

UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/135366

MARK: GALAXY DESSERTS DUO



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GENERAL TRADEMARK INFORMATION:
<http://www.uspto.gov/main/trademarks.htm>

APPLICANT: Galaxy Desserts, Inc.

CORRESPONDENT'S REFERENCE/DOCKET
NO:

N/A

CORRESPONDENT E-MAIL ADDRESS:

REQUEST FOR RECONSIDERATION DENIED

ISSUE/MAILING DATE:

Applicant is requesting reconsideration of a final refusal issued/mailed 1/14/08.

After careful consideration of the law and facts of the case, the examining attorney must deny the request for reconsideration and adhere to the final action as written since no new facts or reasons have been presented that are significant and compelling with regard to the point at issue.

Applicant argues that reconsideration of the Final Refusal is warranted because (1) the marks are dissimilar in appearance, sound, connotation, and commercial impression; (2) the wording DUO is a weak term entitled to a limited scope of protection, which is evidence by the existence of other registered marks encompassing the term, and as a result its mark should proceed to registration.

COMPARING THE MARKS

The applicant's mark is **GALAXY DESSERTS DUO ELEGANT FRENCH DESSERTS and design**. The registrants' marks are (1) **DUOS**, (2) **DOUBLE DUOS**, and (3) **DUO DELIGHTS**.

Applicant's argument is without merit because the issue regarding the determination of whether a likelihood of confusion exists is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison.

The question is whether the marks create the same overall impression. *Recot, Inc. v. M.C. Becton*, 214 F.2d 1322, 54 USPQ2d 1894, 1890 (Fed. Cir. 2000); *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b).

The examining attorney disagrees with the applicant that a likelihood of confusion does not exist because there are other registered marks encompassing the wording DUO(S). Applicant should note that some of the other marks may create a different connotation and/or commercial impression. Further, the applicant's assertion basically suggests that the registrants' marks should be diluted and afforded no protection of a registered mark. The examining attorney must resolve any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i). Additionally, the applicant's reference of other marks are not dispositive on the determination in the herein matter. Previous decisions of examiners allowing other marks are without evidentiary value and are not binding upon the Agency or the Board. Each case must be decided on its own merits. *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 639 (TTAB 1984).

Last, the test under Trademark Act Section 2(d) is whether there is a likelihood of confusion. It is unnecessary to show actual confusion in establishing likelihood of confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990), and cases cited therein. See also *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984), wherein the Board stated as follows:

[A]pplicant's assertion that it is unaware of any actual confusion occurring as a result of the contemporaneous use of the marks of applicant and registrant is of little probative value in an ex parte proceeding such as this where we have no evidence pertaining to the nature and extent of the use by applicant and registrant (and thus cannot ascertain whether there has been ample opportunity for confusion to arise, if it were going to); and registrant has no chance to be heard (at least in the absence of a consent agreement, which applicant has not submitted in this case).

As an ancillary argument, applicant provided a definition of the term DUO to posit that the wording is a weak term. While it is noted that the term could be defined as "a Duet or pair" the definition has no bearing on the determination of whether a likelihood of confusion exists in the herein case. The definition along with the other registered marks encompassing the term DUO does not substantiate the argument that the term is weak. Additionally, the definition in relation to the goods does not prove that the term is descriptive, which it appears that applicant is attempting to argue. Nevertheless, the term DUO simply appears to be an arbitrary term that is shared by the cited registrations.

Thus, the proposed marks create the same overall impression, and the marks would confuse consumers into believing that the goods would emanate from the same source.

COMPARING THE GOODS

Applicant's goods are "Chocolate mousse; Dessert mousse." **Registrants' goods** are (1) "cookies", (2) "cookies," and (3) "candies, cookies and chocolates."

Applicant does not advance any arguments regarding the parties' goods. Nevertheless, a likelihood of confusion exists as to the source of the goods because the parties' goods are all confections and/or desserts. Also, neither the application nor the registrations contain any limitations regarding trade channels for the goods and therefore it is assumed that registrant's and applicant's goods are sold everywhere that is normal for such items, i.e., grocery stores, online retail stores, etc. Thus, it can also be assumed that the same classes of purchasers shop for these items and that consumers are accustomed to

seeing them sold under the same or similar marks. See *Kangol Ltd. V. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). In support of the refusal the examining attorney provided copies of printouts from the USPTO X-Search database, which showed third-party registrations of marks used in connection with the same or similar goods as those of applicant and registrants in this case. These printouts have probative value to the extent that they serve to suggest that the goods listed therein, namely "chocolates, mousse, candy, and cookies," are of a kind that may emanate from a single source. See *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-1218 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988).

In further support of the position that the goods are closely related between these parties, examining attorney provided evidence taken from the Internet demonstrating that entities manufacture and/or sell the goods of the parties (chocolates, mousse, candy, and cookies). See attached evidence. Printouts of articles downloaded from the Internet are admissible as evidence of information available to the general public, and of the way in which a term is being used by the public. TMEP §710.01(b). *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1475-76 (TTAB 1999); *Raccioppi v. Apogee Inc.*, 47 USPQ2d 1368, 1370-1 (TTAB 1998).

Based on the evidence provided, any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i). In view of the above, the refusal made under Section 2(d) of the Trademark Act is deemed to have been proper.

Accordingly, applicant's request for reconsideration is *denied*. The time for appeal runs from the date the final action was issued/mailed. 37 C.F.R. Section 2.64(b); TMEP Section 715.03(c). If applicant has already filed a timely notice of appeal, the application will be forwarded to the Trademark Trial and Appeal Board (TTAB).

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STATUS CHECK: Check the status of the application at least once every six months from the initial filing date using the USPTO Trademark Applications and Registrations Retrieval (TARR) online system at <http://tarr.uspto.gov>. When conducting an online status check, print and maintain a copy of the complete TARR screen. If the status of your application has not changed for more than six months, please contact the assigned examining attorney.