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Subject: U.S. TRADEMARK APPLICATION NO. 86533628 - RED LABEL - N/A - EXAMINER BRIEF

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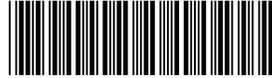
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UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)

U.S. APPLICATION SERIAL NO. 86533628

MARK: RED LABEL



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GENERAL TRADEMARK INFORMATION:

<http://www.uspto.gov/trademarks/index.jsp>

TTAB INFORMATION:

<http://www.uspto.gov/trademarks/process/appeal/index.jsp>

APPLICANT: Tyson Foods, Inc.

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EXAMINING ATTORNEY'S APPEAL BRIEF

Applicant has appealed the Trademark Examining Attorney's refusal to register the trademark "RED LABEL" (standard character mark) (Serial No. 86533628). Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1502(d) on the ground that the applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 4412555 as to be likely to cause confusion, to cause mistake, or to deceive.

I. PROCEEDINGS BELOW

On February 12, 2015, the applicant, Tyson Foods, Inc. (the “Applicant”), filed a Section 1(a) trademark application seeking registration on the Principal Register of the mark “RED LABEL” (standard characters) for “Chicken for sale to foodservice institutions” in International Class 29.

In an Office Action mailed on May 15, 2015 (the “First Office Action”), the Examining Attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1502(d) on the ground that Applicant’s mark (RED LABEL, standard character mark, for “Chicken for sale to foodservice institutions” in International Class 29), when used on or in connection with the identified goods, so resembled the mark in U.S. Registration No. 4412555, owned by Ruggiero Sea Food, Inc. (the “Registrant”) (RED LABEL, standard character mark, for “Frozen fish and seafood” in International Class 29) as to be likely to cause confusion, to cause mistake, or to deceive. The Examining Attorney also advised Applicant of an unnecessary Section 2(f) claim contained in the application.

On November 4, 2015, Applicant filed a Response to Office Action, arguing against the Trademark Act Section 2(d) refusal to register and deleting the unnecessary Section 2(f) claim. Thereafter, on November 12, 2015, the Examining Attorney issued a Final Office Action (the “Final Office Action”), which maintained and made final the Trademark Act Section 2(d) refusal to register. On April 7, 2016, Applicant filed an Appeal Brief (the “Appellant’s Brief”). On April 8, 2016, the Trademark Trial and Appeal Board forwarded the Appellant’s Brief to the Examining Attorney for briefing.

II. STATEMENT OF THE ISSUE

The only issue on appeal is whether Applicant’s mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 4412555 as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).

III. ARGUMENT

Applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 4412555 as to be likely to cause confusion, to cause mistake, or to deceive. Applicant has applied to register "RED LABEL" (standard character mark) for "Chicken for sale to foodservice institutions" in International Class 29. Registrant's mark is "RED LABEL" (standard character mark) for "Frozen fish and seafood" in International Class 29.

a. The Marks are Identical

In a likelihood of confusion determination, the marks in their entireties are compared for similarities in appearance, sound, connotation, and commercial impression. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b)-(b)(v).

In the present case, Applicant's mark is "RED LABEL" (standard character mark) and Registrant's mark is "RED LABEL" (standard character mark). Thus, the marks are identical in terms of appearance and sound. Applicant provided no argument to the contrary. In addition, the connotation and commercial impression of the marks do not differ when considered in connection with Applicant's and Registrant's respective goods, as more fully enumerated herein below. It is established that the marks are identical and, therefore, the marks are confusingly similar for purposes of this Section 2(d) analysis.

b. The Goods are Highly Related

Applicant's "[c]hicken for sale to foodservice institutions" in International Class 29 are related to Registrant's "[f]rozen fish and seafood" in International Class 29 because it is common for companies that provide chicken to foodservice institutions to also provide frozen fish and seafood and market them under the same trademarks. Moreover, the goods at issue have complementary uses, and thus are often used together or otherwise purchased by the same purchasers for the same or related purposes. To this point, in the Final Office Action, Examining Attorney attached evidence of companies that provide both chicken for sale to foodservice institutions and frozen fish and seafood to foodservice institutions and

market them under the same trademarks, including MarxFoods, Nueske's®, Metropolitan, AdvancePierre® Foods, Inland Seafood, Wholey®, and B&M Provisions. Specifically, Examining Attorney attached evidence of the following:

- MarxFoods: The company is a “fine retail & wholesale” company whose “traditional customers are restaurants” and offers “a discount by selling in bulk.”¹ The company’s goods are “packaged for restaurant use.”² The company provides poultry, as well as fish and seafood, to their customers, under the same trademark, MarxFoods.³
- Nueske's®: The company provides seafood and poultry to their customers, which include “professional chefs, food service distributors & specialty retailers,” under the same trademark, Nueske's®.⁴
- Metropolitan: The company provides meat, seafood and poultry to its customers under the same trademark, Metropolitan, with the terms seafood and poultry appearing next to each other within the company’s logo.⁵
- AdvancePierre® Foods: The company is a “manufacturer” of seafood and poultry for “foodservice, school, military, retail, warehouse club, vending and convenience store customers,” all branded under the same trademark.⁶
- Inland Seafood: The company “only sell[s] to food service professionals”⁷ and provides seafood and poultry under the same trademark.⁸
- Wholey®: The company provides seafood and chicken under the same trademark.⁹

¹ Final Office Action, pg. 4.

² *Id.*

³ *Id.* at pg. 6-13.

⁴ *Id.* at 14-17.

⁵ *Id.* at 20-21.

⁶ *Id.* at 22-27.

⁷ *Id.* at 36.

⁸ *Id.* at 37-41.

⁹ *Id.* at 42-46.

- B&M Provisions: The company provides chicken and seafood to “[r]estaurants, [f]acilities and the [p]ublic” under the same trademark.¹⁰

Examining Attorney also attached the following third-party registrations, which clearly identify both Applicant’s goods and Registrant’s goods under the same registered marks: U.S. Reg. No. 3622832 (GOLBON®) for, among other things, “fresh and frozen meat, poultry, and seafood” in International Class 29; and U.S. Reg. No. 3019648 (SMARTFARE®) for, among other things, “vitamin and mineral fortified meat, fish and poultry, sold to foodservice operations and not for retail” in International Class 29. The evidence of record clearly shows that Applicant’s goods and Registrant’s goods are provided by the same companies, to the same consumers, under the same trademarks.

Applicant argues that its consumers, foodservice institutions, are sophisticated purchasers and use great care when purchasing their seafood and poultry goods, thus negating a finding of a likelihood of confusion. Applicant concedes that Registrant’s goods are broadly identified and thus encompass frozen fish and seafood for sale to foodservice institutions.¹¹ However, Applicant argues that “foodservice institution purchasers are recognized to be more sophisticated and use greater care in making purchasing decisions.” Applicant relies on a number of cases which are distinguished from the instant matter: (1) in *Calypso*¹², the parties’ marks were not identical and the record was devoid of evidence showing the parties’ services offered by a single company – in contrast, in the instant matter, the parties’ marks are identical and the evidence of record clearly establishes that the parties’ goods are complementary in nature and commonly provided to the same consumers, foodservice institutions, under the same trademarks; and (2) in *Astra*¹³, the parties’ goods had “few, if any, similarities” and the Court found that sales efforts were directed to different consumers – in contrast, in the instant matter,

¹⁰ *Id.* at 47-57.

¹¹ Appellant’s Brief, pg. 4.

¹² *Calypso Technology, Inc. v. Calypso Capital Management, LP*, 100 USPQ2d 1213 (TTAB 2011).

¹³ *Astra Pharmaceutical Prod., Inc. v. Beckman Inst., Inc.*, 718 F.2d 1201, 220 USPQ 786 (1st Cir. 1983).

the parties' goods are similar, namely bulk foodstuffs, whose sales are directed to the same consumers, namely foodservice institutions. Moreover, in *Astra*, the products at issue were medical products, and the Court noted that such consumers are highly trained, as such products are used in "life and death situations," which is clearly distinguishable from the instant goods, seafood and poultry.

Applicant argues that "the sophistication of the relevant purchasers should be considered a critical factor and given great weight in this case."¹⁴ The Examining Attorney respectfully disagrees, as the requested weight of this factor completely overshadows the fact that the parties' marks are identical, and the parties' goods are similar, related and marketed to the same consumers. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. TMEP §1207.01(d)(vii); *see, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014); *Top Tobacco LP v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1170 (TTAB 2011). The discrimination and degree of care by users of the respective goods must be considered, **along with other relevant factors**, and given appropriate weight. *See In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993) (indicating that "even sophisticated purchasers can be confused by very similar marks").

Applicant contends that the purchasers of its goods are sophisticated, analogizing them with financial institutions and medical companies. However, the record reflects that Applicant's consumers are "foodservice institutions," which broadly "defines those businesses, institutions, and company responsible for any meal prepared outside the home," including any-sized restaurant.¹⁵ The recitation of services in no way excludes from the potential class of consumers less sophisticated purchasers from within the purchasing universe. Applicant's consumers are both professionals and non-professionals, as

¹⁴ Appellant's Brief, pg. 6.

¹⁵ Final Office Action, pg. 33-35.

foodservice institutions also include “locations that are not primarily engaged in dispensing meals such as recreational facilities and retail stores.”¹⁶ When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d. 1317, 1325, 110 USPQ2d 1157, 1163 (Fed. Cir. 2014); *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). Applicant has provided no evidence or authority to support its contention that the care taken by medical institutions and financial institutions when evaluating goods and/or services is analogous to the care taken by a bevy of businesses responsible for “any” meal prepared outside the home. Assuming, *arguendo*, that the purchasers of Applicant’s goods will be careful and discriminating, it does not serve to obviate the likelihood of confusion, as the parties’ marks are identical.

Applicant also argues that the third-party websites attached to the Final Office Action fail to establish that Applicant’s and Registrant’s goods are “manufactured or produced by the same company even if the goods are identified by the same mark” despite the fact that they “may be distributed to foodservice institutions by the same company...”¹⁷ In support of Applicant’s argument, Applicant attached evidence to Appellant’s Brief that was not made of record during examination and is, therefore, untimely. Specifically, ***none*** of the exhibits attached to Appellant’s Brief were made part of the record during examination. The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Because Applicant’s new evidence was untimely submitted during an appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it. *See In re Fiat Grp. Mktg. & Corp. Commc’ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

¹⁶ *Id.*

¹⁷ Appellant’s Brief, pg. 7.

The evidence of record clearly demonstrates that Applicant's goods and Registrant's goods are manufactured or produced, not merely distributed, to foodservice institutions under the same trademark. Specifically, the Nueske's® company is a manufacturer/producer, providing both Applicant's goods and Registrant's goods *to* "food service distributors" under the Nueske's® mark.¹⁸ Similarly, AdvancePierre® Foods is a self-proclaimed "manufacturer" of seafood and poultry for "foodservice, school, military, retail, warehouse club, vending and convenience store customers," all branded under the same trademark.¹⁹ Thus, the evidence of record clearly demonstrates that manufacturers and/or producers of both Applicant's and Registrant's goods proffer those goods to the same consumers under the same trademark. Accordingly, the goods in question are related and marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source.

Applicant also argues that the cited third-party registrations filed in connection with the Final Office Action "appear to be used in connection with foodservice distributors rather than manufacturer or producers."²⁰ In support of Applicant's argument, Applicant attached evidence to Appellant's Brief that was not made of record during examination and is, therefore, untimely. None of the exhibits attached to Appellant's Brief were made part of the record during examination. The record in an application should be complete prior to the filing of an appeal. 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). Because Applicant's new evidence was untimely submitted during an appeal, the trademark examining attorney objects to this evidence and requests that the Board disregard it. See *In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A*, 109 USPQ2d 1593, 1596 (TTAB 2014); *In re Pedersen*, 109 USPQ2d 1185, 1188 (TTAB 2013); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c). The third-party registrations of record are clear that the registrants provide Applicant's and Registrant's goods under

¹⁸ *Id.* at 14-17.

¹⁹ *Id.* at 22-27.

²⁰ *Id.* at 10.

the same marks, irrespective of any distribution services they may also offer. These registrations are use-based registrations, evidencing that the registrants satisfactorily demonstrated use of the marks in commerce in connection with the goods themselves, not just in connection with ancillary services, via an acceptable specimen. In light of the foregoing, and in light of all proper evidence of record, the Examining Attorney has demonstrated that Applicant's chicken and Registrant's frozen fish and seafood are normally manufactured or produced by the same entity, and thus are related for purposes of this Section 2(d) analysis.

Finally, Applicant argues that it does not provide Registrant's goods and that Registrant does not provide Applicant's goods. The fact that the goods of the parties differ is not controlling in determining likelihood of confusion. The issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling Co.*, 315 F.3d 1311, 1316, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); TMEP §1207.01.

c. The Alleged Weakness of Registrant's Mark

Applicant argues that the cited Registration is suggestive, and, as such, should be afforded less protection than an arbitrary, fanciful mark, because "RED LABEL" is not Registrant's corporate name and because it is merely "suggestive of a particular grade or quality of product in a particular line."²¹ Examining Attorney respectfully disagrees. First, there is no evidence of record demonstrating that the registered mark is weak. Second, Applicant presents no authority supporting its assertion that suggestive marks should be afforded less protection when the marks are issue are identical and the goods are highly related.

²¹ *Id.* at 12.

Assuming, *arguendo*, that the registered mark is weak, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. TMEP §1207.01(b)(ix); *see King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974) (likelihood of confusion is “to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong mark’)); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (“even weak marks are entitled to protection against registration of similar marks”). This protection extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); *see, e.g., In re Clorox Co.*, 578 F.2d 305, 307-08, 198 USPQ 337, 340 (C.C.P.A. 1978); *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975). The parties’ marks are more than “similar,” they are identical marks. Moreover, as the evidence of record demonstrates, the parties’ goods are highly related. Therefore, any alleged weakness of the registered mark, which is unsupported by the record, does not weigh against a finding of a likelihood of confusion in this case.

IV. CONCLUSION

For the foregoing reasons, the refusal to register on the basis of Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), on the ground that Applicant’s mark, when used or in conjunction with the identified goods, so resembles the mark in U.S. Registration No. 4412555 as to be likely to cause confusion, to cause mistake, or to deceive, should be affirmed.

Respectfully submitted,

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