coatings, Inc.*, \_\_\_ F.3d \_\_\_, \_\_\_ USPQ2d \_\_\_, No. 2013-1448, slip op. at 6 (Fed. Cir. July 16, 2014) (“There is no correct pronunciation of a trademark that is not a recognized word.”), *citing In re*

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<sup>3</sup> **THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE** (Unabridged), p. 614 (2nd ed. 1987). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>4</sup> The Online Slang Dictionary (onlineslangdictionary.com) attached to the May 17, 2013 Office action.

*Belgrade Shoe Co.*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969) (while “there is no correct pronunciation of a trademark,” the court held that “one is very likely to pronounce ‘Collegienne’ as if it were spelled ‘Colleegen’ or ‘Colleejun.’”). Nevertheless, “absent evidence to the contrary, we must consider all of the possibilities that are reasonable, considering the nature of the goods and their purchasers.” *Henri I. Siegel Co., Inc. v. A & F Originals, Inc.*, 230 USPQ 530, 533 (TTAB 1985). Here we have ginger-based dietary supplements leading us to find that the simplest means of verbalizing the marks is the prefix syllable pronounced “Ging” as in “Ginger” and the suffixes “Ease” and “EZE” pronounced as “ēz,” emphasizing that the product will ease one’s pain.

Finally, while the marks are not identical, they are similar in appearance because they share the prefix syllable “Ging.”

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

C. Degree of consumer care.

Applicant argues that the purchase price and sophistication of the purchasers is relevant in the likelihood of confusion analysis. Applicant asserts the following:

Applicant’s GINGER-EZE product is a certified organic product; Registrant’s GINGEASE product is not. Applicant’s product sells at a significantly higher price point than Registrant’s product does. Applicant’s product is only sold in high-end stores authorized to distribute certified organic products or through organic product websites. As explained above, Registrant’s product is only sold at one location on the internet, and is not sold in high-end department stores or through organic product websites. The .6 oz glass jar of GINGER-EZE retails for

\$36.00 three times that of the bottle of 60-capsules of GINGEASE. Conversely, the product sold under the mark GINGEASE is a very reasonably priced product which is sold for only \$12.99 and as far as this applicant can ascertain is only sold via its own website. See Exhibit B, filed on November 18, 2013.

The 5.5 oz glass jar of GINGER-EZE retails for \$218.00, 16 times the cost of Registrant's 60-capsule bottle of GINGEASE. Applicant's GINGER-EZE product contains all natural rare pink Fijian ginger seed, which is proprietary and indigenous only to Applicant's Wakaya Island. GINGER-EZE is sold worldwide and is only purchased by very sophisticated purchasers. See Exhibit A, filed on November 18, 2013.<sup>5</sup>

We cannot resort to extrinsic evidence to restrict the nature of Applicant's and Registrant's goods (certified organic or not certified) or their prices when those characteristics are not reflected in the descriptions of goods. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

Even assuming that purchasers are sophisticated when it comes to their buying decisions, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as this involving similar marks and identical goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) ("Human memories even of discriminating purchasers...are not infallible.") (quoting *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970)). *See also In re Decombe*, 9 USPQ2d

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<sup>5</sup> Applicant's Brief, p. 7.

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, 1823 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1841-42 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). Thus, this factor is neutral.

D. The number and nature of similar marks in use on similar goods.

Applicant contends that there are numerous marks incorporating the word “Ginger” and that the USPTO database includes over 263 marks for words containing the word “Ginger,” including ten in Class 5.<sup>6</sup> However, Applicant did not submit any evidence to support its contention. To make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, prior to appeal. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1372-73 (TTAB 2006); *In re Ruffin Gaming*, 66 USPQ2d 1924, 1925 n.3 (TTAB 2002); TBMP §§ 710.03, 1208.02 (2014). As indicated above, we will not consider any evidence that was not made of record during the prosecution of the application. Accordingly, this factor is neutral.

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<sup>6</sup> Applicant’s Brief, p. 8.

E. Miscellaneous.

Applicant contends that we should follow the proposition that doubt should be resolved in favor of applicant as applied in descriptiveness cases.<sup>7</sup> See *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1144 (Fed. Cir. 1987); *In re Grand Metro. Foodservice, Inc.*, 30 USPQ2d 1974, 1976 (TTAB 1994); and *In re Women's Publ'g Co.*, 23 USPQ2d 1876, 1878 (TTAB 1992). However, our case law expressly provides that when the issue is likelihood of confusion, as it is in this appeal, doubt should be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). In this case, we have no doubt regarding the likelihood of confusion.

F. Balancing the factors.

In view of the facts that the marks are similar, the goods are in part identical and the presumption that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant's mark GINGER-EZE for "dietary herbal supplement containing ginger; tablet containing ginger to help with symptoms of motion sickness, nausea, and stomach queasiness; capsule containing ginger to help with symptoms of motion sickness, nausea, and stomach queasiness; dietary supplement containing ginger formulated for sublingual delivery to help with symptoms of motion sickness, nausea, and stomach

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<sup>7</sup> Applicant's Brief, p. 8.

queasiness” is likely to cause confusion with Registrant’s mark GINGEASE for “dietary and nutritional supplements.”

**Decision:** The refusal to register Applicant’s mark is affirmed.