

ESTTA Tracking number: **ESTTA684475**

Filing date: **07/18/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86384029
Applicant	Sammy Snacks, Inc.
Applied for Mark	A MODERN ANCESTRAL DIET
Correspondence Address	DALE R JENSEN DALE JENSEN PLC 606 BULL RUN STAUNTON, VA 24401 UNITED STATES djensen@dalejensenlaw.com
Submission	Reply Brief
Attachments	20150718 Reply Brief.pdf(31891 bytes)
Filer's Name	Dale R. Jensen
Filer's e-mail	djensen@dalejensenlaw.com
Signature	/Dale R. Jensen/
Date	07/18/2015

**In the United States Patent & Trademark Office
Before the Trademark Trial and Appeal Board**

Applicant/Appellant: Sammy Snacks, Inc.
Serial No.: 86384029
Filing Date: September 6, 2014
Mark: A MODERN ANCESTRAL DIET
Law Office: 102
Examining Attorney: Tara L. Bhupathi

Reply Brief

Commissioner for Trademarks
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

The present Reply Brief is submitted in support of the Notice of Appeal filed electronically on April 10, 2015 and responsive to the Examining Attorney's Appeal Brief filed on July 6, 2015.

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I. INTRODUCTION.

In opposing registration of the present mark “A MODERN ANCESTRAL DIET”, the Examining Attorney’s Appeal Brief (the “Opposition Brief”) provides a contorted legal argument that disproportionately emphasizes the similarity of the goods between the competing marks, does not properly weigh the differences between the marks, and largely ignores key *Dupont* factors (1) that there other similar marks have been concurrently registered; and (2) that the marks have been concurrently used by competing businesses for over two years without any evidence of actual confusion. Indeed, the business owning the competing mark has not objected to its registration and has made no communication with Applicant concerning the concurrent use of Applicant’s mark in commerce.

The Opposition Brief cites a battery of inapposite and distinguishable case law in a strained attempt support of an improper rejection. Each of the cases cited by the Opposition Brief reference marks that are much less distinguishable in their sight, sound, and commercial impression than the marks at issue in this case.

More significantly, the Opposition Brief dismisses in passing the *In re Hearst* case, which is binding precedent and which is more closely on point to this case than any other case cited in this appeal. The marks here are even more distinguishable in their sight, sound, and commercial impression than the marks of *In re Hearst. In re Hearst Corp.* 982 F.2d 493, 494 (Fed.Cir.1992)

Appellant respectfully submits that the refusal of registration be reversed.

II. ARGUMENT

A. The *DuPont* Factor Concerning Similarity of Goods Does Not Control Here

The Opposition Brief asserts without any supporting authority whatsoever that the *DuPont* factor concerning similarity or dissimilarity and nature of Applicant’s goods and those of the cited prior mark should be analyzed first and should be dispositive in this case. That assertion is false and provides no basis to affirm the rejection of Applicant’s marks. Applicant does not dispute that its goods are similar to those that use the prior mark, but avers that this factor does not control in view of more pertinent *DuPont* factors. See, *In re E. I. Du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973).

The *In re Hearst* case is controlling here. The Opposition Brief attempts to dismiss that binding precedent off-handedly by merely asserting, “the determination of whether marks are confusingly similar relies heavily on the facts presented in each case”, but completely and utterly

ignores the substantial factual similarities between that case and this one.

In *In re Hearst*, the Hearst Corporation sought to register the mark “VARGA GIRL”, but was refused registration in view of a previously registered mark “VARGA”. *In re Hearst Corp.*, 982 F.2d at 493. The VARGA GIRL trademark was used in association with drawings published in Esquire Magazine during the World War II era that were drawn by Alberto Vargas. *Id.* The Hearst Corporation sought to register VARGA GIRL for calendars. *Id.* The Board refused the registration, on the ground of likelihood of confusion with the registered trademark VARGAS, which was registered for use with (emphasis added) “posters, **calendars**, greeting cards, paintings, limited edition prints, books of images and art work, and art prints”. The drawings for the VARGAS calendars were also made by the same Alberto Vargas. *Id.*

Thus, the goods for both marks in *In re Hearst Corp.* were substantially the same, just as they are in this case. Understandably, the Opposition Brief does not mention this parallel between the present case or acknowledge the factual similarities to this case.

It is very apparent that if the Opposition Brief were analyzing the “VARGA GIRL” and “VARGAS” marks, the same erroneous ruling that the Federal Circuit reversed in *In re Hearst* would have ensued.

Since the similarity of goods did not control in *In re Hearst*, they cannot control here either absent some other DuPont factor weighing against registration. Since there are no such other factors weighing against registration, reversal of the present refusal to register is warranted in this case.

B. The DuPont Factor Concerning Similarity of the Marks Controls – The Marks are Dissimilar in Their Appearance, Sound, Connotation, and Commercial Impression

The marks at issue in this case are not “reverse combinations” as alleged by the Opposition Brief. Applicant’s mark, “A MODERN ANCESTRAL DIET” consists of only four words and seven syllables. The prior mark at issue, “THE ANCESTRAL DIET MEETS MODERN NUTRITION”, has six words and eleven syllables. Also, the words “MEETS” and “NUTRITION” are significantly different and are not mere connective words as was the case, for example, in the *In re Wine Soc’y of Am. Inc.*, 12 USPQ2d 1139, 1142 (TTAB 1989) upon which the Opposition Brief places heavy reliance. None of the other Trademark Trial and Appeal Board decisions cited by the Opposition Brief have differences between the marks as significant as the marks at issue here.

Marks are to be perceived in their entireties, and all components thereof must be given appropriate weight. *In re Hearst*, 982 F.2d at 494.

The *In re Hearst* case is much more analogous to the present case concerning dissimilarity of the marks than any authority cited in support of the rejection by the Opposition Brief. Indeed, the marks “THE ANCESTRAL DIET MEETS MODERN NUTRITION” is even more different compared to the applied-for mark “A MODERN ANCESTRAL DIET” than “VARGA GIRL” was different from “VARGAS” in *In re Hearst*.

In reversing the rejection of the registration of the mark “VARGA GIRL” in *In re Hearst*, Judge Newman held:

[t]he appearance, sound, sight, and commercial impression of VARGA GIRL **derive significant contribution from the component “girl”. By stressing the portion "varga" and diminishing the portion “girl”, the Board inappropriately changed the mark.** Although the weight given to the respective words is not entirely free of subjectivity, we believe that the Board erred in its diminution of the contribution of the word “girl”. **When GIRL is given fair weight, along with VARGA, confusion with VARGAS becomes less likely.**

In re Hearst, 982 F.2d at 494.

As further binding authority, the case of *Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 507 F.2d 1404 (CCPA 1975) is applicable. In *Conde Nast*, the Court of Customs and Patent Appeals (the “CCPA”) affirmed a Trademark Trial and Appeal Board decision issuing the mark “COUNTRY VOGUES” over the prior mark “VOGUE”. *Id.*, 507 F.2d at 1405. In so holding, the CCPA held that the marks “Vogue” and “Country Vogues” **did not look or sound alike**. *Id.*, 507 F.2d at 1407.

The Trademark Trial and Appeal Board decisions cited by the Opposition Brief are of inferior authority to, and do not control to the extent that they are not in harmony with, either *In re Hearst* or *Conde Nast*.

The appearance, sound, sight, and commercial impression of “THE ANCESTRAL DIET MEETS MODERN NUTRITION” is distinct from the applied-for mark “A MODERN ANCESTRAL DIET”. The appearance of “A MODERN ANCESTRAL DIET” is different from “THE ANCESTRAL DIET MEETS MODERN NUTRITION” because the terminology “THE”, “MEETS”, and “NUTRITION” is nowhere present in Applicant’s mark and the order of the words “MODERN”, “ANCESTRAL” and “DIET” is different between the two marks.

The sound of “A MODERN ANCESTRAL DIET” is distinct from the sound of “THE ANCESTRAL DIET MEETS MODERN NUTRITION”. Five syllables of the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION” are not present in Applicant’s mark. In addition, the ordering of the words and syllables of the words is also very different. Consequently, the sound of the two marks is profoundly different.

The sight of “THE ANCESTRAL DIET MEETS MODERN NUTRITION” is distinct from the applied-for mark “A MODERN ANCESTRAL DIET” as well. The absence of the words “MEETS” and “NUTRITION” and the different ordering of words make the sight of Applicant’s mark different.

The commercial impression of “THE ANCESTRAL DIET MEETS MODERN NUTRITION” derives significant contribution from the words “MEETS” and “NUTRITION” and conveys the impression that an ancestral diet has somehow been modified to have the characteristics of “Modern Nutrition”. By contrast, Applicant’s mark the impression that a current product has one or more characteristics of an “Ancestral Diet”.

By stressing the individual words of the phrase “MODERN ANCESTRAL DIET” and completely ignoring the ordering of those words as well as the portions “MEETS” and “NUTRITION”, the Office Action did not properly compare the applied-for mark with the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION”. The Office Action erred in its diminution of the contribution of the terminology “MEETS” and “NUTRITION”. When these differences are given fair weight and the ordering of the words is considered, confusion is not likely.

The differences between the applied-for mark and “A MODERN ANCESTRAL DIET” and the mark upon which the rejections are based, “THE ANCESTRAL DIET MEETS MODERN NUTRITION”, are analogous, but even more pronounced, than those of “VARGAS” and “VARGA GIRL” in *In re Hearst*. Giving fair weight to the phrase “MEETS” and “NUTRITION” and considering the different ordering of words in the marks, there is little likelihood of confusion between the applied-for mark and “THE ANCESTRAL DIET MEETS MODERN NUTRITION”.

For at least the reasons mentioned herein, there is little likelihood of confusion between the applied-for mark and the mark “THE ANCESTRAL DIET MEETS MODERN NUTRITION”. Accordingly, this factor alone warrants reversal of the Examiner’s decision.

C. The *DuPont* Factor of Similar Marks Registered For Use on Similar Goods Favors Registration

In addition to Applicant's mark and the prior mark, **an Office Action already of record in this case** also noted at least two other similar marks. The mark "Ancestral Model Diet" was registered on October 28, 2008 for dog food and cat food, which goods are similar to both those of Applicant as well as the prior mark.

Also, the mark "Ancestry" was registered on June 25, 2013 for Cat food; Cat treats; Dog food; Dog treats; Pet food; and Pet treats, which goods are also similar to both those of Applicant as well as the prior mark.

The Opposition Brief incorrectly argues that this factor be ignored because applicant has not submitted registrations for marks cited as being similar. However, **the Office Action dated December 15, 2014, issued by the very same Examining Attorney, has already made the referenced registrations of record in this case and admitted their relevance to Applicant's registration by citing them.** Accordingly, the argument that the other registrations are not of record is meritless.

As to substance of these similar registered marks, although the Opposition Brief is correct in stating that the trademark "ANCESTRAL MODEL DIET" went abandoned. The Opposition Brief utterly fails to mention key facts relevant to this appeal. The abandonment of the "ANCESTRAL MODEL DIET" was not until late 2014, which was after the present application was filed. In addition, the mark "THE ANCESTRAL DIET MEETS MODERN NUTRITION" was registered **after** the mark "ANCESTRAL MODEL DIET" registered. Accordingly, the United States Patent and Trademark Office (the "USPTO") determined that the trademark "THE ANCESTRAL DIET MEETS MODERN NUTRITION" was not confusingly similar to the mark "ANCESTRAL MODEL DIET". It is facially apparent that, other than the ordering of words, the mark "ANCESTRAL MODEL DIET" differs in pertinent part from Applicant's mark, "A MODERN ANCESTRAL DIET", by only a single syllable. It is amazing that the Opposition Brief ignores the prior finding of the United States Patent and Trademark Office that "THE ANCESTRAL DIET MEETS MODERN NUTRITION" was not confusingly similar to the mark "ANCESTRAL MODEL DIET", but continues to incorrectly assert is confusingly similar to "A MODERN ANCESTRAL DIET".

In addition, the registration of "ANCESTRY" is similar to the mark "THE ANCESTRAL DIET MEETS MODERN NUTRITION".

In sum, the other similar marks in essentially the same area of commerce also favor reversal of the Examiner's decision under the *DuPont* factors.

D. The *DuPont* Factor Considering Applicant's Mark Has Been Concurrently Used for Over Two Years Without Evidence of Actual Confusion Favors Registration

The trademark "A MODERN ANCESTRAL DIET" has been actively used in commerce for over two years, as indicated by the record of the present application. During that time Applicant has not been made aware of any actual confusion in the market place and has had no communication from the trademark owner of the mark "THE ANCESTRAL DIET MEETS MODERN NUTRITION" expressing any concern whatsoever about Applicant's mark. The Opposition Brief does not present any evidence to show that this factor is not in favor of Applicant.

III. CONCLUSION

For all of the reasons discussed herein, Petitioner respectfully requests that this Board reverse the rejection for the trademark "A Modern Ancestral Diet" and direct issuance of a Notice of Allowance.

Dated: July 18, 2015

By 

Dale R. Jensen, Attorney
606 Bull Run
Staunton, VA 24401
(434) 249-3874
(866) 372-0348 FAX
djensen@jensenjustice.com