

ESTTA Tracking number: **ESTTA746534**

Filing date: **05/16/2016**

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

Proceeding	86533628
Applicant	Tyson Foods, Inc.
Applied for Mark	RED LABEL
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Date	05/16/2016

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

Appellant: Tyson Foods, Inc.	)
	) Law Office: 114
Serial No.: 86/533,628	)
	) Trademark Attorney: Brittney L. Cogan
Filed: February 12, 2015	)
	)
Mark: RED LABEL	)

Commissioner for Trademarks  
PO Box 1451  
Alexandria, Virginia 22313-1451

**APPELLANT’S REPLY BRIEF**

Appellant’s Appeal Brief (“Appellant’s Brief”) was filed on April 7, 2016. The Examining Attorney’s Appeal Brief (the “Examining Attorney’s Brief”) was sent April 27, 2016. This reply brief is directed to certain arguments raised by the Examining Attorney in the Examining Attorney’s Brief.

The issue on appeal is whether Appellant’s RED LABEL mark for “chicken for sale to foodservice institutions” (“**Appellant’s Mark**”) so resembles the RED LABEL mark of U.S. Registration No. 4,412,555 for “frozen fish and seafood” (the “**Registered Mark**”) as to be likely to cause confusion, to cause mistake, or to deceive under Trademark Act Section 2(d).

**I. Initial Matter: The Evidence Presented by Appellant Should be Considered**

The Examining Attorney contends that Appellant has “attached evidence to Appellant’s Brief that was not made of record during examination and is, therefore, untimely.” *See* the Examining Attorney’s Brief, TSDR p. 1. The Examining Attorney specifically stated that “none of the exhibits attached to Appellant’s Brief were made part of the record during examination” and therefore objected “to this evidence and request[ed] that the Board disregard it.” *Id.* While

the Examining Attorney has pointed out the correct rule that “[t]he record in an application should be complete prior to the filing of an appeal,” in this case, that rule has been met, at least in large part. *Id*; *See also* 37 C.F.R. §2.142(d); TBMP §§1203.02(e), 1207.01; TMEP §710.01(c).

The Examining Attorney submitted evidence with the Final Office Action on November 12, 2015 (the “**Final Office Action**”) that included portions of different websites allegedly showing that chicken and seafood normally emanate from the same source. “[I]f the applicant or 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.” TBMP §1207.01; *See also In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 820 (Fed. Cir. 1986) (if only a portion of an article is submitted, that portion is not thereby insulated from the context from whence it came). “[B]ecause 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.” *Id*.

In this case, Appellant has properly made of record at least most of the evidence submitted with Appellant’s Brief, and the Board may consider the evidence pursuant to TBMP §1207.01. Specifically, excerpts from the websites identified in Exhibits A-E of Appellant’s Brief were referenced and attached to the Final Office Action by the Examining Attorney. The Examining Attorney’s inclusion of excerpts of these websites allows Appellant to use, and the Board to consider, the websites in their entirety to put them in proper context.

Even though Exhibits F and G of Appellant’s Brief were not attached to the Final Office Action, Appellant respectfully requests the Board’s consideration of these Exhibits as they are

highly related to the issues at hand. However, if Exhibits F and G of Appellant's Brief are not considered, the point made by Appellant is still supported by the remaining exhibits.

**II. Foodservice Institution Purchasers are Sophisticated Purchasers Who Use Great Care When Purchasing Goods**

The Examining Attorney contends that foodservice institution purchasers are not analogous to financial institutions and medical companies, and therefore should not be considered sophisticated. *See* the Examining Attorney's Brief, TSDR p. 1. However, this Board has found foodservice institution purchasers such as wholesalers and storeowners to be sophisticated. *See In re Thomas H. Wilson*, 57 USPQ2d 1863 (TTAB 2001) (PRECEDENTIAL) (assuming true Applicant's argument "that wholesalers and storeowners, the relevant class of purchasers in this case, are sophisticated and careful purchasers, under the fourth *du Pont* factor").

Additionally, while not precedential, the Board has been faced with a similar situation where it found "common purchasers of [a] registrant's 'retail food store services' and [an] applicant's 'wholesale distributorship featuring the sale of food and quantities of food for the restaurant market'" sophisticated. *In re Food Depot, Inc.*, 2002 WL 976454, at \*3 (TTAB 2002). In *Food Depot*, the Board found that "[w]hen it comes to purchasing food items, owners and operators of restaurants are clearly sophisticated purchasers." *Id.* "This is true when they purchase food at the wholesale level for their restaurants, and it is likewise true when they purchase food at the retail level for their own consumption." *Id.* The Board ultimately took "the view that sophisticated purchasers of food items would not assume that FOOD DEPOT retail food store services and FOOD DEPOT OF NEW YORK wholesale food distribution services to restaurants are related merely because both marks contain the extremely suggestive words FOOD

DEPOT.” *Id.* Accordingly, the Board “reversed the refusal pursuant to Section 2(d) of the Trademark Act.” *Id.*

Here, the Board is faced with a similar situation. Appellant’s Mark is for chicken for sale to foodservice institutions. The foodservice institutions can include restaurants, schools, colleges, universities, hospitals and military installations who tend to buy in large quantities and at bulk prices. This typically equates to greater sums of money being expended than the average grocery store shopper. Even though the Registered Mark is not so limited, the only potential overlap of purchasers with Appellant’s Mark would be foodservice institution purchasers, which thus creates the relevant class of purchasers for a likelihood of confusion analysis. As a result, these institutional purchasers more closely evaluate the source of the products they purchase, and just as in *Thomas and Food Depot*, should be considered sophisticated purchasers.

With that being said, the “primary reviewing Court has made it abundantly clear that in any likelihood of confusion analysis, purchaser “sophistication is important and often dispositive because sophisticated consumers may be expected to exercise greater care.” *Id.* (quoting *Electronic Design & Sales v. Electronic Data Systems*, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992)). Thus, just as this Board did in *Food Depot*, the sophistication of the relevant class of purchasers should weigh strongly against a finding of a likelihood of confusion.

### **III. The Registered Mark is not Entitled to a Broad Scope of Protection**

The Examining Attorney disagrees with Appellant’s argument that the Registered Mark is highly suggestive, and as such should be afforded less protection. Examining Attorney’s Brief, TSDR p. 1. However, the Board has found commonly used words that are highly suggestive or descriptive of the goods or services offered to be weak marks that are afforded less protection. *See Carefirst of Maryland, Inc. v. FirstHealth of the Carolinas Inc.*, 77 USPQ2d

1492 (TTAB 2005) (PRECEDENTIAL) (finding that “[t]he record clearly establishes that the parties’ marks are highly suggestive, given the commonly understood and readily recognized meanings of ‘care’ and ‘first’”); *see also In re Surgical Specialties Corporation (US), Inc.*, 2015 WL 9702633, AT \*9 (TTAB 2015) (finding “[t]rademarks containing commonly used words and highly suggestive or descriptive words are generally considered as weak marks that are afforded less protection than that accorded an arbitrary or coined word.”).

In the instant case, the terms “RED” and “LABEL” are both terms with commonly recognized meanings and together form a mark that is highly suggestive of a grade of the corresponding goods. Appellant is not arguing that weak or highly suggestive marks are not entitled to protection; rather, Appellant is arguing that because the Registered Mark is a weak and highly suggestive mark, it should be given far less protection than an arbitrary or fanciful mark. This is a significant factor in the likelihood of confusion analysis in this case. The mark RED LABEL is neither the company name of Appellant nor the company name of the owner of the Registered Mark. RED LABEL is suggestive of the particular grade or quality of the product. Sophisticated foodservice institution purchasers will readily understand this connotation and thus not give it a great deal of weight in terms of source identification. Thus, this factor should weigh against a finding of a likelihood of confusion.

#### **IV. Chicken and Frozen Fish and Seafood are Not Highly Related**

As previously discussed, at least most of the evidence submitted with Appellant’s Appeal Brief is properly of record and may be considered by the Board. The goods in question are not related or 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. Even though chicken and frozen fish and seafood may be distributed to foodservice institutions

by the same company, sophisticated foodservice purchasers are not likely to believe such goods were manufactured or produced by the same company. Sophisticated foodservice purchasers understand that chicken and frozen fish and seafood are raised and processed in significantly different manners, and as such will distinguish between a distributor and a manufacturer or producer.

As discussed in Appellant's Appeal Brief, although there may be a couple of exceptions, the evidence relied on by the Examining Attorney is not sufficient to establish that chicken and frozen fish and seafood are normally manufactured or produced by the same entity. For example, Marx Foods appears to be a distributor rather than a producer or manufacturer. *See* Exhibit A of Appellant's Appeal Brief. Nueske's appears to be in the business of smoking rather than manufacturing or originally processing meats. *See* Office Action, November 12, 2015, TSDR pp. 14-19. AdvancePierre Foods appears to only sell seafood on its retail product lines (as opposed to foodservice institution customers). *See* Office Action, November 12, 2015 TSDR pp. 22-27; *see also* Exhibit B of Appellant's Appeal Brief. Inland Seafood appears to process and/or manufacture fish and seafood, but merely is a distributor of chicken as evidenced by the fact that it sells Grassroots Farms and Springer Mountain Farms branded chicken. *See* Exhibit C of Appellant's Appeal Brief. Inland Seafood further goes on to proclaim it is "the largest seafood distributor in the southeast." *Id.* B&M Provisions appears to be a distributor based upon on its website proclaiming it to be "[t]he Lehigh Valley's Leading Foodservice Distributor." *See* Office Action, November 12, 2015, TSDR pp. 47-54.

The Examining Attorney has made reference to a couple of companies such as Metropolitan Meat Seafood & Poultry and Wholey that may be exceptions, although there is still some question based upon the evidence of record as to whether or not they actually are

manufacturers and/or producers of both chicken and frozen fish and seafood. *See* Office Action, November 12, 2015, TSDR pp. 21-22; *see also* Exhibit E of Appellant's Appeal Brief. However, even if the evidence does establish that a few companies manufacture and/or produce chicken and frozen fish and seafood, the evidence of record is still not sufficient to establish that chicken and frozen fish and seafood are normally manufactured and/or produced by the same company. The majority of references made of record appear to be distributors rather than manufacturers or producers.

Additionally, Appellant does not produce and market frozen fish and seafood, and the owner of the Cited Registration does not produce or sell chicken. *See* Exhibit A of Response to Office Action, November 4, 2015, TSDR p. 2. Further, to Appellant's knowledge, none of its primary competitors in the chicken industry sell frozen fish and seafood. *See* Exhibit B of Response to Office Action, November 4, 2015, TSDR pp. 3-8. This further strengthens the fact that chicken and frozen fish and seafood are not normally manufactured and/or produced by a single company.

As a result, the differences between chicken and frozen fish and seafood and the manner in which they are manufactured and/or processed along with the evidence of record shows that chicken and frozen fish and seafood are not normally manufactured and/or produced by the same company which also weighs against a finding of a likelihood of confusion.

## **V. Conclusion**

In view of the foregoing, Appellant's Mark is not likely to cause confusion with the Registered Mark. When weighing all the relevant factors, including the sophistication of the relevant purchasers, the relatively weak nature of the RED LABEL mark, and the dissimilarities

of the goods and corresponding trade channels associated with the respective marks, confusion is not likely to occur.

Accordingly, Appellant respectfully requests that the Trademark Trial and Appeal Board reverse the Examining Attorney's decision to refuse registration of Appellant's Mark.

Respectfully submitted,



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