

This Opinion is not a  
Precedent of the TTAB

Mailed: January 26, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Ol Happ's Place Restaurant, LLC*  
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Serial No. 90738221  
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Patrick A. Reid, Stephen E. Kelly, Thomas J. Banks of Hill Ward Henderson, P.A.  
for Ol Happ's Place Restaurant, LLC.

Philip Liu, Trademark Examining Attorney, Law Office 109,  
Michael Kazazian, Managing Attorney.

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Before Lynch, Acting Deputy Chief Administrative Trademark Judge, and Goodman  
and Larkin, Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Ol Happ's Place Restaurant, LLC ("Applicant") seeks registration on the Principal  
Register of the word and design mark show below ("FINE FARE," "ESTD 1997," and  
"PLACE"<sup>1</sup> disclaimed) for "restaurant services; bar services" in International Class  
43.<sup>2</sup>

<sup>1</sup> Although not reflected in Office records, in the March 28, 2023 Request for Reconsideration at TSDR 3, Applicant provided a disclaimer of "Place" to narrow the issues.

<sup>2</sup> Application Serial No. 90738221 was filed on May 27, 2021 based upon Applicant's allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant provided the following description of the



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



confusion with the mark **HAP'S PIT BARBECUE** (PIT BARBECUE disclaimed) for "Catering services; Restaurant services" in International Class 43.<sup>3</sup> The Examining Attorney has also refused registration based on Applicant's failure to satisfy a requirement of a disclaimer of "GRILL" in the mark.

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mark: "The mark consists of the wording "FINE FARE & FRIENDSHIP" in stylized font between two circles, above a barn and trees superimposed in front of mountain, above the wording "HAPPS PLACE" and "ESTD 1997" in stylized font, above a banner with the wording "BARN AND GRILL" in stylized font between two circles."

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Applicant's appeal brief is at 6 TTABVUE and its reply brief is at 9 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

<sup>3</sup> Registration No. 4352367 issued June 18, 2013, renewed. The registration includes a description of the mark that states: "The mark consists of the stylized word 'HAP'S' above the words 'PIT BARBECUE' in stylized font. Flames appear above the letter 'P' in 'HAP'S.'" Color is not claimed as a feature of the mark. The name(s), portrait(s), and/or signature(s) shown in the mark does not identify a particular living individual.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed.

We affirm the Section 2(d) refusal to register and reverse the disclaimer requirement.

## I. Disclaimer

### A. Applicable Law

An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable. Trademark Act Section 6(a), 15 U.S.C. § 1056(a). Under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), merely descriptive terms are unregistrable, and, therefore, are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. *See In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, 1860 (Fed. Cir. 1987); *In re Richardson Ink Co.*, 511 F.2d 559, 185 USPQ 46, 47 (CCPA 1975).

An exception to a disclaimer requirement exists, however, if the descriptive term at issue is so merged together with other elements of a composite mark, that they form a unitary, non-descriptive whole that renders a disclaimer unnecessary. *In re EBS Data Processing, Inc.*, 212 USPQ 964, 966 (TTAB 1981). According to the U.S. Court of Appeals for the Federal Circuit, “a unitary [phrase] simply has no ‘unregistrable component,’ but is instead an inseparable whole.” *Dena Corp. v. Belvedere Int'l, Inc.*, 950 F.2d 1555, 21 USPQ2d 1047, 1051 (Fed. Cir. 1991).

“A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used.” *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007) (citing *In re Gyulay*, 820 F.2d 1216, 3, USPQ2d 1009, 1009 (Fed. Cir. 1987)). Whether terms in a mark are merely descriptive is considered in relation to the goods and/or services, and not in the abstract. *Id.* (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 813-14, 200 USPQ 215, 218-219 (CCPA 1978); *In re MBNA Am. Bank N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1783 (Fed. Cir. 2003)).

B. Whether “BARN AND GRILL” is a unitary or incongruous term or a double entendre.

The Examining Attorney has required a disclaimer of GRILL from the phrase BARN AND GRILL in Applicant’s mark.<sup>4</sup> In the present appeal, we have no doubt that GRILL by itself is merely descriptive as applied to “restaurant services.” The Examining Attorney submitted a dictionary definition of “grill,” which is defined as “food cooked by broiling or grilling,” and “an informal restaurant or a room in a restaurant where grilled foods are served.” February 18, 2022 Office action at TSDR 2. American Heritage Dictionary, ahd.com.

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<sup>4</sup> The Examining Attorney withdrew the disclaimer for “barn.” September 29, 2022 Office Action at TSDR 9.

The Examining Attorney’s entire disclaimer requirement was as follows: No claim is made to the exclusive right to use “FINE FARE”, “ESTD 1997”, “PLACE”, and “GRILL” apart from the mark as shown. *Id.* at TSDR 11. Applicant initially provided disclaimers of “Fine Fare” and “ESTD 1997” in its August 18, 2022 Response to Office action at TSDR 1; in its March 28, 2023 Request for Reconsideration at TSDR 2, Applicant added the disclaimer of “Place” to its statement: “No claim is made to the exclusive right to use “FINE FARE”, “ESTD 1997”, “PLACE”, and “GRILL” apart from the mark as shown”.

Applicant does not dispute that the word GRILL is merely descriptive in connection with restaurant services. Instead, Applicant contends that BARN AND GRILL is a unitary term, incongruous, or a double entendre and thus, the requirement for a disclaimer for “grill” should be “reversed.” Applicant’s Appeal brief, 6 TTABVUE 9; Applicant’s reply brief 9 TTABVUE 3, 8. In particular, Applicant asserts that “BARN AND GRILL” “is a play on words of the commonly known phrase ‘bar and grill.’” Applicant submits that

Barns are often dirty, dusty, and emanating with odd or foul odors. By contrast, a grill is a particular type of cooking apparatus and a style of cooking for human consumption. Grill areas are often filled with appetizing aromas. Thus, a dirty, dusty, foul-smelling barn for farm equipment and farm animals is incongruous with a sanitary, aromatic grilling area with grilling equipment and products. By juxtaposing the incongruous terms “barn” and “grill,” Applicant requires those viewing the mark to use imagination and mental pause to work out its meaning.

*Id.* at 10.

As to the double entendre, Applicant argues that “Barn and Grill” on one hand evokes “the expected restaurant concept of a ‘bar and grill,’ and on the other hand evok[es] the concept of a barn incorporating a grill or a grill incorporating a barn area.” Applicant’s Reply brief, 9 TTABVUE 5.

A mark is unitary if it creates a single, distinct commercial impression. *Dena Corp. v. Belvedere Int’l, Inc.*, 21 USPQ2d at 1052. If the matter that comprises the mark or relevant portion of the mark is unitary, or if the composite has an incongruous meaning, no disclaimer of an element, whether descriptive, generic, or otherwise, is required. TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1213.05

(November 2023). *Cf. In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382, 385 (CCPA 1968) (SUGAR & SPICE for “bakery products” unitary); *In re Shutts*, 217 USPQ 363, 364-65 (TTAB 1983) (SNO-RAKE for “a snow removal hand tool having a handle with a snow-removing head at one end, the head being of solid uninterrupted construction without prongs” incongruous).

The Examining Attorney argues that the phrase BARN AND GRILL is separable and not unitary, that “the term BARN has no effect on the wording GRILL and vice versa,” and that the combination does not “create a whole new meaning,” as the meaning of the terms individually or combined remains the same separately or together. Examining Attorney’s brief, 8 TTABVUE 3-4.

We consider whether, in combination, BARN AND GRILL creates an incongruity so that the term BARN AND GRILL and can be considered greater than the sum of its parts, rendering it unitary. We also consider whether it is a double entendre and unitary.

Although we do not find BARN AND GRILL incongruous since Applicant’s restaurant property includes a rickety barn incorporated onto the property, which also is shown in the drawing of the mark, February 18, 2022 Office action at TSDR 3, we do find BARN AND GRILL is a double entendre. A double entendre “is a word or expression capable of more than one interpretation. For trademark purposes, a ‘double entendre’ is an expression that has a double connotation or significance as applied to the goods or services. ... The multiple interpretations that make an expression a ‘double entendre’ must be associations that the public would make fairly

readily.” *In re The Place, Inc.*, 76 USPQ2d 1467, 1470 (TTAB 2005) (citing TMEP 1213.05(c)).

Our case law dictates that a double entendre must be recognizable from the mark itself and in relation to the goods or services in the identification. *See The Place, Inc.*, 76 USPQ2d at 1470 (finding THE GREATEST BAR for “restaurant and bar services” is not a double entendre; “A mark is thus deemed to be a double entendre only if both meanings are readily apparent from the mark itself.”).

We find that BARN AND GRILL is unitary and a double entendre as it brings to mind a restaurant with a barn and a grill and also brings to mind the common term “bar and grill.” Applicant is offering bar services and grill restaurant services, and the barn building depicted in the mark, according to Applicant’s webpage, is incorporated into the restaurant which includes a grill. February 18, 2022 Office action at TSDR 3 Therefore, the double entendre is apparent on the face of the mark. As a result, the disclaimer of “grill” in BARN AND GRILL is unnecessary.

The requirement of a disclaimer of “GRILL” is reversed.

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177

USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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.”). These factors and others are discussed below.

#### A. Second and Third *DuPont* Factors

We first consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.”<sup>5</sup> *DuPont*, 177 USPQ at 567. *See also Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014) (“It was proper, however, for the Board to focus on the application and registrations rather than on real world conditions, because ‘the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application.’”).

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<sup>5</sup> Applicant did not address this factor in its brief, thus conceding the issue. *In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1740 (TTAB 2016) (Board considered Applicant to have conceded the issue of similarity or dissimilarity of the goods or channels of trade, by not addressing the issues).



Applicant's services are "restaurant services; bar services." Registrant's services are "Catering services; Restaurant services." Applicant's and Registrant's services are identical in part with respect to "restaurant services."

The second *DuPont* factor favors a finding of likelihood of confusion.

We turn next to the third *DuPont* factor which requires us to consider "the similarity or dissimilarity of established, likely-to-continue trade channels."<sup>6</sup> *DuPont*, 177 USPQ at 567. "The third *DuPont* factor—like the second factor—must be evaluated with an eye toward the channels specified in the application and registration, not those as they exist in the real world." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018).

Because Applicant's and Registrant's "restaurant services" are identical, we may presume that these services will move in the same trade channels to the same class of purchasers. See *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

The third *DuPont* factor favors a finding of likelihood of confusion.

#### B. First *DuPont* factor

The first *DuPont* factor requires us to determine the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation

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<sup>6</sup> Applicant also did not address this factor in its brief, thereby conceding the issue. *In re Morinaga Nyugyo K. K.*, 120 USPQ2d at 1740.

and overall commercial impression. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014).

In comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the services offered under the respective marks is likely to result. *San Fernando Elec. Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977).

We analyze “the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps.*, 73 USPQ2d at 1691 (quoting *DuPont*, 177 USPQ at 567). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Johann Maria Farina Gegenüber Dem Julichs-*

*Platz v. Chesebrough-Pond, Inc.*, 470 F.2d 1385, 176 USPQ 199, 200 (CCPA 1972); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). The average purchaser here is a consumer of “restaurant services,” which are consumed by the general public.

A determination of likelihood of confusion is not made on a purely mechanical basis, counting the number of words, syllables or even letters that are similar or different. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”).

While the marks must be considered in their entireties, including any disclaimed matter and designs, it is nevertheless appropriate, for rational reasons, to regard certain features of the marks as being more dominant or otherwise significant, and therefore to give those features greater weight. *Stone Lion*, 110 USPQ2d at 1161; *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In the case of marks which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods. *See In re Viterra Inc.*, 101 USPQ2d at 1908 (“In the case of a composite mark containing both words and a design, ‘the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.’”) (quoting *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983)); *In re Dakin’s Miniatures, Inc.*,

59 USPQ2d 1593, 1596 (TTAB 2001) (“words are normally accorded greater weight because they would be used by purchasers to request the goods”).

Also, disclaimed or otherwise descriptive matter is generally viewed as a less dominant or significant feature of a mark. *See In re Nat'l Data Corp.*, 224 USPQ at 751-52. Again, while the analysis cannot be predicated on dissecting the marks into their various components, different features may be analyzed to determine whether the marks are similar, and 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 a consideration of the marks in their entireties. *See In re Nat'l Data Corp.*, 224 USPQ at 751; *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955).

Given that Applicant's and Registrant's services are identical in part, the degree of similarity between the marks required to support a finding of likelihood of confusion declines. *See Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

For convenience, following are Applicant's and Registrant's marks:



Applicant argues that: the Examining Attorney has contravened the anti-dissection rule; provided no rational reason for according little to no weight to inherently distinctive wording, descriptive wording, and design elements in each mark; offered no explanation of the commercial impressions created by each mark; and misapplied controlling Federal Circuit precedent. Applicant's Appeal brief, 6 TTABVUE 16, 19, 22.

Applicant argues that there are fundamental differences in sight, sound and meaning given the additional words, additional syllables, and different designs in each mark. Applicant's Appeal brief, 6 TTABVUE 19. Applicant asserts that the overall commercial impression of Applicant's Mark is very different than the commercial impression created by the cited registration:

[t]he commercial impression of Applicant's mark is characterized by a pleasant social setting in fresh mountain air, where the soiled nature of a barn is juxtaposed with an appetizing grill that produces fine fare. More specifically, the illustration in Applicant's Mark of the building situated in a group of trees at the foot of a mountain connotes a rural setting in the mountains where the air is fresh, crisp, and clean. The design elements of Applicant's Mark impress upon a consumer a clean, organized, simple dining room, in a wooden building such as a barn or cabin, located in the mountains with the fresh and crisp air that is typical of a mountain setting. The inherently distinctive term "FRIENDSHIP" connotes a pleasant social setting. The unitary phrase "BARN AND GRILL" conveys attention-grabbing incongruity, especially in the context of the FINE FARE" wording when viewing the mark as a whole.

In contrast, the small flame creates the impression of a fire such as would be used to smoke meat in a barbecue pit. Barbecue also conveys an impression of a smoky atmosphere due to the pit smoke. The font shifts and differences of capitalization in the Registration impress

upon a consumer a haphazard and eclectic setting where one would be eating the barbecue possibly at picnic tables or in a small room with no formal design plans that is filled with eclectic decorations or has no clear them.

Applicant's Appeal brief, 6 TTABVUE 15.

In comparing the marks, they admittedly have both similarities and dissimilarities. There are a number of words in Applicant's mark, but the dominant literal portion of Applicant's mark is HAPPS because it is by far the largest and most prominent term and it is displayed in the center of the mark. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1184 (TTAB 2018) (the term LAROQUE displayed in a large bold typeface, and comprising the largest literal portion of the mark in terms of size, position and emphasis, is the dominant element in Applicant's word and design mark). The terms "ESTD Place 1997" and "Fine Fare" in Applicant's mark are in smaller font and have been disclaimed; the phrase "Barn and Grill" is in smaller font, and a double entendre. Thus, "Barn and Grill" is at least highly suggestive of the nature of the restaurant and bar services. Although we do not ignore these less prominent, disclaimed, descriptive and suggestive terms in Applicant's mark, these literal terms are entitled to less weight in the analysis of similarity. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (descriptive terms are properly given less weight); *In re Stirbl*, 62 USPQ2d 1446, 1448 (TTAB 2002) ("highly suggestive matter generally is entitled to less weight"). There is no doubt that HAPPS is the primary source identifying word in Applicant's composite mark.

The literal portion of Registrant's mark is HAP'S PIT BARBECUE. The dominant literal portion of Registrant's mark is the word HAP'S in the possessive form because

PIT BARBECUE has been disclaimed as descriptive and HAP'S is the largest and most prominent portion of the mark. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d at 1184. Again, although the literal phrase PIT BARBECUE is not to be ignored, it is entitled to less weight in the analysis. *See In re Chatam Int'l Inc.*, 71 USPQ2d at 1946.

Thus, HAPPS and HAP's are the dominant features of each mark and most likely to be remembered by the consumer. *Carlisle Shoe Co. v. Societe Anonyme: Roger Fare & Cie*, 278 F.2d 519, 126 USPQ 54, 55 (CCPA 1960) (Mademoiselle is the dominant feature of applicant's mark and the one most likely to be remembered as indicating origin of the goods).

As to the literal terms "PIT BARBECUE" in Registrant's mark and the literal terms "BARN AND GRILL," "FRIENDSHIP," "FINE FARE" "ESTD PLACE 1997" in Applicant's mark, consumers will view these different additional words in each mark as simply reflecting or suggesting information relating to the type of restaurant services offered or about the restaurant itself.

The dominant literal terms HAPPS and HAP'S in each mark are very similar in appearance, differing by the one additional letter "p" in Applicant's mark and an apostrophe before the letter "s" in Registrant's mark. The additional letter "p" in Applicant's mark is a very slight distinction that is easily overlooked by customers; the addition of an apostrophe and possessive form used in Registrant's mark has little significance in distinguishing the marks. *See Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (slight differences in marks do not normally

distinguish them; difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009) (noting that “[t]he absence of the possessive form in applicant’s mark ... has little, if any, significance for consumers in distinguishing it from the cited mark”); *In re Curtice-Burns, Inc.*, 231 USPQ 990, 992 (TTAB 1986) (finding the marks MCKENZIE’S and MCKENZIE “virtually identical in commercial impression”).

As to sound, although there is no correct pronunciation of a literal term that is not a known word, given the similarities in HAPPS and HAP’S, we find that they would be pronounced identically or very similarly. The fact that HAPPS in Applicant’s mark has an additional letter “p” and HAP’S in Registrant’s mark is in possessive form does little to distinguish the likely pronunciation.

As to connotation and commercial impression, HAPPS and HAP’S both convey the connotation and commercial impression of a person’s name. Considering the entire literal portion of each mark, FINE FARE & FRIENDSHIP HAPP’S ESTD PLACE 1997 BARN AND GRILL and HAP’S PIT BARBECUE they both provide the connotation and commercial impression of the name of a person who owns a restaurant (the “place” for “fine fare” and “grill” or “pit barbecue”). *See Barbara’s Bakery, Inc. v. Landesman*, 82 USPQ2d 1283, 1288 (TTAB 2007) (BARB’S BUNS BAKERY and BARBARA’S BAKERY both provide the connotation and commercial impression of a bakery owned by Barb or Barbara).

As to the design portions of the marks, they are different, with Applicant’s mark displaying a barn, mountains and trees, and Registrant’s mark displaying flames.



The design in Applicant's mark is slightly smaller than the wording HAPPS which has the prominent center position. Similarly, in the cited mark, the flame design is smaller, and rests slightly above the larger and more prominent wording HAP'S, which is also in the center position.

We emphasize that our determination as to the similarity of the marks is based on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009) (citation omitted). A consumer relies on the recollection of the various marks that he has previously seen in the marketplace and, given the fallibility of memory, recollection is based on an overall general impression and not minute details or specific characteristics of the marks.

In both Applicant's and Registrant's marks, as is typically the case, the literal element is dominant notwithstanding the accompanying and differing designs. *See In re Viterra Inc.*, 101 USPQ2d at 1911 ("the verbal portion of a word and design mark likely will be the dominant portion"); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that "if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services" and "because applicant's mark shares with registrant's mark that element responsible for creating its overall commercial impression, the marks are confusingly similar"). Each design reinforces other descriptive or suggestive wording in the respective marks. In Applicant's mark, the design reinforces that the restaurant services are in a barn-like building or

environment. In Registrant's mark, the flames presumably depict the "PIT BARBECUE" referenced in the literal portion of the mark. We find that the literal portions, particularly the dominant terms HAPPS and HAP'S in each mark, clearly contribute more to the source-indicating significance of each mark than the design elements in the marks. *Barbara's Bakery, Inc. v. Landesman*, 82 USPQ2d at 1288 (BARBARA'S in BARBARA'S BAKERY AND DESIGN contributes more to the source indicating significance than the generic term bakery or the design element).

We recognize the differences between the marks when considered in their entireties. Although the design element and additional wording in each mark provide points of difference between Applicant's and Registrant's mark, we find that this difference is not sufficient to overcome their overall similarities.

When considered in their entireties, we find that the similarities in Applicant's mark and the cited mark far outweigh the dissimilarities. Viewing the respective marks of Applicant and Registrant from the standpoint of the general recollection of the consumer, it is apparent that the points of distinction in each mark do not significantly diminish the similarities in commercial impression engendered by each mark of a restaurant owned by HAPPS/HAP'S. Additionally, consumers familiar with Registrant's mark and services may, upon hearing Applicant's mark, believe the two marks refer to the same source, especially given that "consumers engage in 'the penchant of consumers to shorten marks.'" *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at \*36 (TTAB 2021) (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016)).

As a result, we find ordinary consumers may reasonably assume that Applicant's restaurant services offered under its mark emanate from the same source as the restaurant services of the cited registration.

The first *DuPont* factor weighs in favor of a finding of likelihood of confusion.

### III. Conclusion

The first, second, and third *DuPont* factors weigh in favor of a finding of likelihood of confusion. We find that a likelihood of confusion exists between Applicant's mark and Registrant's mark in connection with the identical restaurant services.

**Decision:** The disclaimer requirement is reversed; the Section 2(d) refusal to



register Applicant's mark  is affirmed.