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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Knauss Foods, LLC

Serial No. 85522084

Charlie C. Lyu of Woodcock Washburn LLP for Knauss Foods, LLC.

Cory Boone, Trademark Examining Attorney, Law Office 104
(Chris Doninger, Managing Attorney).

Before Grendel, Wellington, and Masiello,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Knauss Foods, LLC ("applicant") has filed an application to register the mark shown below on the Principal Register for "oven-dried marinated beef steak slices and tenders; oven-dried marinated whole beef steak rounds" in International Class 29:¹

¹ Serial No. 85522084, filed January 21, 2012, based on an allegation of a first use of the mark in commerce on the identified goods on January 20, 2012.



The wording HIGH QUALITY BEEF STEAK has been disclaimed.²

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), in view of the following registered mark:



for "Cheese food; Food additives in the nature of fat acids made from meat, fish, fruits, vegetables, eggs, milk and edible oils and fats; Food package combinations consisting primarily of cheese, meat and/or processed fruit; Meat-based snack foods; Prepared food kits composed of meat,

² The application contains the following description of the mark: The mark consists of wording and designs. The wording "PJ'S" appears in large white letters with black outline in the center of the mark in the middle of a red background that is roughly four-sided. Below this, the wording "HIGH QUALITY BEEF STEAK" appears in red letters on a white banner and is bookended by red stars. Around the edges of the mark, there are scattered pin-striping lines.

poultry, fish, seafood, and/or vegetables and also including sauces or seasonings, ready for cooking and assembly as a meal, all organically grown or raised" in International Class 29.³ The registration contains a disclaimer of the term ORGANICS.

Applicant appealed the final refusal of the application. Both applicant and the examining attorney have filed briefs, including a reply brief from applicant. As discussed below, the refusal to register is affirmed.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, 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/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

³ Registration No. 3786248 issued May 4, 2010.

With respect to the goods, applicant has not contested the examining attorney's assertion that applicant's "oven-dried marinated beef steak slices and tenders [and] oven-dried marinated whole beef steak rounds" are closely related to, and possibly encompassed by, the goods described in the cited registration, namely, "meat-based snack foods." Despite there being no apparent dispute involving the relatedness of the goods, we note the evidence submitted by the examining attorney shows that applicant does in fact offer snack goods akin to beef jerky. Indeed, applicant's advertisements tout their snack goods as "deliciously tender, all-natural and gluten free alternative to jerky."⁴ These snack goods being offered by applicant may be described in broader terms as "meat based snack foods" and thus are encompassed by the cited registration's identification of goods. In view thereof, we must consider the real possibility that the goods, as they are identified in the application and registration, may be identical in part. This factor therefore weighs heavily against applicant in the likelihood of confusion analysis.

Because the identified goods are potentially identical, we must also presume the possible scenario that

⁴ Attached to Office action issued January 18, 2013.

they will be sold in the same trade channels to the same classes of purchasers who, in this case, are likely to be purchasers of meat-based snack foods. Accordingly, the factors involving channels of trade and classes of consumers also favor finding a likelihood of confusion.

As to the marks, we examine the similarities and dissimilarities of the marks in their appearance, sound, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). In situations such as the present case, where the marks may appear on identical goods, such as meat-based snack goods, the degree of similarity between the marks that is necessary to support a finding of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant's essential argument on appeal is that confusion is unlikely "given the differences in commercial impression, appearance and sound of the marks." Brief, p. 3. Applicant points out the additional wording "High Quality Beef Steak" and "Organics" in the applied-for mark and registered mark, respectively, as well as the shapes and colors employed in the design portions of the marks.

For the reasons already articulated by the examining attorney, we find the dominant elements of the two marks are nearly identical. That is, the terms PJ'S and PJ*S figure prominently in the respective marks and, as the only non-descriptive or generic literal elements, will be perceived by consumers as the principal source-identifying elements in the respective marks. The disclaimed terms "High Quality Beef Steak" and "Organics," on the other hand, appear in a significantly smaller font in both marks and merely offer highly descriptive or generic information with respect to the identified goods. As the examining attorney explained in the Office actions and reiterated in his brief, it is well-settled that disclaimed, descriptive matter generally has less significance in likelihood of confusion determinations. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1983) ("Regarding descriptive terms, this court has noted that the descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion"); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB

2001) (disclaimed matter is often "less significant in creating the mark's commercial impression").

As to sound and appearance, the differences between the marks are the addition of the descriptive and generic wording and the border designs that carry the wording in the marks. We do not ignore these differences and there is no dispute that the banner or border design portions of the marks are shaped differently and employ different colors. Nevertheless, such differences are outweighed by the similarity resulting from both marks' emphasis on the dominant literal portion, PJ'S or PJ*S. We make this decision keeping in mind the oft-stated proposition that our analysis involving the similarity of the marks is not based on whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether they are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods and/or 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), *aff'd*, No. 92-1086 (Fed. Cir. June 5, 1992). Consumers are rarely offered a side-by-side comparison and we therefore focus on the

recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Viewing the marks in their entirety, we find them to be significantly more similar than dissimilar. Again, consumers will focus on and recall the designations PJ'S and PJ*S in the marks as identifying the source of the goods rather than relying on the different designs or additional wording that appears in significantly smaller and descriptive wording. Even to the extent that consumers recall or retain a commercial impression based on the different terms ORGANICS and HIGH QUALITY BEEF STEAK in the respective marks, the same consumer may mistakenly construe this information as indicating different lines of PJ'S meat-based snack products originating from the same manufacturer.

Accordingly, the *du Pont* factor of the similarity of the marks favors finding a likelihood of confusion.

Finally, we address applicant's argument that "because there are numerous marks in Class 29 that either include the term 'PJ's' or are similar, purchasers are unlikely to be confused." Brief, p. 9. In support, applicant submitted Office database records for several third-party

registrations for marks containing the element PJ or PJ's, (and other configurations of initials containing the same and different letters) for a variety of goods and services.

Simply put, the record does not support applicant's argument that the relevant consuming public has been so exposed to the term PJ's, or a similar variation thereof, and are therefore able to distinguish between applicant's mark and the cited mark based on differences in the marks. At best, the third-party registrations submitted by applicant show that the term PJ'S or PJ, by itself or in connection with other terms, has been adopted by different entities in seeking to register trademarks for very different goods that, pointedly, do not include snack food items akin to applicant's and registrant's identified goods. In fact, the only registered mark that comes close is for the mark PJ SNACKENWAFFLES for "waffles"; the other registrations referenced by applicant in its brief cover goods and services that are clearly unrelated such as soft drinks, roasted coffee beans, and restaurant services. Other third-party registrations submitted by applicant are for marks with different letter initials, e.g., CJ, BJ's, TJ, and JJ, and we thus do not find these registrations probative for purposes of showing that the public is accustomed to seeing PJ'S in marks. Even putting aside the

fact that the third-party registrations cover unrelated goods and services or that the relevant common element, PJ's, is not present in the marks, these registrations are not evidence of actual use and we cannot even assume that the public has been exposed to those marks. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973) (the purchasing public is not aware of registrations reposing in the U.S. Patent and Trademark Office); and *Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011). See also *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) ("As to strength of a mark, however, registration evidence may not be given any weight"). The sixth *du Pont* factor focuses on the number and nature of similar marks *in use on similar goods*. See 2 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11:89 (4th ed. 2009) ("The mere citation of third party registrations is not proof of third party uses for the purpose of showing a crowded field and relative weakness.").

In view thereof, we do not agree that consumers have become so conditioned by a plethora of similar PJ or PJ's marks that these consumers have been educated or accustomed

to distinguishing the marks based on differences in the marks that would otherwise be less meaningful.

In conclusion, when we consider the record and the relevant likelihood of confusion factors, we conclude that, should potential purchasers encounter applicant's mark on the goods identified in the application, including oven-dried marinated beef steak slices and tenders, and also encounter the registered mark used on meat-based snack foods, they are likely to believe that these goods emanate from the same source. As a result, there is a likelihood of confusion.

DECISION: The refusal to register the mark under Section 2(d) of the Trademark Act is affirmed.