

This Opinion is not a  
Precedent of the TTAB

Mailed: November 17, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re The Kitchen Cafe, LLC*  
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Serial No. 85969508  
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Nadya Davis, Scott S. Havlick, and Andrew Roppel of Holland & Hart LLP,  
for The Kitchen Cafe, LLC.

John S. Miranda, Trademark Examining Attorney, Law Office 120,<sup>1</sup>  
Michael W. Baird, Managing Attorney.

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Before Quinn, Ritchie, and Lykos,  
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

The Kitchen Cafe, LLC (“Applicant”) seeks registration on the Principal Register of the mark THE KITCHEN (in standard characters), for services identified as “restaurant services,” in International Class 43.<sup>2</sup>

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<sup>1</sup> The case was reassigned to this Trademark Examining Attorney after the appeal was filed.

<sup>2</sup> Application Serial No. 85969508 was filed on June 25, 2013, under Section 1(a) of the Trademark Act, alleging dates of first use in February 2004 and dates of first use in commerce on March 16, 2004, and claiming acquired distinctiveness of the mark in whole.

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), on the ground that Applicant's mark, when applied to the identified services, so resembles the previously registered mark, DA KITCHEN, also in standard character format, for, as relevant, "restaurant services; carry out restaurant services; catering services," in International Class 43,<sup>3</sup> as to be likely to cause confusion, mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

## I. Evidentiary Issues

Preliminarily, we note that the Examining Attorney objects to all evidence attached to Applicant's brief on the grounds that it was submitted for the first time on appeal. The record should be complete prior to the filing of an appeal. 37 C.F.R. § 2.142(d); TBMP § 1203.01 (June 2015). The objection is sustained and we have given the evidence no consideration in our analysis.<sup>4</sup>

## II. Applicable Law

Our determination of the issue of likelihood of confusion is based on an analysis of all 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). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed.

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<sup>3</sup> Registration No. 3792358, issued May 25, 2010, and disclaiming "kitchen."

<sup>4</sup> We note that inclusion thereof would not have affected our decision.

Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and 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). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which there were arguments and evidence. The others, we consider to be neutral.

#### Services/Channels of Trade

We consider first the *du Pont* factor of similarity or dissimilarity of the services. Applicant identifies “restaurant services.” This is identical-in-part, and thus legally identical to, the services identified in the cited registration, “restaurant services; carry out restaurant services; catering services.”

Because the services identified in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of purchasers are the same for those identical services. *See Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983); *see also In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) (“Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.”). Additionally, there is nothing in the identification of services in either the cited registration or the application that limits either Registrant’s or Applicant’s channels of trade. *See 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 goods listed in the registration and the application move in all channels of trade normal for those goods, and that the goods are available to all classes of purchasers for the goods). Accordingly, we find that these *du Pont* factors weigh heavily in favor of finding a likelihood of consumer confusion.

### The Marks

We note that when, as here, the services at issue are identical, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than if the services were not identical. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012) (citing *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992)). We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

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 in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *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.*,

No. 92-1086 (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 THE KITCHEN, whereas the mark in the cited registration is DA KITCHEN. The Examining Attorney argues that these marks are similar in sight, sound, and commercial impression, in that the first terms are quite similar and have the same meaning and the second terms are the same. In particular, the Examining Attorney asserts that the term "DA" is understood as a slang term for "the," which is the same as the first term as the mark in the cited registration. Applicant, on the other hand, argues that it would not be understood this way. Rather, Applicant argues that 1) "DA" has other meanings; 2) "DA" only means "the" if translated from Hawaiian pidgin or Hawaiian slang, which is not subject to the doctrine of foreign equivalents; 3) regardless, the term "DA" changes the overall commercial impression of the mark; 4) there is no evidence that consumers are likely to pronounce the marks identically; 5) the correct analysis is to compare KITCHEN (without "THE") and DA KITCHEN; and 6) Registrant has acknowledged that the cited mark is entitled to a narrow scope of protection, and that the mark in the cited registration would not be confused with the term "THE KITCHEN."

The Examining Attorney submitted numerous examples of slang dictionary definitions and third-party uses of the term “DA” as referring to the word “the.”

Some examples include the following:

The Online Slang Dictionary: da: “the” Go get da rake; That was da best song I ever heard.

October 3, 2013 Office Action, at 23; *Onlineslangdictionary.com*.

What does DA mean?

DA is “The” or “District Attorney” or “Dad”

October 3, 2013 Office Action, at 18; *InternetSlang.com*.

DA: THE for people who are to stupid to string all three letters together [sic]: *that is da bomb*; da 1. (Russian) Yes; 2. (slang) The.

October 3, 2013 Office Action, at 20; *urbandictionary.com*.

da: (*in the US, especially used in Chicago and New York*) *Eye dialect spelling of the. Da New York Times. Da Bears*. April 24, 2015

Denial of Request for Reconsideration, at 7; <http://en.wiktionary.org>.

USA Today; December 20, 2014; Only thing even Rahm Emanuel can’t fix: Da Bears: Chicago (AP) Rahm Emanuel traded Washington politics for the City of Big Shoulders because here, at least, he figured he could actually fix things. The Chicago Bears were not on his list.

April 24, 2015 Denial of Request for Reconsideration, at 30; *usatoday.com*.

How to Fake a Chicago Accent: Emphasize “D” sounds at the start of words and replace “th-“ sounds with “D”s. For example, “I was supposed to see the Bears play but I got stuck in traffic on the Dan Ryan” becomes: “I was supposed to see da Bears play but I got stuck in traffic on da Dan Ryan.” If talking fast try to blend in the “th” with a “d” sound.

April 24, 2015 Denial of Request for Reconsideration, at 57-58; *Wikihow.com*

We find that although “DA” may have other meanings, and while it may indeed also be Hawaiian pidgin, there is no need to consider those other meanings, or to invoke the doctrine of foreign equivalents. Rather, the obvious meaning in this context is clear. The mark DA KITCHEN gives the clear commercial impression of

“the kitchen.” It also has a very similar sound to the common pronunciation of “the,” with a soft “e.”

As to Applicant’s other arguments, we must consider the marks in their entirety. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d at 1692. Furthermore, while Registrant may indeed have argued against a prior citation of a mark for THE KITCHEN, and design as cited against its DA KITCHEN, we note that while arguing against the citation, Registrant at the same time pointed out that it had been abandoned,<sup>5</sup> which is illuminative of the “shade and tone” of the picture before us. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015), citing to *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978).

Finally, Applicant argues that the mark in the cited registration is weak and entitled to only a narrow scope of protection. Applicant cited in its brief to sixteen third-party registrations that were submitted into the record by the Examining Attorney with the October 3, 2013 Office Action and that include the term “KITCHEN” for restaurant services: KITCHEN, and design, Registration No. 3191490, and disclaiming “kitchen”; BROWN SUGAR KITCHEN, Registration No. 4089191, on the Supplemental Register, and disclaiming “kitchen”;

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<sup>5</sup> Applicant submitted into the record the Office Action and Response to Office Action from Registrant’s file. The Office Action noted the pending application for THE KITCHEN, and design as a possible Section 2(d) bar to registration, and the Response to Office Action argued against any likelihood of confusion therewith, while noting that the application had, in any regard, been abandoned.

CALIFORNIA CHUTNEY TANDOORI KITCHEN, Registration No. 4402012, on the Supplemental Register and disclaiming “Tandoori kitchen”; VILLA ITALIAN KITCHEN, Registration No. 4269655, and disclaiming “Italian kitchen”; O’S AMERICAN KITCHEN, Registration No. 4290216, and disclaiming “American kitchen”; YOUR WORLD KITCHEN, Registration No. 4325707, and disclaiming “kitchen”; RUSTIC KITCHEN, Registration No. 4253386, and disclaiming “kitchen”; VINE AMERICAN KITCHEN, Registration No. 4373470, and disclaiming “American kitchen”; ELEVEN14 KITCHEN, Registration No. 4257696, and disclaiming “kitchen”; KO JA KITCHEN, Registration No. 4312271, and disclaiming “kitchen”; TWISTED KITCHEN PASTA & NOODLE COMPANY, and design, Registration No. 4327564, and disclaiming “kitchen pasta & noodle company”; GLENN’S KITCHEN, Registration No. 4321204, and disclaiming “kitchen”; K-PAUL’S LOUISIANA KITCHEN, Registration No. 4360386, and disclaiming “Louisiana kitchen”; LEGACY KITCHEN, and design, Registration No. 4381324, and disclaiming “kitchen”; CROSBY’S KITCHEN, and design, Registration No. 4383590, and disclaiming “kitchen”; and BUTTERMILK KITCHEN, and design, Registration No. 4406269, and disclaiming “kitchen.”

The term “kitchen” is disclaimed in all of these registrations. It is also disclaimed in the cited registration, and Applicant claims acquired distinctiveness of the mark in whole, thereby acknowledging descriptiveness. *The Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F.3d 1352, 92 USPQ2d 1626, 1629 (Fed. Cir. 2009) (“where an applicant seeks registration on the basis of Section 2(f),



the mark's descriptiveness is a nonissue; an applicant's reliance on Section 2(f) during prosecution presumes that the mark is descriptive.") Accordingly, there is clear evidence of descriptiveness of the term "KITCHEN." *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. August 19, 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 115 USPQ2d at 1675.

That said, there is no evidence of commercial weakness of the mark in the cited registration. Furthermore, we find that Applicant's standard character mark at issue in this proceeding, THE KITCHEN, is more similar than any of the third-party registrations to the mark in the cited registration, DA KITCHEN, in sight, sound, meaning and commercial impression.

Accordingly, we find that the similarities in meaning and commercial impression outweigh differences in sight and sound, and that the first *du Pont* factor weighs in favor of finding a likelihood of confusion.

### III. Conclusion

In conclusion, considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find the services are in relevant part identical and would therefore travel through the same and similar channels of trade while the marks have the same meaning and commercial impression of "the kitchen," and are also similar in sound, which similarities outweigh slight differences between them. We further find that the weakness of the mark in the

cited registration does not overcome the similarities between the marks. Accordingly, we find a likelihood of confusion.

**Decision:** The Section 2(d) refusal to register Applicant's mark is affirmed.