

This Opinion is not a  
Precedent of the TTAB

Mailed: August 9, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

—  
Trademark Trial and Appeal Board  
—

*In re Tyson Foods, Inc.*  
—

Serial No. 86533628  
—

Chase C. Webb and Clifford C. Dougherty III of McAfee & Taft,  
for Tyson Foods, Inc.

Brittney L. Cogan, Trademark Examining Attorney, Law Office 114,  
K. Margaret Le, Managing Attorney.

—  
Before Bergsman, Gorowitz and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Tyson Foods, Inc. (“Applicant”) seeks registration on the Principal Register of the mark RED LABEL (in standard characters) for “chicken for sale to foodservice institutions” in International Class 29.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1502(d), on the ground that

---

<sup>1</sup> Application Serial No. 86533628 was filed on February 12, 2015, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as February 2010.

Applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 4412555, RED LABEL (in standard characters) for "frozen fish and seafood" in International Class 29,<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. In her final Office Action, the Examining Attorney submitted as evidence pages from food suppliers' websites, to show that chicken and seafood (Applicant and Registrant's respective goods) may emanate from the same sources.<sup>3</sup> In that same Office Action, the Examining Attorney also made of record two registrations on the Principal Register for marks used on both poultry and fish or seafood.<sup>4</sup> To help rebut the Examining Attorney's evidence, Applicant attached to its brief on appeal Exhibits A through E, consisting of additional screenshots from five of the cited food suppliers' websites.<sup>5</sup> Applicant's brief also attached as Exhibits F and G screenshots from the websites of the two food companies whose registrations were cited.<sup>6</sup>

The Examining Attorney objects that that Applicant's attached exhibits are

---

<sup>2</sup> Registration No. 4412555, issued on the Principal Register on October 8, 2013.

<sup>3</sup> Office Action of November 12, 2015 at pp. 6-31, 40-58.

<sup>4</sup> Office Action of November 12, 2015 at pp. 32-36.

<sup>5</sup> Applicant's brief, 4 TTABVue 15-26.

<sup>6</sup> Applicant's brief, 4 TTABVue 27-29.

untimely, as the record in an application should be complete prior to the filing of an appeal, and exhibits attached to a brief that were not made of record during examination generally will not be considered. Trademark Rule 2.142(d), 37 CFR § 2.142(d); *In re Compania de Licores Internacionales S.A.*, 102 USPQ2d 1841, 1843 (TTAB 2012).<sup>7</sup>

As Applicant correctly notes, however, the Trademark Trial and Appeal Board Manual of Procedure (TBMP) provides an exception to that general rule:

However, if ... the examining attorney submits excerpts from articles during examination, the nonoffering party may submit the complete article, even if such submission is made after the appeal is filed. If the nonoffering party wishes to have the entire article considered, the better practice is to submit the article with a request for remand. However, because the party submitting the excerpt of the article had the opportunity to review the entire article, if the article is submitted with an appeal brief the Board need not remand the application, and may instead consider the article as part of the record.

TBMP § 1207.01.

This principle is illustrated in *In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986). In that case, the examining attorney's final Office Action made of record two articles found in an online Nexis search. The applicant included more extensive excerpts of those same articles in its brief before the Board, showing additional text qualifying the examining attorney's excerpts. On appeal, the Federal Circuit held that the additional text was entitled to be considered by the Board: "Let it be clear that by citing only a portion of an article, that portion is not thereby insulated from the context ... whence it came." *Id.* at 820.

---

<sup>7</sup> Examining Attorney's brief, 6 TTABVUE 8.

Although the present appeal concerns food suppliers' web pages rather than articles, the same principle applies. The Examining Attorney had the opportunity to review the suppliers' entire websites, and is not prejudiced by Applicant's introduction of additional screenshots from those sites. Consequently, Exhibits A through E to Applicant's brief will be considered. Exhibits F and G do not fall under this exception, and will not be considered.

## II. Analysis

Our determination of likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all of 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, 567 (CCPA 1973) ("*DuPont*") cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, \_\_\_U.S. \_\_\_, 135 S.Ct.1293, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor that is relevant and for which there is evidence of record. See *M2 Software, Inc. v. M2 Communications, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. and H.J. Heinz Company v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) ("While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant."). 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). See also *In re i.am.symbolic, LLC*, 116 USPQ2d 1406, 1409 (TTAB 2015).

A. Comparison of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks as compared in their entireties, taking into account their 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, 1692 (Fed. Cir. 2005); *In re Midwest Gaming & Entm't LLC*, 106 USPQ2d 1163, 1165 (TTAB 2013).

Applicant and Registrant's RED LABEL marks are identical. Both appear as standard character marks, which means that Registrant's mark may be depicted in any font size, style or color that Applicant might adopt for its mark. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012). There is no suggestion that the marks are pronounced differently. Their overall commercial impression is the same.

The identity between the marks is a *DuPont* factor that "weighs heavily in favor of a finding of likelihood of confusion." *i.am.symbolic*, 116 USPQ2d at 1411. *Accord Midwest Gaming*, 106 USPQ2d at 1165 ("In short, we find that the marks are identical. This finding under the first *DuPont* factor strongly supports a conclusion that a likelihood of confusion exists."); *Davey Prods.*, 92 USPQ2d 1198, 1202 (TTAB 2009) ("[W]e find that applicant's DAVEY mark and the cited registered DAVEY mark are identical in terms of appearance, sound, connotation and commercial

impression. We find that the first *du Pont* factor weighs heavily in favor of a finding of likelihood of confusion.”).

B. Similarity and Nature of the Goods, Channels of Trade and Sophistication of Purchasers

The next step in our analysis is to compare the goods identified in the application with the goods identified in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). *See also, Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

The respective goods in this case are Applicant’s “chicken for sale to foodservice institutions” and Registrant’s “frozen fish and seafood,” both sold under the RED LABEL mark.

Where identical marks are involved, as is the case here, the degree of similarity between the goods required to support a finding of likelihood of confusion declines. *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) (“Where, as in this case, applicant’s mark is identical to opposer’s ... mark, there need only be a viable relationship between the goods to find that there is a likelihood of confusion.”). *Accord Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). “[E]ven when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source.” *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993).

There can be little dispute that these goods are similar in nature, as chicken, fish and seafood can be used interchangeably as appetizers or entrees, or in salads and sandwiches. *See e.g., Ralston Purina Co. v. Old Ranchers Canning Co., Inc.*, 199 USPQ 125, 127 (TTAB 1978) (boned chicken and tuna fish can be substituted for one another in salads, sandwiches, and the like). In the first Office Action, the Examining Attorney attached evidence showing that large retailers such as Target and Costco sell chicken, fish and other seafood products to the general public under the same marks.<sup>8</sup>

Applicant does not dispute the similar nature of the goods *per se*, but maintains that the Examining Attorney's evidence is not on point, as its goods are not directed to retail consumers,<sup>9</sup> but to foodservice institutions, which are more sophisticated purchasers than the general public.

The subject Application expressly restricts its channel of trade to a certain class of customers, "foodservice institutions." Foodservice institutions are "businesses, institutions, and companies responsible for any meal prepared outside the home. This industry includes restaurants, school and hospital cafeterias, catering operations, and many other formats."<sup>10</sup> Applicant agrees that foodservice institutions include "restaurants, schools, colleges and universities, hospitals and military

---

<sup>8</sup> Office Action of May 15, 2015, pp. 4-14.

<sup>9</sup> Applicant's Response to Office Action, Nov. 4, 2015, p. 1.

<sup>10</sup> Office Action of Nov. 12, 2015, p. 37, citing [www.en.Wikipedia.org/wiki/Foodservice](http://www.en.Wikipedia.org/wiki/Foodservice) 11/06/2015.

installations....”<sup>11</sup> Since the Application limits its identified class of purchasers to foodservice institutions, and the cited Registration does not, the only point of overlap is foodservice institutions.<sup>12</sup> *Cf. Calypso Technology Inc. v. Calypso Capital Management LP*, 100 USPQ2d 1213, 1222 (TTAB 2011) (Registrant’s identified services were limited to financial institutions. “Therefore, the only overlap in terms of customers for defendant’s services are financial institutions as well.”).

Applicant argues that “because food service institutions are the only potential overlap of purchasers, a great deal of weight must be given to the fact that foodservice institutions are sophisticated purchasers who exercise a high degree of care when purchasing goods.”<sup>13</sup> Although there is no record evidence to support this assertion, it stands to reason that institutional purchasers will exercise greater care in making their purchases than the general purchasing public, so we will assume that this assertion of sophistication and care is true. *See In re Thomas H. Wilson*, 57 USPQ2d 1863, 1866 (TTAB 2001) (assuming wholesalers and storeowners are sophisticated purchasers). Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. *Palm Bay Imports*, 73 USPQ2d at 1695.

In order to show that this relevant class of institutional customers would likely believe that the goods of Applicant and Registrant emanate from the same source, the Examining Attorney has made of record excerpts from various commercial

---

<sup>11</sup> Applicant’s brief, p. 6, 4 TTABVUE 7.

<sup>12</sup> “Applicant does not disagree with the Examining Attorney that the mark of the Cited Registration covers frozen fish and seafood for sale to foodservice institutions.” Applicant’s brief, p. 4, 4 TTABVUE 5.

<sup>13</sup> Response to Office Action of Nov. 4, 2015, p. 1. Applicant’s brief, p. 4, 4 TTABVUE 5 et seq.



websites offering chicken and fish or other seafood under the same mark to foodservice institutions. E.g.:

MarxFoods—A company whose “traditional customers are restaurants” provides poultry, fish and other seafood “packaged for restaurant use” under the trademark MarxFoods.<sup>14</sup>

Nueskes—Provides “premium quality” smoked meats, poultry and seafood specialties to its customers, which include “professional chefs, food service distributors & specialty retailers” under the Nueske’s ® trademark.<sup>15</sup>

Metropolitan—Provides meat, seafood, and poultry under the trademark Metropolitan, and under its logo:<sup>16</sup>



AdvancePierre® Foods—Is a “manufacturer” and supplier of meat, poultry and seafood (in the form of fish puree) to “foodservice, retail, schools and convenience channels across the United States under its trademark,” AdvancePierre.®<sup>17</sup>

Wholey®--Provides fish, seafood and chicken under that trademark.<sup>18</sup>

B&MProvisions—Provides meat, chicken, fish and other seafood to restaurants, facilities and the public.<sup>19</sup>

The Examining Attorney has also submitted use-based, third-party registrations, each owned by a single registrant that supplies chicken, fish and seafood to foodservice institutions--e.g.,

---

<sup>14</sup> Office Action of November 12, 2015, pp. 6-17.

<sup>15</sup> Office Action of November 12, 2015, pp. 18-23.

<sup>16</sup> Office Action of November 12, 2015, pp. 24-25.

<sup>17</sup> Office Action of November 12, 2015, pp. 26-31.

<sup>18</sup> Office Action of November 12, 2015, pp.

<sup>19</sup> Office Action of November 12, 2015, pp. 51-58.

GOLBON, Reg. No. 3622832 owned by Oppenheimer Companies, Inc., for *inter alia* “procurement services, namely, purchasing food products and foodservice industry products for others; distributorship services in the fields of food products and foodservice industry products” and “fresh, and frozen meat, poultry, and seafood.”

SMARTFARE, Reg. No. 3019648 owned by Good Source Solutions, Inc., for *inter alia* “vitamin and mineral fortified meat, fish and poultry, sold to foodservice operations and not for retail.”<sup>20</sup>

Applicant responds: “In this case, although chicken and frozen fish and seafood may be distributed to foodservice institutions by the same company, sophisticated foodservice buyers are not likely to think that such goods are manufactured or produced by the same company even if the goods are identified by the same mark.”<sup>21</sup> *See Calypso Technology*, 100 USPQ2d at 1222 (TTAB 2011) (sophisticated purchasers aware of practices in industry, and recognize that certain goods and services do not emanate from a single source). On this ground, Applicant endeavors to distinguish the Examining Attorney’s evidence of the same purveyors supplying chicken, fish and other seafood to foodservice institutions, e.g.:

Marx Foods’ website, MarxFoods.com, states that “traditionally, we’re a boutique high-end distributor.”<sup>22</sup>

Nueske’s website, Nueskes.com, shows that it appears to be in the business of “smoking meats, rather than manufacturing or producing the actual meat itself.”<sup>23</sup>

AdvancePierre Foods’ website, AdvancePierre.com, appears to show that that it only sells seafood on its retail product lines. The fish puree no longer appears

---

<sup>20</sup> Office Action of Nov. 12, 2015, pp. 32-36.

<sup>21</sup> Applicant’s brief, p. 7, 4 TTABVUE 8 (emphasis in original).

<sup>22</sup> Applicant’s brief, p. 8, Exhibit A, 4 TTABVUE 9, 15.

<sup>23</sup> Applicant’s brief, p. 8, 4 TTABVUE 9.

on its web pages of product lines sold to foodservice institutions.<sup>24</sup>

B&M Provisions' website, BandMProvisions.com, shows that "Although B&M Provisions appears to have a butcher shop, it too seems to be more of a foodservice distributor rather than a producer and/or manufacturer. Evidence of this can be seen on its website where it proclaims to be '[t]he Lehigh Valley's Leading Foodservice Distributor'"<sup>25</sup>

From the above examples, plus its own experience, Applicant concludes that "chicken and frozen fish and seafood normally move through the same trade channels from a single manufacturer or producer to foodservice institution purchasers,"<sup>26</sup> who presumably would be sophisticated enough to appreciate the distinction, thereby minimizing the likelihood of confusion.

Applicant admits, though, that there "may be a few exceptions" that manufacture, produce and distribute poultry and seafood to food service institutions:<sup>27</sup>

Metropolitan Meat Seafood & Poultry, it notes, has processing areas for poultry and seafood, but because it has a list of featured suppliers, "there is still some question as to whether it is actually a producer or manufacturer of the poultry and seafood itself or merely a distributor as it claims."<sup>28</sup>

Wholey "may appear to produce both chicken and seafood, [but] there is still some question as to whether that is the case," as it sells another brand of chicken.<sup>29</sup>

Applicant attempts to distinguish the two cited registrations for GOLBON and

---

<sup>24</sup> Applicant's brief, pp. 8-9, 4 TTABVUE 9-10.

<sup>25</sup> Applicant's brief, p. 9, 4 TTABVUE 10.

<sup>26</sup> Applicant's brief, p. 9, 4 TTABVUE 10 (emphasis in original).

<sup>27</sup> Applicant's brief, p. 9, 4 TTABVUE 10.

<sup>28</sup> Applicant's brief, pp. 9-10, 4 TTABVUE 10-11.

<sup>29</sup> Applicant's brief, p. 10, 4 TTABVUE 11.

SMARTFARE on the ground that they are foodservice distributors, rather than manufacturers or producers,<sup>30</sup> but its evidence to this effect, Exhibits F and G to its brief, are inadmissible.

Moreover, as Applicant admits, foodservice buyers “buy directly from manufacturers or *wholesale distributors*.” Response to Office Action of Nov. 4, 2015, p. 1 (emphasis added). As the above examples demonstrate, some sources (such as Golbon and Marx Foods) distribute all of these food products under the same brand. Other sources (such as Metropolitan and Wholey) produce, as well as distribute, these food products.<sup>31</sup> The cited third-party evidence serves to suggest that the identified goods are of a type that may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Given the identity of Applicant and Registrant’s marks, and the related nature of their food products, foodservice institution purchasers could mistakenly infer that their products emanate from the same source, or that there is an association or connection between sources. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475-76 (Fed. Cir. 2000); *In re Total Quality Group, Inc.*, 51 USPQ2d 1474, 1476 (TTAB 1999). “It is settled, however, that even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving

---

<sup>30</sup> Applicant’s brief, pp. 10-11, 4 TTABVUE 11-12.

<sup>31</sup> Office Action of Nov. 12, 2015, pp. 20-21.

similar marks and closely related goods.” *In re Cook Medical Tech. LLC*, 105 USPQ2d 1377, 1383 (TTAB 2012); *accord i.am.symbolic, LLC*, 116 USPQ2d at 1413.

Hence, the second through fourth *DuPont* factors weigh in favor of finding a likelihood of confusion.

### C. Strength of Registrant’s Mark.

Applicant asserts that the phrase “RED LABEL” suggests a particular grade or quality of product in a product line (e.g., “red label,” “blue label”), so relevant purchasers will not give it a great deal of weight as a source indicator.<sup>32</sup> Applicant provides no evidentiary support or authority for this assertion, nor does it show third parties registering and/or using the term “red label” to suggest a certain level of quality. *Cf. Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334,115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (substantial number of third-party registrations evidencing suggestiveness). But even if this were the case, and the cited mark were deemed suggestive, it would not vitiate its presumptive entitlement to protection as a registered mark. 15 U.S.C. § 1057(b). Even weak marks are entitled to protection against registration of similar marks, especially identical ones, for related goods and services, *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982), and Applicant has not demonstrated that Registrant’s mark is weak.

### III. Conclusion

On balance, based on the evidence of record, we find that Applicant’s and Registrant’s marks, as used on their identified goods, so resemble one another as to

---

<sup>32</sup> Applicant’s brief, p. 12, 4 TTABVUE 13.

be likely to cause confusion, or to cause mistake, or to deceive under Section 2(d) of the Trademark Act.

**Decision:** The refusal to register Applicant's mark RED LABEL is affirmed.