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Mailed: February 14, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Advanced Total Marketing Systems, Inc.

Serial No. 86860062

Cristina Arenas Solis of Ferraiuoli LLC,
for Advanced Total Marketing Systems, Inc.

Samuel R. Paquin, Trademark Examining Attorney, Law Office 101,
Ronald R. Sussman, Managing Attorney.

Before Kuhlke, Shaw and Gorowitz,
Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Advanced Total Marketing Systems, Inc. (“Applicant”) seeks registration on the Principal Register of the mark shown below for goods ultimately identified as “Latin American style food products, namely, processed flavored plantains slices, processed flavored yucca chips, fried pork with salt and chili, potato flakes of different flavors, Latin American style food products, namely, fired flavored peanuts and baked flavored peanuts,” in International Class 29 and “Fried corn tortilla snack foods with

different flavors; corn-based snack foods, namely, extruded corn with different flavors; popcorn of different flavors,” in International Class 30.¹



The application includes the following color claim and description of the mark:

The color(s) red, white, blue and light blue are claimed as a feature of the mark is/are claimed as a feature of the mark [sic].

The mark consists of the white word "YUMMIES" with a red circle over the letter "I" in a curved blue banner with a red and white border at the top and red, white and light blue borders at the bottom all to the right of a white winking smiley face outlined in blue and light blue with a red and white tongue wearing a white crown outlined in blue and light blue.

The Trademark Examining Attorney partially refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with "Latin American style food products, namely, processed flavored plantains slices, processed flavored yucca chips, Latin American Style food products, namely, fired flavored peanuts and baked

¹ Application Serial No. 86860062 was filed on December 29, 2015, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051, based upon Applicant's allegation of first use and first use in commerce on June 1, 2011.

flavored peanuts,”² is likely to cause confusion, mistake or deception with the marks in three registrations registered by different owners summarized below:

Registration No. 1458548 registered on the Principal



Register for the mark for “roasted nuts and dried fruits for consumption on and off the premises,” in International Class 29, “candy for consumption on and off the premises,” in International Class 30, and “retail candy and gift store services,” in International Class 42;³

Registration No. 4025559 registered on the Principal



Register for the mark for “Dairy-based snack foods excluding ice cream, ice milk and frozen yogurt; Fruit-based food beverage; Oils and fats for food; Snack food dips; Vegetable-based snack foods,” in International Class 29 claiming the colors blue, red, black, beige as a feature of the mark;⁴ and

Registration No. 4957659 registered on the Supplemental Register for the standard character mark SUPER YUMMYS for “Vegetable-based snack foods; Fruit-based snack foods; Vegetable chips; Fruit chips; Milk products excluding ice cream, ice milk and frozen yogurt,” in International Class 29.⁵

When the refusal was made final, Applicant appealed and briefs were filed. We reverse the refusal to register.

² The remaining goods in International Class 29, namely “fried pork with salt and chili, potato flakes of different flavors” and the goods in International Class 30 are not subject to the refusal.

³ Registered on September 22, 1987, renewed.

⁴ Registered on September 13, 2011.

⁵ Registered on May 10, 2016.

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) (“*du Pont*”) (cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 135 S. Ct. 1293, 113 USPQ2d 2045, 2049 (2015)). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). Even within the *du Pont* list, only factors that are “relevant and of record” need be considered. *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. 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 In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all DuPont factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 303 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

Similarity of the Goods/Channels of Trade/Consumers

With regard to the goods, channels of trade and classes of consumers, we must make our determinations based on the goods as they are identified in the application and cited registrations. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *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). The factor relating to the goods “considers whether ‘the consuming public may perceive [the respective goods of the parties] as related enough to cause confusion about the source or origin of the goods and services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1004).

Applicant’s “processed flavored plantains slices, processed flavored yucca chips” are encompassed by the “vegetable-based snack foods” in Registration No. 4025559 and the “vegetable-based snack foods,” “vegetable chips” in Registration No. 4957659. Applicant’s “fried flavored peanuts and baked flavored peanuts” are also encompassed by the “vegetable-based snack foods” in those registrations and the “roasted nuts” in Registration No. 1458548.⁶

⁶ A peanut technically is a legume and not a nut, which would include Applicant’s peanuts in the Registrants’ vegetable-based snacks. *See* www.dictionary.com (based on Random House Dictionary (2019)) Peanut “the pod or the enclosed edible seed of the plant, *Arachis hypogaea*, of the legume family”; Legume “any table vegetable of the legume family.” The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). However, in common use and

Considering the channels of trade and classes of purchasers, there are no restrictions in the application or Registration Nos. 4025559 and 4957659. Because the goods are legally identical and there are no limitations as to channels of trade or classes of purchasers in either the application or these cited registrations, we must presume that Applicant's and Registrant's goods will be sold in the same channels of trade and will be bought by the same classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion). *See also Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d 1001; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994).

The nuts and dried fruits which are the subject of Reg. No. 1458548 are specifically restricted to products which are "for consumption on or off the premises." Such language restricts those goods to those that are sold in establishments of the Registrant, where they may be consumed on the premises or taken away for later consumption. Thus, we do not consider the channels of trade to include other retail locations, such as those where Applicant's goods might be sold. While we must consider all ordinary channels of trade for Applicant's goods as the identification is

understanding consumers also categorize peanuts as nuts and the identification of goods "nuts" could include peanuts. Even if not considered to be encompassed by the broad identifications in the registrations, peanuts are a closely-related snack food.

not restricted, it is unlikely Registrant would sell Applicant's goods at the premises where it sells its goods. Thus, there do appear to be differences in the retail channels of trade with regard to the mark and goods in this registration. We realize consumers could cross-shop, such as visiting the premises where Registrant's goods are sold and purchasing nuts and procuring nuts at a grocery store nevertheless, the fact that differences in the channels of trade for the respective goods exist is a factor which, even if the respective goods were to be sold under the same or substantially similar marks, would tend to lessen any likelihood of confusion.

Applicant presented no argument on these factors.

In view of the above findings, these *du Pont* factors favor, to varying degrees, a finding of likelihood of confusion.

Similarity/Dissimilarity of the Marks

Under this factor, we compare Applicant's and Registrants' marks "in their entireties as to 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, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). 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 goods and/or 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). Further, the marks "must be considered ... in light of the fallibility of memory"

In re St. Helena Hosp., 113 USPQ2d at 1085 (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. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *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).

The Examining Attorney finds the marks to be confusingly similar arguing that the wording in the respective marks is the dominant element in the marks with design elements because words are generally dominant over design elements. The Examining Attorney focuses on the words YUMMIES, YUMMY’S and YUMMYS finding them similar in appearance, sound, meaning, and commercial impression; and the word YUMMIES in Registration No. 1458548 is identical in spelling to Applicant’s mark. The Examining Attorney also asserts that Applicant’s mark does not create a distinct commercial impression because there is no other wording in Applicant’s mark to distinguish it and the “mere deletion of wording from a registered mark may not be sufficient to overcome a likelihood of confusion.” 6 TTABVUE 8 (citing *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010)).

Applicant argues that the common element is merely descriptive as they are all derived from the word YUMMY which describes a characteristic of the products.

Applicant did not support this statement with evidence, however, we take judicial notice of the following definitions for YUMMY:

adjective, yummier, yummiest. 1. Very pleasing to the senses, especially to the taste; delicious: *The waiter brought out a tray of yummy desserts.* 2. Extremely attractive or appealing.

Noun, plural yummys. 3. An item of food that is particularly delicious: *The bakery window was full of yummys.* 4. Anything that is extremely attractive or appealing.⁷

The marks  and  are registered on the Principal



Register and we must accord them the presumptions provided by Section 7(b), 15 U.S.C. § 1057. While there is no disclaimer for the words YUMMIES or YUMMY'S they could have been considered unitary and as such no disclaimer was required. In any event, we consider the words YUMMIES and YUMMY'S to be, at minimum, highly suggestive of the various food items. The mark SUPER YUMMYS issued on the Supplemental Register which indicates that YUMMYS is, at minimum, merely descriptive of those goods. Thus, in each of the registered marks the common wording YUMMIES, YUMMY'S, and YUMMYS is conceptually weak.

Applicant argues that it has several other registrations for the applied-for mark for use in connection with other food items but they are not in the record. Moreover, a family of marks argument is not available to an applicant seeking to overcome a

⁷ Dictionary.com based on the Random House Dictionary (2018).

likelihood of confusion refusal in an ex parte proceeding; instead, the focus of the likelihood of confusion analysis must be on the mark an applicant seeks to register, not other marks an applicant may have used or registered. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009); *see also In re Ald, Inc.*, 148 USPQ 520, 521 (TTAB 1965) (“[I]n view of the specific prohibition of Section 2(d) . . . , the fact that applicant may possess a ‘family’ of marks characterized by the term ‘ALD’ is of no particular significance herein if the mark for which applicant now seeks registration . . . is confusingly similar to the previously registered mark . . .”). In addition, Applicant argues that there are many third-party registrations for food items that incorporate some form of the word YUMMY in their marks, but again, none were made of record. We do, however, have these three that have been cited which tend to support the fact that the term YUMMY and its variants has at least a suggestive meaning, and in the case of the SUPER YUMMYS mark is, in fact, merely descriptive. While this record is not as extensive as that found in *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313 (TTAB 2005) (NORTON MCNAUGHTON ESSENTIALS for clothing not confusingly similar to ESSENTIALS for clothing based in part on a dictionary definition, third-party registrations, and third-party uses of the term ESSENTIALS with clothing), the dictionary definition and coexisting registrations, including one on the Supplemental Register, serve to support the finding that variations on the word YUMMY are, at minimum, highly suggestive for food items.

Upon careful consideration of the arguments and evidence presented, we find that, when considered in their entirety, the purchasing public would be able to

distinguish Applicant's mark from the Registrants' marks. The design elements in Applicant's mark are prominent as are the design elements in the  mark in Registration 4025559. Although the design element in  may not be as pronounced, given the weakness of the term YUMMIES we find the differences nevertheless sufficient. Moreover, the trade channels for the goods in this registration are restricted to "on and off the premises." Finally, although the additional word SUPER in the Supplemental Registration is merely laudatory, we cannot ignore it in the likelihood of confusion analysis, which requires that the respective marks be considered in their entireties. *See generally, In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). We find the addition of the prominent design element in Applicant's mark, the additional word in Registrant's mark, the different form of the word YUMMY, and the weakness of the common element combine to create marks that would be distinguished based on their differences.

Accordingly, we find that because the common element YUMMIES/YUMMY'S/YUMMYS is very weak in that it is both, at minimum, highly suggestive of the goods and registered by three different Registrants all with legally identical or closely-related goods, the differences in the marks discussed above create overall different commercial impressions sufficient to distinguish the marks. Moreover, we find this factor to be pivotal in that this factor of the dissimilarities of the marks outweighs the other factors such that confusion is not likely. *See Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991)

(“We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive”). In regard to the mark in Registration 1458548, the determination is further supported by the trade channel restriction in that mark.

Decision: The refusal to register Applicant’s mark is reversed.