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PRECEDENT OF THE TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Pita Jungle – Tempe, Inc.

v.

Pita Pal Foods, LP

Opposition No. 91204422
to Application Serial No. 85250869

John L. Hay and James G. Speer of Gust Rosenfeld, P.L.C. for Pita Jungle – Tempe, Inc.

David Fink of Fink & Johnson for Pita Pal Foods, LP.

Before Kuhlke, Adlin and Gorowitz, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Pita Pal Foods, LP (“Applicant”) seeks registration of the mark shown below



with PITA disclaimed for “Falafel; Processed chickpeas; Processed garbanzo beans.”¹ In its notice of opposition, Pita Jungle – Tempe, Inc. (“Opposer”) alleges prior use (through its predecessors) and registration of the mark THE ART OF EATING HEALTHY, in standard characters, for “restaurants,”² and that “[a] substantial number of the Mediterranean style dishes featured at [Opposer’s] restaurants use falafel and chickpeas/garbanzo beans as principal ingredients.” As grounds for opposition, Opposer alleges that use of Applicant’s mark would be likely to cause confusion with Opposer’s mark. In its answer, Applicant denies the salient allegations in the notice of opposition.

On November 7, 2013, the parties filed a stipulation to forego a traditional trial and instead resolve this dispute via the Board’s Accelerated Case Resolution (“ACR”) procedure (the “ACR Stipulation”). Specifically, the parties agreed: (1) that testimony may be submitted through declarations; (2) that “[r]esponses to discovery” and Opposer’s “registrations with the trademark office” are “admissible;” (3) to file ACR briefs similar in form to cross-motions for summary judgment, with their evidence attached; and (4) that “the Board may resolve genuine disputes of material fact.” The parties also stipulated to certain facts. The Board approved the parties’ ACR Stipulation in its order of November 12, 2013. The parties are

¹ Application Serial No. 85250869, filed February 24, 2011 originally based on use in commerce, but later amended to allege an intent to use the mark in commerce under Section 1(b) of the Act. The application includes a color claim and the following description of the mark: “The mark consists of ‘PITA PAL’ in red separated by a yellow star above ‘THE ART OF HEALTHY EATING’ in green.”

² Registration No. 3267429, issued September 26, 2006; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

commended for agreeing to ACR and stipulating to certain facts, and thereby simplifying and expediting resolution of this proceeding.

The Record

The record consists of the pleadings, the file of the involved application and the following evidence submitted with Opposer's ACR briefs:

- Opposer's advertisements and promotional materials, including those used in-store, on billboards and on the Internet and social media;
- printouts from Opposer's website and "yelp.com";
- Opposer's menus including for take-out;
- billing statements for Opposer's marketing efforts;
- the Declaration of Bruce R. Hernandez, Opposer's expert witness, and his report on the likelihood of confusion survey he conducted on Opposer's behalf;
- the Declaration of Bassel Osmani, one of Opposer's owners and founders ("Osmani Dec."); and
- the Office's Order Summary of Opposer's request for status and title copies of two of its registrations.

Opposer's Opening ACR brief (TTABVue Dkt. # 30).

- the Supplemental Declaration of Mr. Osmani ("Osmani Supp. Dec."); and
- status and title copies of Opposer's pleaded registration and its unpleaded Registration No. 3192893.

Opposer's supplemental filing of May 2, 2014 (TTABVue Dkt. # 33).

- color copies of two cards used in Mr. Hernandez's survey, previously provided in black and white with Mr. Hernandez's original report.

Opposer's Reply ACR brief (TTABVue Dkt. # 35). Applicant has not objected to any of Opposer's evidence. Applicant did not submit any testimony or other evidence.

Evidence Regarding the Parties and Their Marks

Opposer's owners opened their first Pita Jungle restaurant in Tempe, Arizona in 1994. There are now 19 Pita Jungle restaurants in Arizona and California. Osmani Dec. ¶ 3.³ The restaurant's food "is based upon a Mediterranean diet and ... includes substantial amounts of hummus, falafel, chick peas and garbanzo beans as well as a lot of grains, olive oil, vegetables, fish, chicken and pita pocket bread." *Id.* ¶ 4. Opposer offers many foods for take-out, and in the future intends to offer its food products through retail stores. *Id.* ¶¶ 5-6. Opposer has promoted its restaurants under THE ART OF EATING HEALTHY mark since 1994. *Id.* ¶ 7. Opposer claims to have spent \$241,738.37 on marketing efforts "over the years," but it is unclear what portion of these expenses relate to Opposer's pleaded mark. Opposer's ACR Brief at 11 and Ex. 2; Basmani Supp. Dec. ¶ 7 (documents showing promotional expenses related to Opposer's pleaded mark "as well as its other registered Mark"). "The extent to which Pita Jungle's URL ["pitajungle.com"] has been viewed is 1,485,540 sessions and 9,024,509 page views between March 25, 2012 and May 2, 2014." Osmani Supp. Dec. ¶ 4.

³ Opposer's notice of opposition indicates that Opposer owns some Pita Jungle restaurants while others "are owned by franchisees of Opposer's affiliate, Pita Jungle Franchising Corp.," which is not a party. The evidence of record does not reveal the nature of the relationship between Opposer and Pita Jungle Franchising Corp. For convenience, we will refer collectively to Opposer and its affiliates which own or operate Pita Jungle restaurants as "Opposer."

Applicant's hummus and other products are offered in Costco stores in the same geographical areas where Opposer operates its Pita Jungle restaurants. Osmani Dec. ¶ 9. Moreover, Applicant's "marketing efforts using [Applicant's mark] appear in the very same Costco stores where [Opposer] has placed display racks prominently featuring [Opposer's] similar" pleaded mark. Osmani Supp. Dec. ¶ 8.⁴ Applicant offers pitas, falafel and other products in addition to hummus. Osmani Dec. ¶ 9; Opposer's ACR Brief Ex. 5.

Standing and Priority

Opposer introduced a copy of its pleaded registration certified by the Office as being "in full force and effect" and owned by Opposer. Opposer's Supplemental Filing of May 2, 2014 Ex. 2. Opposer's pleaded registration establishes its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000). Because the pleaded registration is of record, and Applicant has not counterclaimed for cancellation of the registration, priority is not at issue in this proceeding with respect to the services identified in the registration. *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974).

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See*

⁴ Apparently the display racks contain coupons for Opposer's restaurants.

also In re Majestic Distilling Co., Inc., 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 goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Opposer bears the burden of establishing that there is a likelihood of confusion by a preponderance of the evidence. *Cunningham*, 55 USPQ2d at 1848. We consider the likelihood of confusion factors about which the parties introduced evidence, and treat the remaining factors as neutral.

Goods and Services and Channels of Trade

Turning first to the parties' goods and services and channels of trade, it is settled that they need not be identical or even competitive in order to support a finding of likelihood of confusion. It is enough that the goods and services are related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used, to a mistaken belief that Applicant's goods and Opposer's services originate from or are in some way associated with the same source or that there is an association between the sources of the goods and services. *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423, 1432 (TTAB 1993); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Schering Corp. v. Alza Corp.*, 207 USPQ 504, 507 (TTAB 1980); *Oxford Pendaflex Corp. v. Anixter Bros. Inc.*, 201 USPQ 851, 854 (TTAB 1978); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911

(TTAB 1978). The issue is not whether purchasers would confuse the goods and services, but rather whether there is a likelihood of confusion as to the source of the goods and services. *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984). Furthermore, it is settled that we must consider the goods as identified in Applicant's involved application and the services as identified in Opposer's pleaded registration. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *Octocom Systems, Inc. v. Houston Computers Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

While Applicant seeks registration for food products and Opposer's restaurants offer food, "there is no *per se* rule which mandates a finding that confusion is likely whenever foods and restaurants services are sold under similar marks." *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209, 1210 (TTAB 1999). Rather, "[t]o establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services." *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982). Here, we find that Opposer has shown the requisite "something more," for two reasons.

First, Applicant's mark includes the word "pita," which describes both a type of bread often eaten with Applicant's goods, *and* a type of food served in Opposer's Pita Jungle restaurants. Opposer's ACR Brief Exs. 1A (promotional flyer identifying at the bottom the types of food and services Opposer offers, with "Pitas"

listed first); 1C (flyer prominently bearing PITA JUNGLE & Design mark which lists “Pita Wraps” first among Opposer’s “specialties,” and coupon with picture of pita bread and other foods offered in Opposer’s restaurants); 1D (flyers identifying “pitas” first among Opposer’s food offerings and including a picture of pita bread with Opposer’s other foods); 1F (Opposer’s menu featuring “hot pitas,” “cold pitas” and “pita wraps”). In addition, Applicant’s website reveals that it offers “traditional pocket pita.” Opposer’s ACR Brief Ex. 5. *See, In re Azteca Restaurant Enterprises*, which affirmed a refusal to register AZTECA MEXICAN RESTAURANT for restaurant services due to the prior registration of AZTECA for prepared Mexican foods, in which “something more” was found because:

Mexican food items are often principal items of entrees served by restaurants, certainly by Mexican restaurants. The average consumer, therefore, would be likely to view Mexican food items and Mexican restaurant services as emanating from or sponsored by the same source if such goods and services are sold under the same or substantially similar marks.

50 USPQ2d at 1211; and *In re Golden Griddle Pancake House Ltd.*, 17 USPQ2d 1074 (TTAB 1990), which affirmed the refusal to register GOLDEN GRIDDLE PANCAKE HOUSE for restaurant services based on a registration of GOLDEN GRIDDLE for table syrup, finding that “Applicant’s mark makes it clear that its restaurant serves pancakes and, no doubt, pancake (or table) syrup, as well. There is an undeniable connection between the goods of the registrant and the services of applicant.” Similarly, in this case the evidence reveals an “undeniable connection”

between the pita identified by Applicant's mark, which is used with Applicant's goods, and the pita and related foods sold in Opposer's restaurants.

Second, Opposer's Pita Jungle restaurants offer takeout and catering services featuring the same foods for which Applicant seeks registration, and featuring the pita identified and described by Applicant's mark. Opposer's ACR Brief Exs. H and O (flyer promoting catering services and listing pitas among other foods; "to go" menu featuring three types of "cold pitas," seven types of "hot pitas," four types of "pita wraps," as well as hummus and falafel; flyer promoting "take out," including "pitas"); Osmani Dec. ¶ 4 ("Pita Jungle's food ... includes substantial amounts of hummus, falafel, chick peas and garbanzo beans ... as well as pita pocket bread."). *See In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012) (affirming refusal to register COLOMBIANO COFFEE HOUSE for "providing food and drink" based on registered certification mark COLOMBIAN for "coffee," in part because "applicant's own website evidence indicates that it is in the business of rendering coffee house services"); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001) (affirming refusal to register OPUS ONE for restaurant services based on a likelihood of confusion with the same mark for wine, and stating "[t]he fact that applicant's restaurant serves the type of goods (indeed the actual goods) identified in the cited registration is certainly probative evidence which supports a finding under the second *du Pont* factor that applicant's services and opposer's goods are related"); *In re Golden Griddle Pancake House*, 17 USPQ2d at 1074 (finding "something more" in part because "restaurants frequently package certain of their

products for retail sale”); *Roush Bakery Products Co., Inc. v. Ridlen, et al.*, 190 USPQ 445, 447 (TTAB 1976) (finding relationship between restaurant services and bread, stating that “[w]hatever gap exists is substantially narrowed by applicants’ business of selling packaged bread as a retail food product at their restaurant.”).

In short, the evidence reveals that Applicant’s processed chickpeas and garbanzo beans (essentially hummus)⁵ and falafel are related to Opposer’s restaurant services which offer all of those foods, as well as the pita identified in Applicant’s mark, for takeout. This factor weighs in favor of finding a likelihood of confusion.

As for channels of trade, neither Opposer’s identification of restaurant services nor Applicant’s identification of food products contain any limitations with respect to channels of trade. Therefore, Applicant’s goods and Opposer’s services are presumed to move in all normal channels of trade for those goods and services and be available to all classes of consumers for such goods and services. *Citigroup Inc. v. Capital City Bank Grp., Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Elbaum*, 211 USPQ at 640; *see also, Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). Since Applicant’s goods are the type that are sold in Opposer’s restaurants the normal channels of trade are likely to overlap, as both parties would be expected to market their respective goods and services through the same advertising channels to

⁵ Opposer’s ACR Brief Ex. 5.

consumers interested in hummus, falafel and related products. Indeed, the record establishes that Applicant's goods are offered and Opposer's services are promoted in the same Costco stores. Osmani Dec. ¶ 9; Osmani Supp. Dec. ¶ 8. The overlapping channels of trade also weigh in favor of finding a likelihood of confusion.

The Marks

Turning to the parties' marks, we must compare them "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). That is, we may not dissect the marks into their various components. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981). Of course, one feature of a mark may be more significant than another, and it is not improper to give more weight to the dominant feature of a mark in determining its commercial impression. *In re Nat'l. Data Corp.*, 224 USPQ at 751 ("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. Indeed, this type of analysis appears to be unavoidable.").

Here, Applicant's mark is comprised of a slight variation of Opposer's mark (THE ART OF HEALTHY EATING rather than THE ART OF EATING HEALTHY)

combined with the term PITA PAL, with PITA disclaimed. This case is therefore analogous to those finding a likelihood of confusion where one mark contains the entirety of another, and merely adds additional elements. *See, Bellbrook Dairies, Inc. v. Hawthorn-Mellody Farms Dairy, Inc.*, 253 F.2d 431, 117 USPQ 213 (CCPA 1958); *see also, International Paper Co. v. Valley Paper Co.*, 468 F.2d 937, 175 USPQ 704 (CCPA 1972); *In re Fiesta Palms LLC*, 85 USPQ2d 1360 (TTAB 2007); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155 (TTAB 1982).

More importantly, Applicant's slogan THE ART OF HEALTHY EATING is separable and distinct from PITA PAL and the star design, as it appears on a different line than PITA PAL and the star and is a unitary phrase. Moreover, the additional elements in Applicant's mark, the wording PITA PAL and the ordinary star design serving to separate the descriptive term PITA from PAL, are not sufficiently distinctive to obviate the similarities engendered by the nearly identical slogan. Applicant's argument to the contrary notwithstanding, the term PITA PAL is at best suggestive of Applicant's goods. It is also suggestive of the foods served in Opposer's restaurants, which are often served with pita bread. Indeed, Applicant's mark is used on packaged foods which are: (1) often consumed with pita; and (2) prominently featured in Opposer's restaurants. In addition to not being particularly distinctive, Applicant's yellow star design is not large and in any event the literal elements of marks are generally entitled to greater weight than design

elements. *See In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1911 (Fed. Cir. 2012); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987).

While Applicant's mark is displayed in stylized lettering, and its words are presented in red and green, this is not relevant because Opposer's pleaded mark is registered in standard characters, meaning that it could be displayed in the same or a similar manner. *Viterra*, 101 USPQ2d at 1909; *Citigroup*, 98 USPQ2d at 1258-59; *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012).

In short, 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 that confusion as to the source of the goods and 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); *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991). We find that the parties' marks are more similar than dissimilar, and this factor also weighs in favor of finding a likelihood of confusion.⁶

⁶ Applicant's brief is focused in large part on an alleged third-party registration for the mark THE ART OF HEALTHY EATING for retail grocery stores (Reg. No. 4376219), presumably in an attempt to establish that Opposer's mark is weak. However, because this registration is not of record we give it no consideration. In any event, even if this registration were of record, it would not be evidence that the mark is in use on a commercial scale or that the public has become familiar with it. *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); *Productos Lacteos Tocombo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). Nor would it establish that Opposer's mark is so weak that it is not entitled to protection against Applicant's similar mark for related goods.

Opposer's Survey

Mr. Hernandez, Senior Vice-President of Quantitative Research for Behavior Research Center, Inc. ("BRC"), was Senior Project Director for Opposer's survey, which was conducted between March 1 and April 6, 2013. Hernandez Dec. ¶¶ 1, 2. Mr. Hernandez has a BA from Arizona State University, and his curriculum vitae reveals that he has substantial experience working with Arizona and other state and local governmental entities to study topics such as watercraft fuel consumption and the taxes therefor, motorist attitudes and behaviors and City of Phoenix Police Department employee attitudes, among other topics. However, the extent of Mr. Hernandez's litigation experience is unclear, he "has not testified as an expert at trial or by deposition since 2005," and his experience with trademark-related surveys is limited. Hernandez Dec. Ex. A.

In any event, according to Mr. Hernandez, the survey in this case was intended "to determine if there was consumer confusion between Pita Jungle's slogan 'the art of eating healthy' and Pita Pal's slogan 'The Art of Healthy Eating' (Pita Pal's slogan including the words 'Pita Pal' immediately above it with a yellow star separating 'Pita' and 'Pal')." Hernandez Dec. ¶ 2 and Ex. A. At each of the 17 Pita Jungle locations, BRC interviewed 26 or 27 customers exiting the restaurant, for a total of 446 interviews. *Id.* Ex. A. It is not clear how the interviewees were selected.

The survey revealed that 57% of those questioned were aware that THE ART OF EATING HEALTHY is Opposer's slogan. *Id.* Respondents were then asked "If

you were in a local food store shopping for hummus and saw [Applicant's involved mark] on a package of hummus you were considering purchasing, would you definitely, probably, probably not or definitely not think it was produced by [Pita Jungle]?," and 21% answered "probably" while 9% answered "definitely." *Id.* Based on the survey, Mr. Hernandez concludes that Applicant's mark "created a consistently high level of confusion (30%) across demographic sub-groups." Hernandez Dec. ¶ 4.

We do not find the survey reliable and accordingly do not rely on it in our likelihood of confusion analysis. Indeed, the survey did not include a "control," i.e. the survey was not divided into a "test cell" and a "control cell." *See, American Flange & Manufacturing Co., Inc. v. Rieke Corp.*, 80 USPQ2d 1397, 1414 (TTAB 2006), *withdrawn after settlement*, 90 USPQ2d 1127 (TTAB 2009); *Ava Enterprises, Inc. v. Audio Boss USA, Inc.*, 77 USPQ2d 1783, 1786-87 (TTAB 2006); J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 32:187 (4th ed. 2014). Furthermore, the universe of interviewees was skewed because it only included Opposer's customers who were leaving the restaurant and they were questioned immediately after being exposed to Opposer's marks in the restaurant. Moreover, the extent of Mr. Hernandez's experience with trademark surveys is unclear, and his qualifications do not suggest expertise in trademark matters. Finally, the survey's key question was leading, as it asked whether Opposer's customers would believe the hummus bearing Applicant's mark was produced by

Opposer, rather than asking open-ended questions, such as “who do you think produced this hummus?” *Cf. Ava Enterprises*, 77 USPQ2d at 1786-87.

Conclusion

Opposer has established its claim of priority and likelihood of confusion by a preponderance of the evidence. The parties’ goods and services are related, the channels of trade overlap and the marks are similar. Any doubts as to whether a likelihood of confusion exists must be resolved in favor of Opposer, the prior user and registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *Kohler Co. v. Baldwin Hardware Corp.*, 82 USPQ2d 1100, 1113 (TTAB 2007). Accordingly, after careful review of all evidence of record pertaining to the relevant *du Pont* factors, and based on a preponderance of the evidence, we conclude that there is a likelihood of confusion between the parties’ marks.

Decision: The opposition is sustained.