

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: August 15, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Arcor S.A.I.C.
v.
“ROT FRONT” Open-Type Joint Stock Co.
—

Opposition No. 91222153
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Perla M. Kuhn and Barri A. Frankfurter of Fox Rothschild LLP for Arcor S.A.I.C.

Alexander Lazouski of Lazouski IP LLC for “ROT FRONT” Open-Type Stock Co.
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Before Cataldo, Kuczma and Pologeorgis,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

“ROT FRONT” Open-Type Stock Co. (Applicant) filed an application to register the mark displayed below for “Confectionery made of sugar, namely, candy, sweets, caramels” in International Class 30.¹

¹ Application Serial No. 79151042 was filed on June 6, 2014, based upon a request for an extension of protection of International Registration No. 1213719 under Section 66(a) of the Trademark Act.



“The wording ‘BON BON’ is disclaimed apart from the mark as shown.”

“The mark consists of the words ‘BON BON’ in white, outlined in dark purple and partially outlined in light purple set inside a jagged edged purple square outlined in dark purple that is reminiscent of a candy wrapper.”

“The color(s) purple, dark purple, light purple and white is/are claimed as a feature of the mark.”

Arcor S.A.I.C. (Opposer) opposed registration of the mark on the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Opposer alleges use and registration of the marks BON O BON (in standard characters) for “Chocolates, pastries filled with sweet fillings, alfajores, and wafers” in International Class 30;² and the mark displayed below for “Chocolates, bonbons, alfajores and filled obleas (wafers)” in International Class 30.³



“The mark consists of the words ‘BON O BON’ in yellow stylized letters over a red circle on a yellow background. There is a white inner border

² Registration No. 2779822 issued on November 4, 2003. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First renewal.

³ Registration No. 4633325 issued on November 4, 2014.

inside the circle and the letter ‘O’ of ‘BON O BON’ is inside a white heart.”

Applicant filed an answer denying the salient allegations in the notice of opposition.⁴

On July 25, 2016, the Board denied the parties’ cross-motions for summary judgment on Opposer’s claim of likelihood of confusion. In that order, the Board, noting that the issues remaining to be resolved were relatively straightforward, encouraged the parties to stipulate to the resolution of the proceeding by means of the Board’s Accelerated Case Resolution (“ACR”) procedure.⁵

- **ACR.**

In an Interlocutory order issued on February 6, 2017,⁶ the Board approved the parties’ ACR stipulations, filed on December 14, 2016⁷ and February 6, 2017.⁸ *See Bond v. Taylor*, 119 USPQ2d 1049, 1051 (TTAB 2016); *Conolty v. Conolty O’Connor NYC LLC*, 111 USPQ2d 1302, 1304 (TTAB 2014). *See also* Trademark Board Manual of Procedure (TBMP) § 528.05(a)(2) (June 2017) and authorities cited therein. A summary of the procedural and factual stipulations approved by the Board is set forth below:⁹

⁴ In an order issued July 25, 2016, the Board, *inter alia*, struck Applicant’s affirmative defense nos. 1-6, 8 and construed affirmative defense no. 7 as an amplification of its denials of the salient allegations of the notice of opposition. 14 TTABVUE 2-3, n 5.

⁵ *Id.* at 5-6.

⁶ 20 TTABVUE.

⁷ 18 TTABVUE.

⁸ 19 TTABVUE.

⁹ 18 TTABVUE 2-3; 19 TTABVUE 2-3; 20 TTABVUE 1-2.

1. The Board may resolve any disputed issues of material fact in making a final determination on the merits.
2. The parties will not conduct discovery.
3. The parties waive pre-trial disclosures.
4. The parties will submit their evidence and briefs at the same time as if proceeding on summary judgment.
5. The parties may offer into evidence testimony by declaration or affidavit, including testimony by expert witnesses.
6. The parties reserve the right to object to the admissibility of evidence offered by declaration or affidavit on any grounds available under the Federal Rules of Evidence, provided that such objections are made within fourteen days from the service of a declaration or affidavit containing the evidence being objected to by the party.
7. Opposer has standing to bring this opposition.
8. Evidence may be marked as “Confidential” or “Attorney’s Eyes Only” and such marked evidence (and any briefs containing such evidence) shall be handled pursuant to the Board’s standard protective order which is deemed to be entered in this case.
9. The parties will forego an oral hearing.
10. The Parties agree that the following fact stipulations are being made for the purposes of the instant Opposition proceeding only and will not operate as admissions outside of the Opposition context.
11. Opposer is the owner of U.S. Trademark Registration No. 2,779,822 (the “822 Registration”) for the mark BON O BON in standard characters on the Principal Register for “Chocolates, pastries filled with sweet fillings, alfojores, and wafers” in Class 30.
12. The application that matured to the ‘822 Registration was filed on November 17, 1999 and the registration issued November 4, 2003.
13. Opposer is the owner of the U.S. Trademark Reg. No. 4,633,325 (the “325 Registration”) for the mark BON O BON (and design) on the Principal Register for “chocolates, bonbons, alfajores and filled obleas (wafers)” in Class 30 (collectively with the ‘822 Registration, the “BON O BON Registrations”).

14. The application that matured to the '325 Registration was filed on May 24, 2013 and the registration issued on November 4, 2014.

15. On June 6, 2016 Applicant filed Application Serial Number 79/151,042 (the "042 Application") for the mark BON BON.

16. The '042 Application is a request for extension of the International Registration number 1213719 for use in connection with "confectionery made of sugar, namely, candy, sweets, caramels."

17. Opposer is the prior user and priority of use is not at issue in this opposition.

18. The mark BON O BON is used by Opposer in connection with goods that are closely related to the goods with which Applicant seeks to use the mark BON BON.

19. The channels of trade through which Opposer's and Applicant's goods move are similar.

20. The issues in contention in this Proceeding are the likelihood of confusion between Opposer's and Applicant's marks and whether the terms "BON BON" or "BONBON" are merely descriptive in connection with confectionery.

- **The Record.**

The record includes the pleadings, and by operation of Trademark Rule 2.122(b), 37 CFR § 2.122(b), the application file of the opposed application. In addition, the following evidence was introduced by the parties with their ACR briefs:

Opposer's evidence:

1. The declaration of Opposer's counsel Perla Kuhn, introducing as exhibits portions of the prosecution history of the involved application, internet printouts of third-party uses and registrations of marks featuring purple backgrounds in connection with candy;¹⁰ and

¹⁰ 21 TTABVue 19-139.

2. The affidavit of Maria Paula Rodriguez, marketing manager for Opposer, introducing as exhibits a chart listing the stores in the United States that sell Opposer's goods under its BON O BON marks, and advertisements for such goods.¹¹

Applicant's evidence:

1. The declaration of Applicant's counsel, Alexander Lazouski, introducing as exhibits portions of the prosecution history of the involved application, dictionary definitions of "bonbon," third-party registrations and Office actions from their underlying applications, printouts from internet publications discussing "bonbons;"¹² and
2. The affidavit of the intellectual property department deputy director for Applicant's holding company, Sergey Vladimirovich, introducing as an exhibit Applicant's accounting report from 1956 regarding its sales of BON BON candies in the USSR.¹³

- **Standing and Priority**

The parties have stipulated to Opposer's standing (stipulation no. 7) and priority of use (stipulation nos. 11-14, 17).¹⁴

- **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 also Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396

¹¹ *Id.* at 140-170.

¹² 22 TTABVUE 19-20, 22-130.

¹³ *Id.* at 21-22, 131-136.

¹⁴ 19 TTABVUE 2-3.

F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *see also In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

For purposes of our likelihood of confusion determination, we focus on Opposer’s pleaded Registration No. 2779822 for the mark BON O BON (in standard characters) for “Chocolates, pastries filled with sweet fillings, alfojores, and wafers” inasmuch as the mark in this registration is more similar to Applicant’s involved mark and the goods in the two pleaded registrations are highly similar. Accordingly, when the mark and goods in Registration No. 2779822 are considered vis-à-vis Applicant’s mark and identified goods, it is that mark that is most likely to support a finding of likelihood of confusion. *See, e.g., In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

1. Similarity or dissimilarity of the goods, channels of trade and class of purchasers.

The parties have stipulated that the goods under Opposer’s registrations for its BON O BON marks are closely related to the goods identified under Applicant’s application for its BON BON mark (stipulation no. 18), and that the parties’ goods move through similar channels of trade (stipulation no. 19). Accordingly, these *du Pont* factors favor a finding of likelihood of confusion.

2. The number and nature of similar marks in use on similar goods, and weakness of the term “bonbon.”

Applicant argues that consumers are likely to distinguish the parties’ marks due to the “extreme weakness of the term ‘BON BON.’”¹⁵ Applicant further argues that “[t]he amount of evidence is truly overwhelming and strongly indicates genericness of ‘bonbon’ for both parties’ goods, because the genus of goods at issue is candy or sweets and the relevant public understands “bonbon” primarily refers to candy or sweets.”¹⁶ We do not construe Applicant’s argument as a challenge to the validity of Opposer’s pleaded registrations.¹⁷ Indeed, “Applicant acknowledges that ‘BON O BON’ is not generic because it created a distinctive and commercial impression different than ‘BON BON.’”¹⁸ We turn to Applicant’s evidence of the weakness of the term “bonbon.”

Applicant has introduced numerous dictionary definitions of the term “bonbon,” of which the following are representative:

A piece of candy, especially one covered with chocolate;¹⁹

¹⁵ 22 TTABVUE 3.

¹⁶ *Id.* at 7.

¹⁷ Applicant has not filed a counterclaim for cancellation of either of Opposer’s pleaded registrations on the ground of genericness or any other available ground. *Cf. Fiserv, Inc. v. Elec. Transaction Sys. Corp.*, 113 USPQ2d 1913, 1919 n.7 (TTAB 2015) (absent a counterclaim, an applicant may not pursue an impermissible collateral attack on an opposer’s registration). As a registration on the Principal Register, Opposer’s registration is treated as valid and entitled to the statutory presumptions under Section 7(b) of the Trademark Act. *In re Dixie Restaurants, Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997).

¹⁸ 22 TTABVUE 6.

¹⁹ Oxforddictionaries.com/us, *Id.* at 27.

A candy that often has a center of fondant, fruit, or nuts and is coated with chocolate or fondant;²⁰

A piece of confectionary, candy.²¹

Applicant has also introduced the following French to English translations of the term “bonbon” – candy.²² Applicant also made of record copies of third-party registrations for marks that include a formative of the term “bonbon” (issued on the Principal Register in standard characters unless otherwise noted) in connection with candies and sweets:²³

Reg. No. 3468795 for the mark BEDAZZLE MY BONBONS (“BONBONS” disclaimed) for “candies, namely, chocolates and bonbons;

Reg. No. 2965225 for the mark GOLDEN BONBON (“BONBON” disclaimed) for Confectionery, namely, candy, candy bars, candy chews, chocolate, turrón, torrone, divinity, nougat made with inclusions such as fruits or flavorings or berries or citrus peel or nuts or grains; chocolate-based ready-to-eat food bars; pastries; cookies; crackers; cakes;”

Reg. No. 4559807 for the mark BELLA BON BON (“BON BON” disclaimed) for “chocolate.” “The foreign wording in the mark translates into English as beautiful.”);

Reg. No. 0736876 for the mark LE BON BONBON NAPOLEON (“LE BON BONBON” disclaimed) for “candies.” “The trademark in translation means ‘the good Napoleon candy.’”);

The following registrations issued to the same entity: Reg. No. 2175919 for the mark BON BON BUM (“BON BON” disclaimed) for “candy;

²⁰ Thefreedictionary.com, *Id.* at 46.

²¹ Dictionary.com, based on the Random House Dictionary (2017), *Id.* at 81.

²² Collins French – English online dictionary, *Id.* at 76; Reverso Dictionary, *Id.* at 78; en.bab.la/dictionary/English-French, *Id.* at 80

²³ *Id.* at 30-40, 92-3,113-126. We note that third-party Reg. No. 3522477 was cancelled in 2015. Expired registrations have very limited probative value. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) (“[A] cancelled registration does not provide constructive notice of anything”).

confectionery, namely, toffees, caramels, mints, suckers, lollipops, bubble gum, chocolates and cookies;” Reg. No. 2888955 for the mark BON BON BOOM (“BONBON” disclaimed) for “candy, lollipops, bubble gum, filled and without;” and Reg. No. 4327067 for the mark displayed below (“BON BON” disclaimed) for “confectionery, especially lollipops with gum or unfilled;”



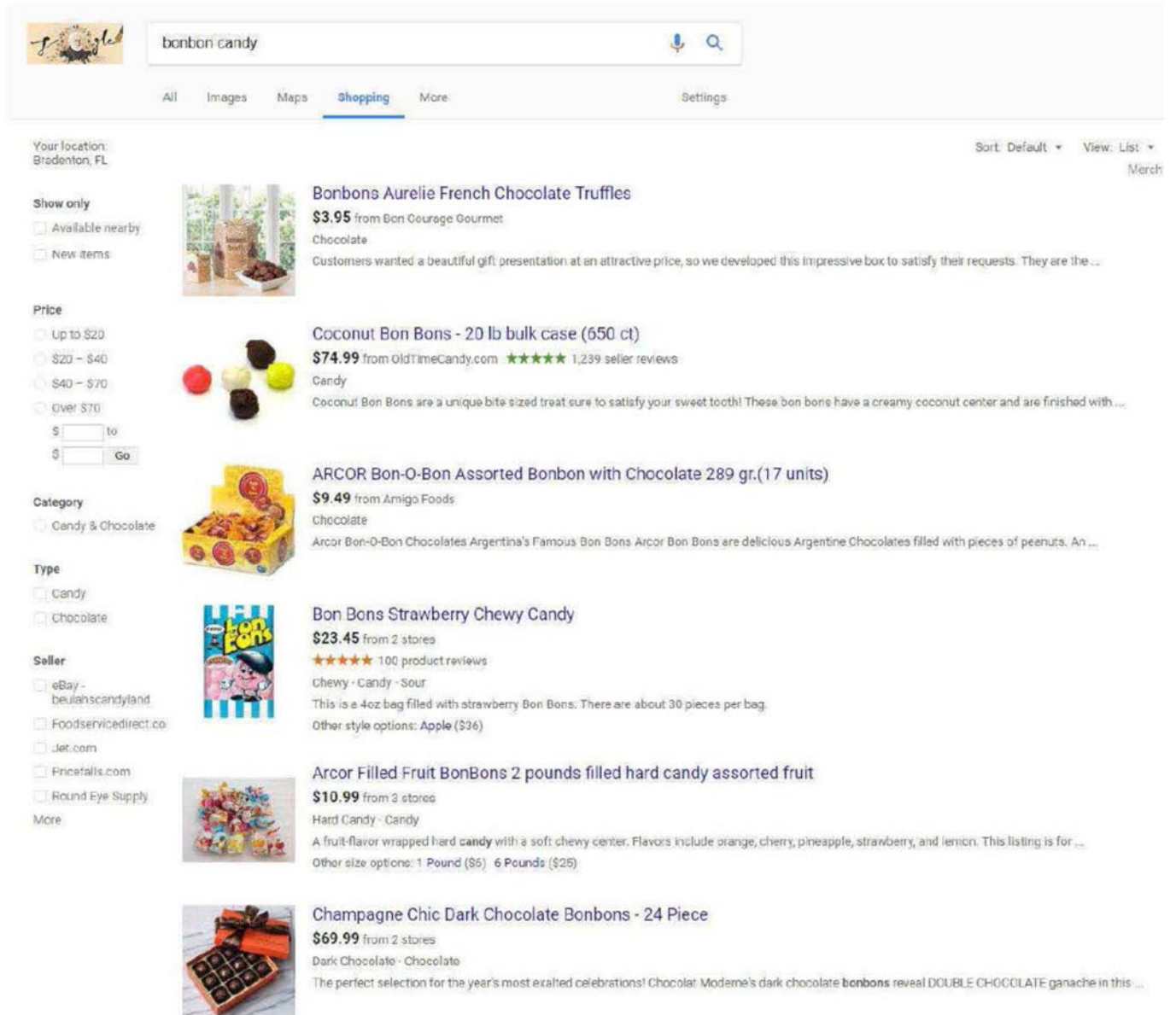
Reg. No. 4640832 for the mark SOPHIE BONO BON SWEETS AND SUCH (“BONBON SWEETS” disclaimed) for “bakery products, namely, sweet bakery goods, candies, gum sweets, peppermint sweets, sugar free sweets, sugarless sweets, sweets;”

Reg. No. 4833208 for the mark CHEZ BON BON (“BON BON” disclaimed) for, *inter alia*, various dessert goods;

Reg. No. 4797084 issued on the Supplemental Register for the mark BON BON BON (“BON BON” disclaimed) for “chocolates and chocolate based ready to eat candies and snacks;” “the English translation of the French wording “BON BON BON” in the mark is “good good good.”)

Applicant further introduced internet screenshots, excerpted below, from webpages advertising for sale various candies identified as “bonbons” or “bon bons.”²⁴

²⁴ *Id.* at 94-102.



Opposer, for its part, introduced evidence in the form of internet screenshots of third-party use and registrations that feature purple-colored backgrounds in packaging and advertisements for candies.²⁵ The following examples are illustrative:

²⁵ 21 TTABVUE 79-138.

The screenshot shows the top navigation bar of the Hershey's Store website. The logo 'HERSHEY'S STORE' is on the left. Navigation links include 'Leave Feedback', 'ID ME LOGIN', 'CUSTOMER CARE', 'MY ACCOUNT (log in)', and 'CART'. Below this is a secondary navigation bar with categories: 'PRODUCTS', 'GIFTS', 'OCCASIONS', 'HOME & ACCESSORIES', 'SHOP BY BRAND', 'PERSONALIZED BAR', and a search icon labeled 'SEARCH'. A banner at the bottom of the navigation bar reads 'FRESH FROM THE FACTORY'.

The main content area shows a breadcrumb trail: 'Home / Shop By Brand / KISSES'. The product title is 'KISSES Dark Chocolate 12oz. Bag'. The item number is 'Item #: HSH 034000121809'. The status is 'In Stock' with a shipping note 'Ships within 1 business day'. The price is '\$3.95' and the quantity is '1'. There is an 'Add to Cart' button. Below the price, there is a 'COOLSHIP' banner with a snowflake icon and text: 'COOLSHIP is suggested with this purchase, because it may be damaged by heat while in transit. Learn More about COOLSHIP'. There is an 'Add Coolship' checkbox.

The screenshot shows the product page for 'Godiva Wrapped Dark Chocolate 1 truffles'. The product image shows a box of 'GODIVA Dark Chocolate Truffles' and a small bowl of truffles. The price is '\$12.00' for 'ITEM# 73247 (20 PIECES)'. The product has a 4.9 star rating from 14 reviews, with a 'Write a review' link. The description states: 'GODIVA Individually Wrapped Dark Chocolate Truffles are filled with a creamy dark chocolate ganache and individually wrapped in smaller sizes so you can enjoy eating them anytime, anywhere. Perfect for many different occasions - hostess and teacher gifts, birthday celebrations, saying thank you, or just READ MORE'. There is a 'Nutrition Information | OU-D' link. A 'SPECIAL OFFER' is displayed: 'Mix & Match, 2 for \$20 or 3 for \$28'. The quantity is set to '1' and there is an 'Add to Bag' button.

Reg. No. 4885578 for the mark displayed below for

“bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution and consumption on or off the premises.”

No claim is made to the exclusive right to use “GOURMET DESSERTS” apart from the mark as shown.

The color(s) white, purple and gold is/are claimed as a feature of the mark. The mark consists of “Applicious” written in a stylized manner in white lettering with gold highlights and underneath “Applicious Gourmet Desserts” is written in stylized block lettering in white and all lettering is in front of a shaded purple block with shaded gold bands on either side and the “A” and “S” of “Applicious” is partially outside the shaded purple block.



Reg. No. 4307603 for the mark displayed below for “candy.”

No claim is made to the exclusive right to use “MILK CHOCOLATE” and “SMOOTH & CREAMY” apart from the mark as shown.

The color(s) purple, gold, cream, brown and dark maroonish-brown is/are claimed as a feature of the mark. The mark consists of a rectangle with the first third (approximate) of the mark containing one purple wrapped square-domed candy piece with the word “BLISS” written on it in a cream color, and one unwrapped square-domed candy piece, propped upon the first, both on a dark maroonish-brown background and appearing in a highlight. The wording “MILK CHOCOLATE,” a row of dots and the wording “SMOOTH & CREAMY” appear in gold directly below the candies. The next two thirds (approximate) of the mark consists of a purple background with the words “HERSHEY’S” written and framed in gold on a brown background and the word “BLISS” directly below in cream. The two sections are divided by a cream colored, curved line. The dotted lines along the outside of the mark indicate the positioning of the mark, and are not part of the mark.



Reg. No. 4129557 for the mark displayed below for “chocolate candies.”

No claim is made to the exclusive right to use “BOERNE” and “CHOCOLATE FACTORY” apart from the mark as shown.

The color(s) purple, light purple and gold is/are claimed as a feature of the mark. The mark consists of a purple square box with a smaller purple box outlined in a gold double line; the top portion of the smaller box includes a lighter purple section that has a bottom edge of decorative swirling and swash-work in gold; the word “Boerne” in gold is centered in the top portion; the bottom portion of the smaller box has light purple triangular portion with a top edge of decorative swirling and swash-work in gold; the center of the smaller box is purple and includes the word “Chocolate” in gold centered over the word “Factory” in gold; below the smaller box and the edge of the square box, are the words “Treat Thyself” in gold.



The evidence of record leaves no doubt that the term “bonbon” or “bon bon” is, at best, highly descriptive of Applicant’s goods and Opposer’s goods, if not generic therefor. The dictionary definitions and evidence of third-party use clearly establish that “bonbon” or “bon bon” has a recognized meaning as applied to candies. Similarly, the third-party registrations indicate that the United States Patent and Trademark Office consistently treats “bonbon” or “bon bon” as, at best, a merely descriptive term as applied to candies and sweets. Such treatment is consistent with the examination of Applicant’s involved application in which the wording “BON BON” is disclaimed apart from the mark as shown.

Opposer is correct that disclaimer of a term apart from a mark as shown does not remove the disclaimed wording either from the mark or from consideration in a likelihood of confusion determination. See *In re Shell Oil Co.*, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Giant Food Inc. v. Nation's Foodservice, Inc.*, 218 USPQ 390, 395 (Fed. Cir. 1983). However, the wording "BON BON" in Applicant's mark is at best highly descriptive of Applicant's goods, and thus has little, if any, source-identifying value. With regard to the purple background in Applicant's mark, the evidence of record shows that a number of third parties have used and registered trademarks and trade names incorporating backgrounds that include various shades of purple. We note that Applicant does not claim any particular shade of purple as its mark, but merely as a feature thereof. This evidence tends to support a finding that Applicant's mark, consisting of the highly descriptive term BON BON and purple background that is not uncommon in the field of candy, is quite weak.

On this same record, Opposer's BON O BON mark has no recognized meaning other than a suggestion of "good oh good" or simply "good" as translated from the French language. As excerpted above, Applicant has made of record examples of ten third-party registrations and numerous third-party uses of "BON BON" in connection with various candies and sweets, suggesting that Applicant's involved mark exists in a crowded field. Particularly the mark BON BON BON for chocolates in third-party Reg. No. 4797084, is quite similar to the marks at issue herein. We note nonetheless that none of the third-party uses or registrations include Opposer's BON O BON mark.

In summary, the evidence of record establishes the weakness of Applicant's mark, particularly with regard to the term "BON BON," and that such mark exists in a crowded field therefor. Furthermore, the evidence indicates that Opposer's BON O BON mark suggests candies and sweets that are "good." "[T]he strength of a mark is not a binary factor" and "varies along a spectrum from very strong to very weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015) (internal citations omitted). On this record, Opposer's BON O BON mark is entitled to a somewhat narrower scope of protection than would be accorded an arbitrary mark.

Accordingly, we find the sixth *du Pont* factor to be neutral or to slightly favor a finding of no likelihood of confusion.

3. Similarity or dissimilarity of the marks.

We continue our analysis with the first *du Pont* factor, the similarity or




dissimilarity of the marks and BON O BON (in standard characters) and compare them "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps.*, 73 USPQ2d at 1691. "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*, 101 USPQ2d 1713, 1721 (Fed. Cir.

2012) (emphasis added). While “the similarity or dissimilarity of the marks is determined based on the marks in their entirety ... 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 entirety.” *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In this case, Applicant’s mark is a composite, consisting of a verbal or literal portion and a design. When evaluating a composite mark containing both words and designs, the verbal portion of the mark often is the one most likely to indicate the origin of the goods to which it is affixed because it is the portion of the mark that consumers would use to refer to or request the goods or services. *In re Viterra*, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (“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.”). In this case, however, the evidence of record clearly indicates that the wording BON BON in Applicant’s mark is, at best, highly descriptive of the identified goods. Thus, we find that consumers are likely to look to the stylized font and purple background as the more distinguishing features thereof. *See, e.g., In re Covalinski*, 113 USPQ2d 1166 (TTAB 2014).



Applicant's  mark is similar in sound to Opposer's BON O BON mark inasmuch as the wording in the two marks is likely to be pronounced in a similar fashion. Furthermore, because Opposer's mark is registered in standard characters, it may be displayed in any font or size, including a font identical to that in which the wording in Applicant's mark is displayed. As a result, the marks are similar in appearance. However, the wording in Applicant's mark consists in its entirety of the highly descriptive, if not generic, term for chocolate-covered candy. This wording indicates a type of candy offered under Applicant's mark rather than indicating the source thereof. While the term BON O BON comprising Opposer's mark has no known meaning on this record, it suggests that the sweets identified thereby are "good." The marks thus differ in connotation, Applicant's mark describing candies and sweets known as "bon bons" and Opposer's mark suggesting sweets that are "good."²⁶

As such, while there are similarities between the marks, differences in appearance and connotation leads the marks to convey overall commercial

²⁶ We further observe that to the extent a casual observer may mistake Opposer's mark as comprising the term "bon bon," it would not be perceived as a mark so much as the descriptive or generic name for certain of the identified goods.


impressions that are more dissimilar than similar. Accordingly, we find that the first *du Pont* factor favors a finding of no likelihood of confusion.²⁷

4. No actual confusion.

Applicant's argument that there has been no actual confusion is not persuasive. The lack of evidence of actual confusion carries little weight. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395-96 (Fed. Cir. 1983); *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965). Insofar as the absence of actual confusion is concerned, there is little in the record regarding the extent of use, if any, of Applicant's mark in the United States. "Thus, we are unable to determine if there has been any meaningful opportunity for confusion to occur in the marketplace. In any event, the test is likelihood of confusion, not actual confusion, and, as often stated, it is unnecessary to show actual confusion in establishing likelihood of confusion." *In re Big Pig Inc.*, 81 USPQ2d 1436, 1439-40 (TTAB 2006); see also *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and *Giant Food, supra*. Thus, we find the seventh *du Pont* factor to be neutral.

- **Conclusion.**

Having considered all the evidence and arguments on the relevant *du Pont* factors, whether specifically discussed herein or not, we conclude that, as stipulated

²⁷ The additional design element in the  mark in Opposer's Registration No. 4633325 results in that mark being even less similar to Applicant's mark in appearance and overall connotation.

by the parties, Opposer has standing and priority of use, and that the parties' goods are related and will move in common trade channels. However, we find that due to the weakness of the term "BON BON" in Applicant's mark, the parties' marks are



more dissimilar than similar, and that registration of Applicant's mark for "Confectionery made of sugar, namely, candy, sweets, caramels" is not likely to cause confusion with Opposer's mark BON O BON for "Chocolates, pastries filled with sweet fillings, alfojores, and wafers."

Decision: The opposition is dismissed.