

This Opinion is Not a  
Precedent of the TTAB

Mailed: November 30, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re LSB Group LLC*

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Serial No. 86510189

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Matthew Swyers of The Trademark Company PLLC  
for LSB Group LLC.

Kathy de Jonge, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.

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Before Wellington, Adlin and Lynch,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

LSB Group LLC (“Applicant”) seeks registration on the Principal Register of the mark LUCKY SUSHI BAR in standard characters for “Bar and restaurant services; Restaurant services; Restaurant services, including sit-down service of food and take-out restaurant services; Restaurant services, namely, providing of food and beverages

for consumption on and off the premises; Restaurant, bar and catering services” in International Class 43.<sup>1</sup> Applicant has disclaimed SUSHI BAR.

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the registered mark LUCKY BAR in standard characters for “Bar, restaurant, cocktail lounge services; Nightclub services” in International Classes 43 and 41.<sup>2</sup> The cited registration includes a disclaimer of BAR.

After the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal to register.

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the services. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *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

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<sup>1</sup> Application Serial No. 86510189 was filed January 21, 2015 based on an intent to use under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

<sup>2</sup> Registration No. 3204545 issued January 30, 2007; renewed.

characteristics of the goods [or services] and differences in the marks.”). We address these and other relevant *du Pont* factors below.

A. The Services, Trade Channels, and Classes of Consumers

Both the subject application and cited registration include bar and restaurant services among those identified. Thus, they are identical in part. Turning to the trade channels, because Applicant’s identified services and those in the cited registration are unrestricted, and because they overlap, we presume both Applicant’s and Registrant’s bar and restaurant services move in all channels of trade normal and are available to all potential classes of ordinary consumers. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, “we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods”); *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Assoc. Charities Inc. v. Child Health Research Inst.*, 101 USPQ2d 1022, 1028 (TTAB 2011). Thus, the second and third *du Pont* factors strongly weigh in favor of a finding of likely confusion.

B. Number and Nature of Similar Marks for Similar Services

Turning to the marks, we next address Applicant’s assertion that the shared term LUCKY in the marks is weak and diluted for the relevant services because this, in turn, helps us gauge the importance of any similarity between the marks based on that shared term. In support, Applicant offered no evidence of actual use of other

LUCKY marks in connection with bars or restaurants, but introduced the following use-based third-party registrations covering restaurant services, bar services, or both.<sup>3</sup> We concur with Applicant that a particular portion of a mark may be weak, as was the case in *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015), such that most of Applicant’s third-party registration evidence cannot be discounted merely because the marks do not include the term BAR in addition to the term LUCKY.

Registration No.	Mark
4011719	LUCKY BURRITO
4840176	LUCKY NOODLES
4715493	THE LUCKY HORSESHOE
4766028	
4675232	THE LUCKY MONK
4606863	LUCKY GIRL LIVE
4682424	LUCKY BELLY
4606709	LUCKY STRIKE LIVE
4335852	

<sup>3</sup> 6 TTABVUE 4-34. The list does not include Registration No. 4719326, which Applicant also introduced, because the registration is not use-based.

Registration No.	Mark
4340071	FEELING LUCKY
4260394	
4474251	LUCKY SLICE
4461862	LUCKY BEAVER BAR & BURGER
4285821	
4052422	LUCKY PIE PIZZA & TAP HOUSE
4277971	LUCKY YOU
4044463	
4112764	
3984784	LUCKY LIVE HAWAII
4018312	LUCKY RED
3567751	MR. LUCKY'S 24/7
3290701	LUCKY 13
2727150	LUCKY'S LOUNGE
3785552	LUCKY STRIKE
3691999	LUCKY PIG

Registration No.	Mark
3635068	
3667548	LUCKY STRIKE LANES & LOUNGE
3436753	LUCKYFISH

The strength of a mark “varies along a spectrum from very strong to very weak,” and “evidence of third-party use bears on the strength or weakness” of a mark. *Juice Generation*, 115 USPQP2d at 1675-76 (internal citations omitted). In determining the strength of a mark or as in this case, a portion thereof, we consider both its inherent strength based on the nature of the term itself and its commercial strength based on use in the marketplace. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) (Measuring a mark’s strength both by conceptual strength and marketplace strength). Third-party registrations such as those offered by Applicant are not evidence of *use* of the marks, *Olde Tyme Foods, Inc. v. Roundy’s Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992), but they can be used to show that a mark or portion thereof has a descriptive or suggestive meaning, leading to the conclusion that it is weak. *See Juice Generation*, 115 USPQ2d at 1675 (weakness of PEACE, LOVE); *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations,

such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). An applicant may come closer to a weak mark without causing a likelihood of confusion. *Juice Generation*, 115 USPQ2d at 1674.

Applicant argues that in the context of bar services, “lucky” may have its conventional meaning associated with having good luck, and also may bring to mind the slang expression “get lucky.” The number of third-party registrations for restaurant and bar services lends support to the position that “lucky” is at least somewhat suggestive in this context. We note, however, that most of the “lucky” references in the marks in the third-party registrations are distinguishable from that in the applied-for and cited marks in this case. Specifically, many of the marks in the third-party registrations place “lucky” within a broader expression with a specific meaning that differs from “lucky” standing alone, such as “lucky strike,” “lucky horseshoe,” “lucky clover” or “lucky streak.” Others use “Lucky’s,” a possessive, giving the different impression that “Lucky” refers to an individual. Still others contain some additional non-generic or non-descriptive distinguishing matter, whereas the marks in the subject application and cited registration both consist only of the word LUCKY and the generic terms BAR and SUSHI BAR, respectively.

Significantly, the record contains no evidence that the referenced third-party marks are in actual use or that consumers are aware of them. Nor does the record include other examples of actual use of LUCKY. Thus, the evidence before us falls short of a showing that would allow us to conclude that “lucky” is diluted and commercially weak. *Cf.*, *Jack Wolfskin*, 116 USPQ2d at 1136 (“extensive” evidence

not only of third-party registrations but also “of these marks being used in internet commerce” for the relevant goods); *Juice Generation*, 115 USPQ2d 1671 (uncontradicted testimony of “a considerable number” of third party uses of similar marks, along with third-party registrations). Instead, we find based on this record and our consideration of the third-party registrations only that the term “lucky” may be conceptually weak due to its suggestiveness. Nonetheless, even assuming some degree of conceptual weakness of LUCKY, this is not dispositive, as “likelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974).

### C. Similarity of the Marks

Turning to the comparison of the applied-for and cited marks, we consider them “in their entirety 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). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); see also *Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant’s proposed mark is LUCKY SUSHI BAR in standard characters, and the mark in the cited registration is LUCKY BAR, also in standard characters. Both marks contain the identical terms LUCKY and BAR. As the first part of both marks, the shared term LUCKY dominates, and is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). In the context of these marks, a “bar” refers to a place where alcoholic drinks are served, and a “sushi bar” refers to “a small and informal restaurant or café serving sushi.”<sup>4</sup> These generic or descriptive terms, BAR and SUSHI BAR, have been disclaimed in the respective marks. While generally consumers are less likely to rely on descriptive or generic components to distinguish source, *See Cunningham* 55 USPQ2d at 1846, we acknowledge below that the distinction between BAR and SUSHI BAR does impact the commercial impression, as discussed in more detail below. As to appearance and pronunciation, we find LUCKY BAR and LUCKY SUSHI BAR similar, particularly given that the services at issue are identical. *See Century 21 Real Estate v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1701 (Fed. Cir.1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines”).

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<sup>4</sup> Entries for “bar” and “sushi bar” in the Collins English Dictionary, [www.collinsdictionary.com](http://www.collinsdictionary.com), accessed Nov. 29, 2016. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

As to commercial impression, we agree to some extent with Applicant that its use of SUSHI BAR, rather than just BAR alone, creates a difference in impression by referring to a specialized type of restaurant service – a sushi restaurant. However, as noted above, both BAR and SUSHI BAR are generic or highly descriptive terms in the context of restaurant and bar services, and both identifications are broad enough to encompass a more specialized type of restaurant. The Examining Attorney also introduced evidence that the same establishments provide sushi bars and bar services,<sup>5</sup> diminishing the significance of the variation in impression in the context of the relevant services. For example:

- The kobē Japanese Steakhouse website states, “[w]e offer dine-in in a traditional setting as well as a bar and cocktail lounge, and sushi bar.”<sup>6</sup>
- The Ichiban Japanese Steakhouse & Sushi Bar website states that it “offers a full service cocktail lounge and a full sushi bar.”<sup>7</sup>
- The Seal Beach Restaurant website promotes its cocktail lounge and its sushi bar.<sup>8</sup>
- The website for the Okinawa invites customers to “[v]isit our Sushi bar and full service cocktail lounge.”<sup>9</sup>

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<sup>5</sup> July 1, 2015 Office Action at 5-24.

<sup>6</sup> *Id.* at 5 (kobeohio.com).

<sup>7</sup> *Id.* at 7 (ichiban-hibachi.com).

<sup>8</sup> *Id.* at 9 (eatatmahe.com).

<sup>9</sup> *Id.* at 12 (okinawajax.com).

- The website for Ohana promotes its sushi bar, where it can provide “Fabulous Cocktail Parties” as well as a “Full service Tiki bar.”<sup>10</sup>

This evidence counters Applicant’s assertion that consumers would not expect the services of LUCKY SUSHI BAR and LUCKY BAR to come from the same source, because the evidence shows that establishments that offer sushi bars also offer traditional bar services under the same mark. Thus, this distinction between the two marks at issue is not sufficient to avoid likely confusion.

We further disagree with Applicant’s characterization that the difference between BAR and SUSHI BAR in the marks “transforms and completely changes the connotation” of the marks as a whole.<sup>11</sup> According to Applicant, BAR alone reinforces a connotation of LUCKY as good fortune and a slang reference to “getting lucky,” but SUSHI BAR reinforces a connotation of lucky as good fortune “as used predominantly throughout many Asian cultures.”<sup>12</sup> Applicant introduced no evidence that “lucky” has a different meaning in particular contexts such as “Asian cultures,” and both the subject application and cited registration cover the same relevant services, which may be offered throughout the United States. Thus, on this record, we find that at least one connotation of the marks in the context of the relevant services applies to both marks, and Applicant’s own arguments acknowledge that the “good fortune” meaning

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<sup>10</sup> *Id.* at 24 (ohanabelltown.com).

<sup>11</sup> 12 TTABVUE 12.

<sup>12</sup> *Id.*

of LUCKY applies to both marks. Thus, the commercial impression of these marks remains relatively similar.

Both marks consist of the same dominant term, LUCKY, accompanied only by generic or highly descriptive wording that does not avoid source confusion. We therefore find them similar.

#### D. Other *du Pont* Factors

The introductory portion of Applicant's brief sets out additional, allegedly relevant *du Pont* factors -- the absence of actual confusion and "impulse" versus sophisticated purchasing. However, the remainder of the brief includes no references to evidence, or even argument, on these factors. To the extent Applicant relies on arguments made during prosecution, we note that the uncorroborated attorney argument that there were no known instances of actual confusion is of little or no evidentiary value in this *ex parte* proceeding, *In re Majestic*, 65 USPQ2d 1205, where a registrant "has no chance to be heard." *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Moreover, the subject application is based on intent to use, and the record includes no evidence of any use by Applicant from which actual confusion could even arise. Accordingly, the actual confusion factor remains neutral. As to sophisticated purchasing, we find no arguments or evidence on this factor in the brief or prosecution history, and note that the unrestricted identifications of bar and restaurant services in the application and registration, which encompass fast, casual and "low end" bar and restaurant services, give rise to no inference of careful, sophisticated purchasing. This factor remains neutral.

### Conclusion

We have considered all of the arguments and evidence of record and all relevant *du Pont* factors. Regardless of the somewhat suggestive nature of the shared term LUCKY, the overall similarity of the marks for overlapping services that move in the same channels of trade to the same classes of customers renders confusion likely.

**Decision:** The refusal to register Applicant's mark is affirmed.