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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re A.H.C.S., Inc.

Serial No. 86782221

James A. Knowlton of Law Office of James A. Knowlton,
for A.H.C.S., Inc., AKA Gwyn's High Alpine Restaurant.

April Roach, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

Before Kuhlke, Taylor and Wolfson,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

A.H.C.S., Inc. ("Applicant") seeks registration on the Principal Register of the mark GWYN'S in standard characters for "Restaurant services; Restaurant services featuring fine dining on ski area mountain" in International Class 43.[1]

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that

[1] Application Serial No. 86782221 was filed on October 8 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. §1051(a), based upon Applicant's allegation of first use and first use in commerce on December 15, 1980.

Applicant's mark, when used in connection with the identified services, so resembles the standard character mark GWIN'S LODGE registered on the Principal Register for "Resort lodging services" in International Class 43,[2] as to be likely to cause confusion, mistake or deception.

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

Likelihood of Confusion

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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.,* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within the *du Pont* list, only factors that are "relevant and of record" need be considered).

Similarity/Dissimilarity of the Marks

We consider Applicant's mark GWYN'S and Registrant's mark GWIN'S LODGE and compare them "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison*

[2] Registration No. 4194651, issued on August 21, 2012.

Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). When comparing marks, the test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014) (citing *In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1586 (TTAB 2007)). Further, marks "'must be considered … in light of the fallibility of memory ….'" *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). "'[S]imilarity is not a binary factor but is a matter of degree.'" *In re St. Helena Hosp.*, 113 USPQ2d at 1085 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003)).

There is no "correct" pronunciation of a mark and the only difference between GWIN'S and GWYN'S is the replacement of I with Y. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cri. 2012) (XCEED for seed confusingly similar

to X-SEED and design for identical goods). Thus, the marks, in part, are phonetic equivalents. *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985) (SEYCOS for wrist watches confusingly similar to SEIKO for watches). In addition, the marks are very similar in appearance based on the GWIN'S portion of Registrant's mark and the entirety of Applicant's mark GWYN'S. As to meaning and overall commercial impression, both appear as alternate spellings of a name or a phonetically equivalent made-up word in possessive form.[3] While the addition of the word LODGE adds the connotation of the services for which the mark is registered it does not alter the meaning or commercial impression of GWIN'S. It is well settled that marks containing additional wording may be confusingly similar. *Stone Lion Capital Partners, LP v. Lion Capital LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014) (STONE LION CAPITAL incorporated entirety of registered marks LION CAPITAL and LION).

Applicant's contention that the Examining Attorney improperly dissected the marks in her analysis is not supported by the record. While the marks must be viewed in their entireties, "in articulating reasons for reaching a conclusion on the issue of confusion, 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." *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 750-51 (Fed. Cir. 1985); *see also Stone Lion*

[3] *See, e.g.*, Applicant's web page attached to July 26, 2016 Response at 2 "The restaurant at the top of the Alpine Springs lift has been presided over by Gwyn Knowlton."

Capital Partners, LP v. Lion Capital LLP, 110 USPQ2d at 1161. Although there is no mechanical test to select a "dominant" element of a compound word mark, consumers are generally more likely to perceive a fanciful or arbitrary term, rather than a descriptive or generic term, as the source-indicating feature of the mark. *See, e.g., In re Dixie Rests. Inc.,* 105 F.3d 1405, 41 USPQ2d 1531, 1533-1534 (Fed. Cir. 1997) (affirming TTAB's finding that "DELTA," not the disclaimed generic term "CAFE," is the dominant portion of the mark THE DELTA CAFE); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (finding that "BINION'S," not the disclaimed descriptive wording "ROADHOUSE," is the dominant portion of the mark BINION'S ROADHOUSE). In addition, consumers are generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *Palm Bay Imps., v. Veuve Clicquot*, 73 USPQ2d at 1692; *In re Integrated Embedded*, 102 USPQ2d 1504, 1513 (TTAB 2016); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Here the term LODGE is generic for Registrant's services and is appropriately disclaimed. In addition, GWIN'S is the first part of the mark. There is no question that GWIN'S is the dominant portion of Registrant's mark and giving that portion greater weight in the analysis is appropriate. Certainly, we consider the marks as a whole and indeed the word LODGE in Registrant's mark is a difference in sound, meaning and appearance from Applicant's mark. The question is whether this difference is sufficient to distinguish the marks; we find that it is not, in particular, where lodge services are related to restaurant services as discussed below.

In general, likely confusion may be avoided if 1) the matter common to the marks is merely descriptive or diluted, or 2) the compared marks in their entireties convey a significantly different commercial impression. *See, e.g., Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011) (CITY BANK diluted for banking services); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (THE RITZ KIDS for clothing items (including gloves) different commercial impression from RITZ for kitchen textiles (including barbeque mitts). Here, however, Applicant's mark is similar to the distinctive and dominant portion of Registrant's mark and the record shows that it is not diluted for restaurant or lodging services. Moreover, as found above, the addition of LODGE does not change the overall commercial impression in a manner that avoids confusion.

Finally, Applicant's and Registrant's marks are in standard characters and they are not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re RSI Sys., LLC*, 88 USPQ2d 1445 (TTAB 2008); *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988); TMEP § 1207.01(c)(iii) (Jan. 2017). We must consider Applicant's and Registrant's marks "regardless of font style, size, or color," *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011), including iterations minimizing the generic word LODGE in Registrant's mark.

Overall, we find that the marks' similarities outweigh the dissimilarities and that this *du Pont* factor weighs in favor of finding a likelihood of confusion.

Similarity of the Services / Channels of Trade / Consumers

With regard to the services, channels of trade and classes of consumers, we must make our determinations under these factors based on the services as they are identified in the application and cited registration. *See In re Dixie Rests. Inc.*, 41 USPQ2d at 1534. *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d at 1161; *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). "This factor considers whether 'the consuming public may perceive [the respective services of the parties] as related enough to cause confusion about the source or origin of the goods and services.'" *In re St. Helena Hosp.*, 113 USPQ2d at 1086 (quoting *Hewlett Packard*, 62 USPQ2d at 1004). It is well settled that Applicant's and Registrant's services do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). It is sufficient if the respective services are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993).

Applicant's services include "restaurant services" unlimited as to type in addition to the "restaurant services" limited to those "featuring fine dining on ski area

mountain." *In re Midwest Gaming & Entertainment LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) ("Under standard examination practice, a semicolon is used to separate distinct categories of goods or services.")

The Examining Attorney has submitted numerous use-based, third-party registrations which cover both restaurant services and lodging services under a single mark.[4] Third-party registrations which individually cover a number of different services that are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services are of a type which may emanate from the same source. *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Albert Trostel* 29 USPQ2d at 1785-86; *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The registrations listed below are representative.

Registration No.	Mark	Services
4950470	ALSOL	hotel services; restaurant, catering, bar and cocktail lounge services; resort lodging services
4965499	SACRED ROCK RESORT	Resort lodging services; restaurant services
4945004	LE BEAR	Residential resort lodging services, namely, hotel and restaurant services, catering, bar and cocktail lounge services, namely providing food and lodging that specialize in promoting patrons' general health and well-

[4] August 11, 2016 Office Action at 23-55.

		being and rental of residential resort units
4884728	SEA PALMS RESORT	Resort lodging services; restaurant services
4967611	TANQUE VERDE RANCH	Bar and restaurant services; hotel, restaurant and catering services; providing dude ranches; … resort lodging services

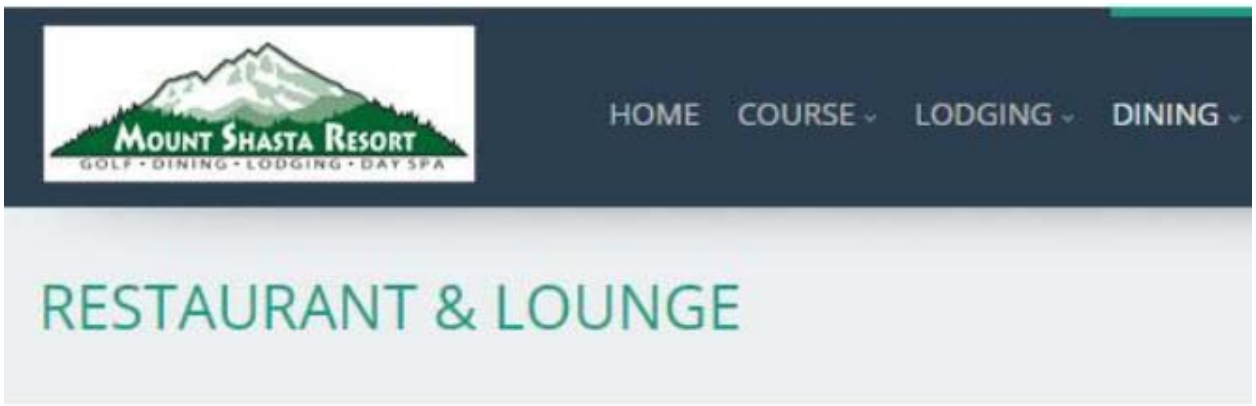
The Examining Attorney also submitted excerpts from third-party websites, including Registrant's website, advertising both restaurant and resort lodging services under the same mark in the same channels of trade. A representative sample, is shown below:

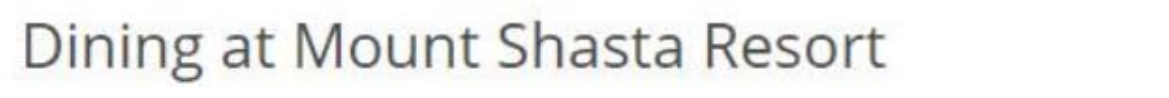
(January 29, 2016 Office Action at 16 (http://www.gwinslodge.com))

(January 29, 2016 Office Action at 17 (http://www.gwinslodge.com))

(January 29, 2016 Office Action at 4 (http://www.trappfamily.com))

(January 29, 2016 Office Action at 7 (http://www.thewhitewolfinn.com))





(August 11, 2016 Office Action at 2 (http://mountshastaresort.com))

(August 11, 2016 Office Action at 3 (http://www.sunnysidetahoe.com))

(August 11, 2016 Office Action at 17 (http://www.mountainvillage.com))

(August 11, 2016 Office Action at 21 (http://highlandsranchresort.com))

We find this evidence sufficient to establish that restaurant services and lodging services are related in that they are of a type that commonly originate from the same source, are used by the same consumers, and serve complementary purposes. *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009). In addition, because the identification of services in the registration and application (at least as to the "restaurant services") do not include any restrictions or limitations as to trade channels, we presume the respective services are or would be marketed in all normal trade channels for such services. *See, e.g.*, *Levi Strauss & Co. v. Abercrombie & Fitch*

Trading Co., 719 F.3d 1367, 1373, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) ("We have no authority to read any restrictions or limitations into the registrant's description of goods."); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Applicant's "restaurant services" are related to Registrant's "resort lodging services." *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986 (CCPA 1981) (it is sufficient for a finding of likelihood of confusion if relatedness is established for any item encompassed by the identification of services within a particular class in the application); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014); *Baseball America Inc. v. Powerplay Sports Ltd.*, 71 USPQ2d 1844, 1847 n.9 (TTAB 2004). In addition, the record establishes that Applicant's "restaurant services featuring fine dining on ski area mountain" are related to "resort lodging services" in that many of the third-party websites are for ski area mountain resorts offering both lodging and restaurant services. *See, e.g.*, http//www.trappfamily.com (January 29, 2016 Office Action at 4-6) "Trapp Family Lodge" offering "The finest dining Vermont has to offer" and hotel accommodations on a ski mountain; http://lodgeatgiantsridge.com (August 11, 2016 Office Action at 6) "The ski slopes of Giants Ridge … are right out our back door."; and http://www.altalodge.com (August 11, 2016 Office Action at 11-12) "This place has a vibe unlike any other ski lodging I've ever stayed in. … Wonderful ski hotel, with very large rooms with amazing views of the forest and the mountains. … The convenient on-mountain location of the Lodge allows guests to ski right to Alta's lifts."

An applicant may not restrict the scope of its goods or services or the scope of the services covered in the registration by extrinsic argument or evidence. *See, e.g.*, *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008); *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764–65 (TTAB 1986). Applicant's arguments on these factors are precisely that, arguing that Applicant's actual restaurant is unaffiliated with any lodge or hotel; that it is a family owned restaurant pioneering the concept of fine dining on a ski area; and that Registrant's actual lodge consists of cabins with a restaurant.

Applicant points to *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) where the court determined that evidence that only a very small percentage of restaurants sell private label beer suggests that it is uncommon for restaurants and beer to share the same trademark. Applicant argues its "restaurant service is not related to [Registrant's lodge] because numerous lodges like [Registrant's] have a restaurant and consumers are not likely to be confused that Gwyn's and Gwin's Lodge provide the same goods and services." 7 TTABVUE 5. *Coors Brewing Co.*, involved goods versus services. In such cases, "something more" may be needed to establish the relatedness of the goods (beer) and services (restaurants). Here, we have only services, and "something more" is not required to establish the relatedness of the services. Indeed, unlike in *Coors Brewing Co.,* where restaurants were found to rarely sell private label beer, the offering of lodging and restaurant services is so common it is clear that consumers are accustomed to seeing such services offered under the same mark. We acknowledge the examples of use of the

same mark for lodging and restaurant services all show such use in connection with onsite restaurants; however, the identification in the application "restaurant services" and "restaurant services featuring fine dining in ski mountain" encompass restaurants at a lodge. Therefore, we need not resolve whether or not such a limitation in the application would obviate a finding of relatedness on this record because it is not in the application before us.

In view thereof, these *du Pont* factors also favor a finding of likelihood of confusion.

Conclusion

In conclusion, because the marks are similar, the services are related, and the channels of trade and consumers overlap, we find that confusion is likely between Applicant's mark GWYN'S and Registrant's mark GWIN'S LODGE.

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