

**This Opinion is Not a  
Precedent of the TTAB**

Mailed: January 29, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re DDMB Inc.*

—  
Serial No. 86312296

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Matthew R. Grothouse of Saper Law Offices, LLC,  
for DDMB Inc.

Shaunia Carlyle, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Kuhlke, Taylor and Wolfson,  
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

DDMB Inc. (“Applicant”) seeks registration on the Principal Register of the mark  
EMPORIUM ARCADE BAR and Design (as depicted below):



for “providing video and amusement arcade services” in International Class 41 and “bar services; bar services featuring snacks” in International Class 43.<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, when used in connection with Applicant’s services, so resembles the previously registered mark depicted below:



for “bar services; restaurant services” in International Class 43 as to be likely to cause confusion.<sup>2</sup> The Examining Attorney also refused registration on the ground that the terms “EMPORIUM” and “ARCADE BAR” in Applicant’s mark are merely descriptive and must be disclaimed. Trademark Act Section 6, 15 U.S.C. Section 1056. Applicant has agreed to disclaim “ARCADE BAR” but not “EMPORIUM.”

After the Examining Attorney made the refusals final, Applicant appealed to this Board. We affirm the refusal to register the mark absent an additional disclaimer of the word “Emporium,” but reverse the refusal under Section 2(d).

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<sup>1</sup> Application Serial No. 86312296 was filed on June 17, 2014, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as June 15, 2012.

<sup>2</sup> Reg. No. 4452032; registered December 17, 2013. The wording “EMPORIUM MUSIC BAR BOWLING EATERY” has been disclaimed.

## I. Disclaimer Requirement

We turn first to the requirement that Applicant disclaim the term “Emporium.” We note that the disclaimer requirement made in the first Office Action required separate disclaimers of “Emporium” and “Arcade Bar.” This format was repeated in the second Office Action. In response to the second Office Action, Applicant entered a disclaimer to “Arcade Bar” but maintained its objection to entering a disclaimer of “Emporium.” In the final Office Action, the Examining Attorney reiterated the requirement for a disclaimer of “Emporium,” but for the first time required that the term be combined with “Arcade Bar” as: “EMPORIUM ARCADE BAR.” Arguably, this raised a new requirement (particularly in the face of Applicant’s amendment disclaiming “Arcade Bar”), and should not have been the subject of a final Office Action. However, in the briefs, both Applicant and the Examining Attorney treat the disclaimer of “Emporium” as a separate requirement from the disclaimer of the wording “Arcade Bar.” Accordingly, and because the terms “Emporium” and “Arcade Bar” do not form a “grammatically or otherwise unitary expression” as contemplated by TMEP § 1213.08(a)(i), we treat the requirement as one for a statement that “No claim is made to the exclusive right to use EMPORIUM and ARCADE BAR apart from the mark as shown.” *See In re Grass*, 79 USPQ2d 1600, 1603 (TTAB 2006) (disclaimer of “SNAP ON 3000” reversed; disclaimer of “SNAP ON and 3000” accepted).

With this caveat in mind, we examine the term EMPORIUM as it relates to video and amusement arcade services and bar services.

Several dictionary definitions of EMPORIUM are in the record. One definition provided by Applicant is “a large retail store, especially one selling a great variety of articles.”<sup>3</sup> The Examining Attorney provided similar definitions: “a large store with a wide variety of things for sale”<sup>4</sup> and “a place of commerce; trading center; marketplace.”<sup>5</sup> Applicant also provided synonyms for the term: “market, marketplace, bazaar.”<sup>6</sup> The connotation of “emporium” thus includes attributes of size, variety of merchandise, and trading activity. Arcades and bars contain elements of these attributes.

An “arcade” is “an amusement center having coin-operated games.”<sup>7</sup> It is more fully defined as a “commercial establishment featuring an array of large mechanical or electronic games, such as pinball machines or video games, that charge players money before each game.”<sup>8</sup> An arcade is an emporium in the sense that it provides the visitor with multiple opportunities to play a variety of different video games.

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<sup>3</sup> At <http://dictionary.reference.com/browse/emporium>; attached to October 28, 2014 response to Office Action.

<sup>4</sup> At <http://www.yourdictionary.com>; attached to Final Office Action.

<sup>5</sup> *Id.*

<sup>6</sup> At <http://dictionary.reference.com/browse/emporium>; attached to October 28, 2014 response to Office Action.

<sup>7</sup> At <http://www.merriam-webster.com>; attached to Applicant’s Brief. 4 TTABVUE 62. Although submitted for the first time with Applicant’s brief, we 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. Cir. 1983); *In re Petroglyph Games, Inc.*, 91 USPQ2d 1332, 1334 n.1 (TTAB 2009).

<sup>8</sup> At <https://www.ahdictionary.com>, The American Heritage Dictionary of the English Language; attached to denial of Applicant’s request for reconsideration.

The term EMPORIUM is therefore descriptive of Applicant's video and amusement arcade services.

In addition, the term describes bar services. A bar is "a place where you go to buy and drink alcoholic drinks"<sup>9</sup> where different varieties of wine, beer, and spirits are offered for sale. A bar is an emporium in the sense that it is a retail outlet serving a variety of different alcoholic beverages. Applicant argues that even though it "operates an arcade bar"<sup>10</sup> where drinks are sold, it does not provide retail store services because its beverages are consumed on-premises, whereas retail stores sell merchandise "usually related to a certain theme and consumed or used off the premises."<sup>11</sup> In support, Applicant submitted Internet evidence consisting of several third-party vendors using the term EMPORIUM that offer products for use off-premises. There are two shoe stores: REGAL SHOE EMPORIUM<sup>12</sup> and BECK'S SHOE EMPORIUM,<sup>13</sup> and three golf stores: LARGO GOLF EMPORIUM,<sup>14</sup> which advertises itself as a "specialty shop" selling "golfing supplies," and two stores which each call themselves THE GOLF EMPORIUM (one located in Michigan<sup>15</sup> and the

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<sup>9</sup> At <http://www.macmillandictionary.com>; attached to denial of Applicant's request for reconsideration.

<sup>10</sup> Reply Brief, 7 TTABVUE 4.

<sup>11</sup> Applicant's Brief, 4 TTABVUE 10.

<sup>12</sup> At <http://www.regalshoemporium.com>; attached to Applicant's response to October 23, 2014 Office Action.

<sup>13</sup> *Id.*, at <http://www.yelp.com/biz/becks-shoe-emporium-sacramento>.

<sup>14</sup> *Id.*, at <http://www.visitstpeteclearwater.com/listings/1218/10>.

<sup>15</sup> *Id.*, at <http://www.thegolfemporium.com>.

other in Florida<sup>16</sup>) that sell sporting goods and athletic wear. There are also several wine or beer establishments that use EMPORIUM in their name: WINE & BEER EMPORIUM<sup>17</sup> of Pennsylvania advertises kits for making homebrewed beer and wine; the AHTESH EMPORIUM<sup>18</sup> in Maine advertises “fine wines, spirits and unique gift ideas” as well as “homemade infused olive oils” and “antiques”; and the HOMEBREW EMPORIUM<sup>19</sup> advertises the sale of supplies for making beer, wine, and cheese.

This evidence does not show that an establishment that sells goods for use or consumption on-premises may not be considered a retail outlet, or that the term “emporium” may not apply to such an establishment. The store in Michigan advertises that it provides a 40-acre practice facility, golf lessons and a golf “factory” (alterations, club fitting and repairs).<sup>20</sup> These take place “on-premises.” The Merriam-Webster dictionary definition provided by the Examining Attorney gives the following examples of “emporium” in connection with retail outlets: “a retail outlet <a hardware *emporium*> <a pizza *emporium*>”<sup>21</sup> -- a pizza emporium can serve pizza for consumption on-premises. Two third-party registrations including disclaimers to the word “EMPORIUM” submitted by the Examining Attorney support the finding that “emporium” is descriptive for retail establishments that

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<sup>16</sup> *Id.*, at <http://www.shopwellingtogreen.com>.

<sup>17</sup> *Id.*, at <http://www.winebeeremporium.com>.

<sup>18</sup> *Id.*, at <http://www.ahteshemporium.com>.

<sup>19</sup> *Id.*, at <https://beerbrew.com>.

<sup>20</sup> *Id.*, at <http://www.thegolfemporium.com>.

<sup>21</sup> At <http://www.merriam-webster.com>; attached to Office Action dated September 25, 2014.

serve food or beverages for consumption regardless of whether the drinks are to be consumed on or off-premises.<sup>22</sup> The distinction between sales of goods for use or consumption on- or off-premises is not a meaningful distinction.

Applicant argues that it is not using the term EMPORIUM to describe a commercial establishment because it uses “bar” or “arcade bar” for that purpose, which creates an “incongruous redundancy.”<sup>23</sup> Applicant’s argument fails because “emporium” does not overlap with “bar”; the two words are not synonyms. To call Applicant’s establishment an emporium arcade bar would not create an incongruous impression on potential consumers, but would still be descriptive of a bar that features a variety of video arcade games. Applicant further contends that “emporium” is arbitrary because it is used “as an adjective to modify the noun ‘bar.’”<sup>24</sup> Essentially, Applicant argues that because “bar” is generic for its services, “emporium” must be arbitrary. Applicant asserts: “In this context, the word “Emporium” is understood by consumers to mean something entirely arbitrary: the EMPORIUM brand of arcade bars.”<sup>25</sup> Clearly, the mere fact that a term precedes a generic term does not make it arbitrary. Moreover, the terms “emporium” and “arcade bar” do not form a unitary phrase as used in the mark but create separate

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<sup>22</sup> See Reg. No. 4394077 for the mark ALL ABOUT MAC A MACARONI AND CHEESE EMPORIUM for “restaurant services, namely, providing of food and beverages for consumption on and off the premises,” registered August 27, 2013 with a disclaimer of “MAC” and “MACARONI AND CHEESE EMPORIUM,” and Reg. No. 4461578 for the mark AN EPICUREAN EMPORIUM DEVOTED TO TASTE for the same recitation of services; registered January 7, 2014 with a disclaimer of “EPICUREAN EMPORIUM.” Submitted with the April 13, 2015 denial of Applicant’s request for reconsideration.

<sup>23</sup> Reply brief, 7 TTABVUE 6.

<sup>24</sup> Reply brief, 7 TTABUVE 7.

<sup>25</sup> Applicant’s Brief, 4 TTABVUE 13.

and distinct commercial impressions. The term “emporium” is not arbitrary in this context.

Our finding that EMPORIUM is descriptive of Applicant’s services is supported by evidence of third-party registrations for marks including the term for restaurant, catering, and bar services, wherein EMPORIUM has been disclaimed.<sup>26</sup> The purpose of a disclaimer is to permit the registration of a mark that is registrable as a whole but contains matter that would not be registrable standing alone, such as matter that is merely descriptive of the goods or services. We recognize that submission of such registrations does not establish a prevailing and binding USPTO practice; however, these registrations may be, and have been, given some weight to show the meaning of the term “emporium” in the same manner that a dictionary definition would be so used. *See Inst. Nat’l des Appellations D’Origine v. Vintners Int’l Co.*, 958 F.2d 1574, 22 USPQ2d 1190, 1196 (Fed. Cir. 1992) (disclaimer of “Chablis” as the common name for a type of wine); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (third-party registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (“Solutions” merely descriptive for computer hardware as shown by its disclaimer in numerous registrations). The following registrations are illustrative:

1. Reg. No. 2216510 for the mark THE FLYING SAUCER DRAUGHT EMPORIUM, registered with a disclaimer of

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<sup>26</sup> Registrations submitted by the Examining Attorney as attachments to October 23, 2014 Office Action.



DRAUGHT EMPORIUM for “restaurant and bar services”;<sup>27</sup>

2. Reg. No. 3304948 for the mark MCDADE’S EMPORIUM, registered on the Supplemental Register with a disclaimer of EMPORIUM for “restaurant and bar services”;<sup>28</sup>



3. Reg. No. 3355802 for the mark , registered with a disclaimer of “TRADEMARK” and “EMPORIUM & ICE CREAM SALOON” for “restaurant and bar services”;<sup>29</sup>

4. Reg. No. 2741163 for the mark THE FOOD EMPORIUM, registered under Section 2(f) with a claim of acquired distinctiveness and with a disclaimer of EMPORIUM for “retail grocery store and delicatessen services” and “catering and take-out delicatessen services”;<sup>30</sup>

5. Reg. No. 2352358 for the mark GARDEN EMPORIUM, registered with a disclaimer of EMPORIUM for “catering services and restaurant services”;<sup>31</sup>

6. Reg. No. 1803950 for the mark STAMPEDE MESQUITE GRILL & DANCE EMPORIUM, registered with a disclaimer of MESQUITE GRILL & DANCE EMPORIUM for “restaurant and nite club entertainment services”;<sup>32</sup> and

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<sup>27</sup> Registered January 5, 1999; renewed.

<sup>28</sup> Registered Oct. 02, 2007; Section 8 declaration accepted.


<sup>29</sup> Registered December 18, 2007; Sections 8 and 15 combined declaration accepted and acknowledged.

<sup>30</sup> Registered July 29, 2003, renewed.

<sup>31</sup> Registered May 23, 2000; renewed.

<sup>32</sup> Registered Nov. 09, 1993; renewed.



7. Reg. No. 4465705 for the mark , registered with a disclaimer of SANDWICH EMPORIUM for “catering services; restaurant services; take-out restaurant services.”<sup>33</sup>

Based on the above, we conclude that the term EMPORIUM is merely descriptive of Applicant’s video and amusement arcade services as well as its bar services and bar services featuring snacks, and a disclaimer of that term is necessary.

## II. Likelihood of Confusion

### A. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the 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., 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.”).

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<sup>33</sup> Registered January 14, 2014.

## B. Analysis

The first *du Pont* likelihood of confusion factor focuses on “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports 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). Because a comparison of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981). The “touchstone of this factor is consideration of the marks in total.” *Jack Wolfskin Ausrüstung Fur Draussen GmbH KGAA v. New Millennium Sports, S.L.U.*, 707 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015). Nonetheless, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *In re National Data*, 224 USPQ at 751 (“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 consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.”). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth*

*Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012). Disclaimed matter is often “less significant in creating the mark’s commercial impression.” *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001).

The Examining Attorney argues that the dominant portion of both Applicant’s and Registrant’s marks is the word EMPORIUM; that it is the “main name of the establishment with the various descriptive features of the location listed underneath;”<sup>34</sup> and that without any geographic (or presumably any other) wording within the mark to help distinguish the marks (the “THE” being insignificant and the other wording being descriptive of the services), the marks have very similar commercial impressions. The Examining Attorney also argues that the design features are subservient to the word portions of the marks and “even though all of the wording in the registrant’s mark has been disclaimed it is still entitled to protection from the applicant’s use of a very similar mark for closely related services.”<sup>35</sup>

Applicant argues that the visual and aural differences in the marks are striking, and that the dominant portion of the cited mark is the letter “E.” Applicant further argues that the term “emporium” in each mark is used differently: in the cited mark it is arguably the generic term for the establishment; in Applicant’s mark it is used as an adjective to modify Applicant’s arcade bar.<sup>36</sup> Finally, Applicant argues that

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<sup>34</sup> Examiner’s Statement, 6 TTABVUE 7.

<sup>35</sup> 6 TTABVUE 8.

<sup>36</sup> Reply brief, 7 TTABVUE 14.

given the disclaimer of all wording in the cited mark, it should be considered weak and entitled to a narrow scope of protection.

We agree with the Examining Attorney that the dominant literal portion of both the cited mark and Applicant's mark is the term EMPORIUM. The remaining wording is generic for the services. The word "THE" in the cited mark is insignificant. However, the very prominent design of a shield with stylized wings surrounding a central letter E in Registrant's mark immediately catches the eye and stands out as a significant feature of the mark.<sup>37</sup> Likewise, Applicant's mark employs a bold background design composed of black-and-white contrasting rectangles, solid circles, and unfilled-black circles that create a prominent impression.<sup>38</sup> The unique design features of the marks create very different commercial impressions. Coupled with the weakness of the wording in both marks, including the disclaimed term EMPORIUM, we find that the design features sufficiently distinguish the marks in their appearances and overall commercial impressions, despite the similarities in pronunciation and connotation of the literal portions of the marks, as to avoid a likelihood of confusion. *See, e.g., In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282, 1284 (TTAB 2009) (no confusion between

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<sup>37</sup> The description of the mark reads: "The mark consists of a shield with stylized wings. In the center of the shield is a stylized letter 'E' and just below the shield is the stylized text 'The'. Below 'The' is the stylized text 'Emporium' with a horizontal line below it. Below the line is the stylized text 'Music Bar Bowling Eatery' with a star between each word, totaling three stars."

<sup>38</sup> The description of the mark reads: "The mark consists of a standard rectangle with a white-colored upper half housing six equally-sized unfilled-black circles, each containing a different black letter spelling out 'EMPORIUM,' as well as a black-colored lower half rectangle that includes the white-lettered words 'Arcade' and 'Bar' and three sets of three white dots, one set before the word 'Arcade,' one set after the word 'Arcade,' and one set after the word 'Bar.'"

VOLTA for caffeine-infused vodka and TERZA VOLTA and design for wines); *Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1315 (TTAB 2005) (NORTON MCNAUGHTON ESSENTIALS not likely to cause confusion with opposer's highly suggestive mark ESSENTIALS); *Steve's Ice Cream v. Steve's Famous Hot Dogs*, 3 USPQ2d 1477, 1478-79 (TTAB 1987) (no confusion between mark STEVE'S and design of dancing hot dogs for restaurant services and STEVE'S in block letter form for selling ice cream).


Indeed, Applicant's mark is so different from the cited registered mark that confusion is unlikely, even though Applicant's and Registrant's services are in-part identical in that both recite "bar services." "No mechanical rule determines likelihood of confusion, and each case requires weighing of the facts and circumstances of the particular mark." *In Re Covalinski*, 113 USPQ2d 1166 (TTAB 2014) (citing *Mighty Leaf*, 94 USPQ2d at 1259.) In this case, we find the first *du Pont* factor, the differences between the marks, to outweigh the factor of similarity of services, and the presumption that the channels of trade and classes of purchasers are the same.<sup>39</sup> *See Champagne Louis Roederer S.A. v. Delicato*

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<sup>39</sup> Because the services are legally identical in part, and neither the cited registration nor Applicant's application contain any limitations on the channels of trade or classes of purchasers, we must presume that the channels of trade and classes of purchasers are the same. *See Stone Lion Capital Partners*, 110 USPQ2d at 1161; *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical [services], 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).

*Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459, 1460-61 (Fed. Cir. 1998) (affirming Board finding of no likelihood of confusion between mark CRYSTAL CREEK for wine and marks CRISTAL for wine and CRISTAL CHAMPAGNE for champagne, where Board relied solely on dissimilarity of marks); *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (confusion unlikely between applicant's mark FROOTEE ICE and Elephant Design for flavored ice bars, and opposer's FROOT LOOPS for breakfast cereal and other products; Court of Appeals for the Federal Circuit finding no legal error in Board's holding single *du Pont* factor dispositive in likelihood of confusion analysis).

**Decision:** The refusal to register based on Applicant's failure to disclaim EMPORIUM is affirmed; however, if Applicant submits the required disclaimer of EMPORIUM to the Board within thirty days, this refusal will be set aside.<sup>40</sup> The

refusal to register Applicant's mark  under Section 2(d) is reversed. If the disclaimer is timely entered, then the application shall proceed to publication. See Trademark Rule 2.142(g), 37 C.F.R. §2.142(g).

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<sup>40</sup> The proper form for the disclaimer, accounting for the fact that ARCADE BAR is already disclaimed, is: "No claim is made to the exclusive right to use EMPORIUM and ARCADE BAR apart from the mark as shown."