

This Opinion is not a
Precedent of the TTAB

Mailed: September 13, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Honestly Cranberry, LLC

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Serial No. 86868625

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Rebecca Liebowitz of Venable LLP
for Honestly Cranberry, LLC.

Matthew T. Stigall, Trademark Examining Attorney, Law Office 105,
Jennifer L. Williston, Managing Attorney.

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Before Taylor, Kuczma and Adlin,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Honestly Cranberry, LLC (“Applicant”) seeks registration on the Principal Register of the mark HONESTLY CRANBERRY (in standard characters with CRANBERRY disclaimed) for

Dried cranberries in International Class 29.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing Registration No.

¹ Application Serial No. 86868625 was filed on January 7, 2016, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as February 1, 2015.

3038902 for the mark **honestly BETTER** (BETTER disclaimed) for retail grocery store services and food products including, “processed, frozen, preserved, canned, dried and candied fruits” in International Class 29, owned by Dorothy Lane Market, Inc., as a bar to registration.²

² Registration No. 3038902 was issued on January 10, 2006, and renewed. The goods covered in the Registration are: food, namely dairy products, excluding ice cream, ice milk and frozen yogurt; eggs; whipped topping; margarine substitutes; fruit salads; fresh, canned and bottled cut fruits; processed, frozen, preserved, canned, dried and candied fruits; raisins; applesauce; jellies; fruit-based spreads; fruit paste; fruit sauce, namely, cranberry sauce; compotes; fruit leathers; fresh, canned and bottled cut vegetables; frozen, processed, cooked, preserved and dried vegetables; salads, except macaroni, rice and pasta salad; cole slaw; dried beans; dried soybeans; tofu; preserved truffles; processed peppers; processed olives; gherkins; processed mushrooms; processed potatoes; french fried potatoes; lentils; baked beans; bean dip; hummus; shelled, roasted and processed nuts; snack mix consisting primarily of processed fruits, processed nuts and/or raisins; nut butters; tahini; flaked coconut; meat; poultry; processed meat, namely beef, pork, chicken, turkey, lamb and veal; meat, chicken and fish croquettes; luncheon meat; bacon; charcuterie; chili; corned beef hash; chow mein; soups; stews; chowder; foie gras; meat paste; jerky; chicken and dumplings; seafood; sardines; lox; processed anchovies; anchovy paste; escargot; caviar; frozen, prepared and packaged meals and entrees consisting primarily of meat, seafood, poultry or vegetables; food package combinations consisting primarily of cheese, meat and/or processed fruit; cheese and cracker combinations; cheese fondue; cheese food; cheese spreads; canned pork and beans; protein based, nutrient-dense snack bars; potato-based snack foods; edible fats and oil; dips, excluding salsa and other sauces used as dips; garlic-based spread; guacamole; condiments, namely pepper oil; chicken stock; veal stock; bouillon; clam juice; dairy-based food beverages; and vegetable-based chocolate food beverages in Class 29; food, namely, yeast; gluten; processed grains; rolled oats; kasha; grits; hominy grits; polenta; wheat germ other than a dietary supplement; flour; couscous; oatmeal; malt extracts for food; bakery goods; bread crumbs; biscuits; wafers; grain-based chips; risotto; rice cakes; rice salad; frozen, prepared and packaged meals and entrees consisting primarily of pasta or rice; crackers; croutons; food package combinations consisting primarily of bread, crackers or cookies; cracker and cheese combinations; ready to eat, cereal derived food bars; rice-based snack foods; pasta; pasta shells; spaghetti and meatballs; lasagna; calzones; ziti; ravioli; macaroni and cheese; pizza; pizza dough; pizza crust; pasta salad; gnocchi; noodles; spring rolls; egg rolls; won tons; lo mein; potstickers; sushi; sandwiches; pot pies; pastries; meat pies; empanadas; enchiladas; burritos; fajitas; quesadillas; tortillas; nachos; tacos; taco shells; taco chips; tortilla chips; corn chips; quiche; processed cereals; breakfast cereals; muesli; granola; granola-based snack bars; waffles; crumpets; pancakes; pancake mixes; bakery deserts; crepes; chocolate-based ready-to-eat food bars; puddings; parfaits; caramel popcorn; chocolate; chocolate chips; chocolate covered nuts; chocolate truffles; chocolate-based fillings for cakes and pies; cake mixes; frostings; candy decorations for cakes; honey; almond paste; marzipan; preserved ginger; marshmallows; cocoa; cocoa mixes; hot chocolate; coffee; cappuccino; coffee beans;

After the Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney submitted briefs. We reverse the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits, we address an evidentiary matter. As part of its appeal brief, Applicant included a copy of a “specimen” filed by Registrant.³ The Examining Attorney objects to this evidence and requests that the Board disregard it.⁴ Inasmuch as the specimen included in Applicant’s Brief was not submitted prior to the filing of this appeal and is not automatically of record, it is untimely and has not been considered.⁵ Trademark Board Manual of Procedure (“TBMP”) § 1208.02 (June 2017). The record in an application should be complete prior to the filing of an

espresso; maple syrup; topping syrup; ice cream; ice cream substitute; ice cream drinks; frozen confections; frozen custards; frozen yogurt; sherbet; sorbet; shakes; popped popcorn; processed unpopped popcorn; wheat-based snack foods; pretzels; snack mix consisting primarily of crackers, pretzels, candied nuts and/or popped popcorn; candy coated popcorn; candy coated apples; candy; candy mints; bubble gum; capers; salad dressings; vinegar; wine vinegar; marinades; dried chili peppers for use as a seasoning; mayonnaise; horseradish; tartar sauce; ketchup; gravies; gravy mixes; ham glaze; sauces; tomato sauce; barbecue sauce; spaghetti sauce; pizza sauce; teriyaki sauce; soy sauce; hot sauce; picante sauce; salsa; mustard; relish; seasonings; seasoned coating for meat, fish and poultry; spices; salt; pepper; vanilla beans; processed herbs; processed and powdered ginger, used as an herb, spice and flavoring; vanilla; cinnamon; nutmeg; and ice cubes; toasted corn kernels in Class 30; food, namely fresh, raw and unprocessed fruits, vegetables, nuts, garlic, ginger, mushrooms, herbs and anchovies; fresh truffles; unprocessed chives and cereals; fresh and unprocessed grains for eating; raw popcorn; live fish for food purposes; live lobsters, shrimp, prawns, oysters and clams; fish food in Class 31; and retail grocery store services in Class 35.

³ Applicant’s Appeal Brief p. 10 (4 TTABVUE 13).

⁴ Examining Attorney’s Appeal Brief (6 TTABVUE 7).

⁵ Even if the specimen was considered, the result in this case would be the same.

appeal. *See In re Fiat Grp. Mktg. & Corp. Commc'ns S.p.A.*, 109 USPQ2d 1593, 1596 (TTAB 2014); 37 C.F.R. § 2.142(d); TBMP §§1203.02(e), 1207.01.

II. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *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, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the nature of the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case, there is also evidence concerning the similarity of the trade channels and the strength of Registrant's mark.

A. Similarity and Nature of the Goods and the Channels of Trade

Applicant seeks to register its mark for "dried cranberries" in International Class 29. Registrant's mark is registered for food products including "dried and candied fruits" in Class 29. Inasmuch as Registrant's "dried and candied fruits" encompass Applicant's more narrowly defined "dried cranberries," the goods are legally identical. Unrestricted and broad identifications are presumed to encompass all goods of the type described. *See In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006) (citing *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981)); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992).

Further, because the goods are legally identical, it is presumed that they travel in the same channels of trade to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (Board entitled to rely on this legal presumption). This presumption is corroborated by the evidence of record, which establishes that the goods are marketed to the same consumers in the same channels of trade as Registrant's goods.⁶

In view of the foregoing, the factors of the similarity of goods and the similarity of trade channels and customers favor a finding of likelihood of confusion.

B. Similarity of the Marks

Marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). When the goods are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *See Bridgestone Americas Tire Operations, LLC v. Fed.*

⁶ The evidence confirms that dried cranberries are a type of dried fruit sold alongside many other dried fruits and combinations of dried fruits. The Examining Attorney produced website evidence showing third-parties offering dried cranberries as well as other types of dried fruits for sale. For example, website printouts from Bella Viva Orchards, Nuts.com, Nuts in Bulk, and NutsTop.com, Eden Foods, Hadley Fruit Orchards, Melissa's, Paradise, Sid Wainer & Son (Jansal Valley brand), Tierra Farm, Traina Foods, and Woodstock Foods, all feature dried cranberries for sale alongside a variety of other dried fruits. Thus, Registrant's dried fruits encompass Applicant's dried cranberries confirming that the goods are legally identical. May 3, 2016 Office Action at 9-11, 12-15, 16-17, 18-19; September 21, 2016 Final Office Action at 7-9, 10-13, 19-22, 29-32, 33-37, 38-42, 43-47, and 54-55.

Corp., 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *In re Viterra Inc.*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010).

Applicant argues that the stylized nature of Registrant's mark distinguishes it from Applicant's standard character word mark. However, a standard character mark, like Applicant's mark, generally will not avoid a likelihood of confusion with a mark presented in stylized characters, like Registrant's mark, because the rights in standard character marks reside in the wording or literal element(s) and not in any particular display or rendition. As such, Applicant's mark could be presented in the same font, style and size as shown in Registrant's mark. *See In re Viterra Inc.*, 101 USPQ2d at 1909; *In re Mighty Leaf Tea*, 94 USPQ2d at 1260 (rejecting an argument that the specific style of a registered mark could serve to distinguish the applicant's mark in standard character form); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983) ("the argument concerning a difference in type style is not viable where one party asserts rights in no particular display").

Additionally, the word "CRANBERRY" in Applicant's mark has little if any source-identifying significance because it is highly descriptive, if not generic, for dried cranberries, as reflected by Applicant's disclaimer of "Cranberry." Similarly, Registrant has disclaimed the laudatory term "BETTER" in its mark. Applicant admits that "[i]t is not in dispute that 'CRANBERRY' is generic and 'BETTER' is laudatory."⁷

⁷ Applicant's Appeal Brief p. 7 (4 TTABVUE 10).

Disclaimed matter that is descriptive or laudatory of a party's goods is typically less significant or less dominant when comparing marks. *See Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (finding "delta" the dominant part of the mark "THE DELTA CAFÉ because CAFÉ was disclaimed"). Greater weight is often given to the dominant feature when determining whether marks are confusingly similar. *See In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Here, the marks share a similar structure, with the same lead element and dominant term "Honestly" followed by disclaimed matter.

While the second word in each mark is disclaimed and therefore accorded less weight, the disclaimers do not remove these terms from the marks. Therefore, we must compare the marks HONESTLY CRANBERRY and **honestly BETTER** in their entireties. Applicant's mark HONESTLY CRANBERRY informs the consumer that the product involves cranberries. On the other hand, Registrant's mark **honestly BETTER** is a general laudatory expression that is directed to a wide variety of food products. Thus, when viewing the marks in their entireties they render somewhat different overall commercial impressions. However, inasmuch as both marks are comprised of two words beginning with the identical nondescriptive word "HONESTLY" followed by descriptive terms, they are more similar than dissimilar.

C. Number and Nature of Similar Marks in Use on Similar Goods

The strength or weakness of the marks is probative of the likelihood of confusion.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015); *du Pont*, 177 USPQ at 567.

“[A] real evidentiary value of third party *registrations* per se is to show the sense in which ... a mark is used in ordinary parlance.’ 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015) (emphasis added).” *Juice Generation*, 115 USPQ2d at 1675. Third-party registrations may be relevant to show that the mark or a portion of the mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services, in the same way dictionary definitions are used to illustrate how a term is perceived in the trade or industry, and therefore, may be considered somewhat weak. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (evidence of third-party registrations is relevant to show the sense in which a mark is used in ordinary parlance; that is, some segment that is common to both parties’ marks may have a normally understood and well-recognized descriptive or suggestive meaning); *Juice Generation*, 115 USPQ2d at 1675 (third-party registration evidence may show that a term carries a highly suggestive or descriptive connotation in the relevant industry and therefore may be considered somewhat weak); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (the thirty-eight third-party registrations provide at least some evidence that thirty-eight applicants considered

the suffixes of the parties' marks to be suggestive of electrical products); *see also Conde Nast Publications, Inc. v. Miss Quality, Inc.*, 597 F.2d 1404, 184 USPQ 422, 425 (CCPA 1975) (third-party registrations used to show meaning in the same way dictionaries are used); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1471 (TTAB 2014) (registrations have some value because they may be used in the manner of a dictionary to show that a mark or a portion of a mark is descriptive or suggestive of goods); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1955 (TTAB 2006) (third-party registrations can be used in the manner of a dictionary definition to illustrate how a term is perceived in the trade or industry); *United Foods Inc. v. J.R. Simplot Co.*, 4 USPQ2d 1172, 1174 (TTAB 1987) (the existence of numerous third party registrations in the food field for marks which include "QUICK" as a portion thereof, (including a number of marks which include "QUICK 'N"), buttresses the conclusion that "QUICK" is a highly suggestive term, and these registrations are entitled to some weight for that purpose).

Here, each mark incorporates the term HONESTLY as part of a composite mark that includes another descriptive or laudatory word. In support of the weakness of Registrant's mark, Applicant relies on a number of third-party registrations for marks beginning with HONESTLY- and HONEST- for food products. These include twelve registrations (owned by six different registrants) for marks beginning with HONEST-⁸ and five third-party registrations (owned by four different owners) for

⁸ Registration Nos. 4266086 for Honest Earth & Design for instant potatoes, processed potatoes, dehydrated potatoes (Class 29), 4273775 for HONEST EARTH for instant potatoes, processed potatoes, dehydrated potatoes (Class 29), 4403535 for Honest Earth & Design for dehydrated and processed potatoes, processed potato mixes (Class 29), owned by Idahoan

marks beginning with HONESTLY- (see chart below). The similarities between the marks in the registrations and Registrant’s mark supports a finding that marks containing HONESTLY- and HONEST- for food products are weak. While all of the marks are relevant, the following marks, each beginning with the HONESTLY- formative followed by a general descriptive or laudatory term, are the most pertinent:

| Registration No. | Mark | Goods | Class | Owner |
|------------------|----------------|---|-------|----------------------------------|
| 3838635 | HONESTLY SWEET | Natural sweetener | 30 | Cargill, Incorporated |
| 4419971 | HONESTLY GOOD | Frozen prepared entrees consisting primarily of meat, fish, seafood, poultry, or vegetables | 29 | Societe des Produits Nestle S.A. |
| 4419975 | honestly good | Frozen prepared entrees consisting primarily of meat, fish, seafood, poultry, or vegetables | 29 | Societe des Produits Nestle S.A. |

Foods, LLC; 4695900 for HONEST SWEETS for candies, candy, candy bars, sweets (Class 30), owned by Iconic Candy, LLC; 4776088 for HONEST CHOPS & Design for all natural meats (Class 29), 4785872 for HONEST PREP for all natural meats (Class 29), owned by Honest Chops International LLC; 5056243 for HONEST CATCH for frozen fish, frozen shellfish, seafood, not live, shellfish for human consumption, not live, frozen shellfish (Class 29), owned by Gourmet Fusion Foods, Inc.; 3696281 for HONEST BEVERAGES for tea-based beverages (Class 30), non-alcoholic, organic beverages containing fruit juices (Class 32), 3745345 for HONEST KOMBUCHA for tea-based beverages (Class 30), 3949984 for HONEST FOOD for packaged nutritional food bars for use as a meal replacement made from vegetables (Class 5), packaged fruit-based food bars (Class 29), 4076733 for HONEST for tea and tea-based beverages, herbal teas (Class 30), nonalcoholic beverages containing fruit juices (Class 32), owned by Honest Tea, Inc.; and 2132526 for HONEST JOE COFFEE for coffee (Class 30), restaurant services (Class 42) owned by Bagel Works, Inc.

Registration Nos. 4009762 for HONEST EARTH for coffee offered through hotels, resorts, and other facilities that provide accommodation, and 4313731 for FRUITFULLY HONEST for fruit-based snack-food (Class 29), grain-based snack food, bakery products, snack cakes, and confectioneries, namely, yogurt enrobed fruit pieces and chocolate enrobed fruit pieces (Class 30), were not considered as they respectively are for coffee offered by places providing accommodation, and for a mark which does not begin with HONEST. Serial No. 86851237 for HONEST HARVEST owned by Bay Valley Foods, LLC has been abandoned and therefore is not considered.

| | | | | |
|---------|-----------------------|-------|----|---------------------------------|
| 4732054 | HONESTLY DELICIOUS | Dough | 30 | Immaculate Baking Company |
| 4953129 | HONESTLY CRAFTED | Candy | 30 | YummyEarth, Inc. |

Each of the foregoing five registrations, with the exception of Registration No. 3838635, covers products that are also mentioned in the cited Registration namely, frozen, prepared and packaged meals and entrees consisting primarily of meat, seafood, poultry or vegetables; pizza dough; and candy. The fifth registration for HONESTLY SWEET is for “natural sweetener” classified in Class 30, which is related to the products contained in the cited Registration, particularly “chocolate-based fillings for cakes and pies; cake mixes; frostings; candy decorations for cakes; honey...coffee”.⁹ Likewise, the goods set forth in the third-party registrations for the registered HONEST- marks, namely, coffee, tea, processed potatoes, candy, meat, frozen fish and seafood, are identical or closely related, to the goods covered in the cited registration.

The five registrations for the HONESTLY- marks owned by four different owners, together with the twelve third-party registrations for HONEST- marks owned by six different owners, all for food products, show that Registrant’s HONESTLY BETTER mark is weak. Thus, the “BETTER” and “CRANBERRY” wording in Registrant’s and Applicant’s marks, despite their disclaimers, have heightened significance in differentiating the marks. Even where, as here, the record lacks proof of actual third-

⁹ See <https://tmidm.uspto.gov/id-master-list-public.html>.

party use, the third-party registration evidence showing similar marks on the same or related goods, is relevant to show the sense in which a mark is used in ordinary parlance, that is, some segment that is common to both parties' marks may have a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak. *Jack Wolfskin*, 116 USPQ2d at 1136 citing *Juice Generation*, 115 USPQ2d at 1675.

Therefore, based on the number of third-party registrations for marks beginning with HONESTLY- or HONEST- that cover identical and/or related goods to Registrant's and Applicant's goods, customers will distinguish the marks as representing two different sources of the goods. Thus, this *du Pont* factor favors a finding of no likelihood of confusion.

III. Conclusion

While Applicant's goods and the goods covered by the cited registration are legally identical in part and otherwise related, and are presumed to travel in the same trade channels to the same customers, the modest similarity between the marks is not enough for us to find a likelihood of confusion, because the shared term HONESTLY is so weak. Therefore, the addition of the word CRANBERRY in Applicant's mark is sufficient to distinguish it from the cited mark, notwithstanding the fact that the distinguishing portions of both Applicant's and Registrant's marks have been disclaimed.

Decision: The refusal to register Applicant's mark HONESTLY CRANBERRY under § 2(d) is reversed.