

This Opinion is not a  
Precedent of the TTAB

Mailed: November 16, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Lightning Strike Distributing, LLC*  
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Serial No. 86855380  
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Eugene Bely of Breanlaw, LLC,  
for Lightning Strike Distributing, LLC

Jean H. Im, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

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Before Shaw, Hightower and Heasley,  
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Lightning Strike Distributing, LLC (“Applicant”) seeks registration on the Principal Register of the mark JED’S JERKY (in standard characters, with “JERKY” disclaimed) for “jerky” in International Class 29.<sup>1</sup>

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark JED’S (in typed drawing format)

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<sup>1</sup> Application Serial No. 86855380 was filed on December 21, 2015 based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as April 1, 2007.

for “barbecue sauce” in International Class 30 as to be likely to cause confusion or mistake, or to deceive.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. For the reasons set forth below, we affirm the refusal to register.

## I. Analysis

We base our determination of likelihood of confusion under Section 2(d) on an analysis of all of the probative facts in evidence that are relevant to the factors enunciated in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1293, 113 USPQ2d 2045, 2049 (2015). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

In the course of applying the *DuPont* factors, we bear in mind the fundamental principles underlying Section 2(d), which are to prevent consumer confusion as to commercial sources and relationships, and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

We have considered each *DuPont* factor that is relevant, and have treated any other factors as neutral. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378,

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<sup>2</sup> Registration No. 1976445, issued on the Principal Register on May 28, 1996, Section 8 & 15 declarations accepted and acknowledged. Prior to November 2, 2003, “standard character” marks were known as “typed drawings.” TMEP § 807.03(i).

78 USPQ2d 1944, 1947 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1242 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). Two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016).

#### **A. Comparison of the Marks**

Under the first *DuPont* factor, we compare Applicant’s and Registrant’s marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567; *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014); *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

The word “JED’S” comprises all of Registrant’s mark and is the first element of Applicant’s mark. In both marks, the name JED<sup>3</sup> looks and sounds the same; in both, the name bears the possessive “S”, imparting the same connotation, that the goods

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<sup>3</sup> “Originally a short form of the biblical name Jedidiah, now generally used as an independent given name.” A DICTIONARY OF FIRST NAMES (2d ed.) OxfordReference.com. The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format or have regular fixed editions. *E.g.*, *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014) *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016). The Board also may notice dictionary definitions *sua sponte*. *See University of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). We have taken judicial notice of all dictionary definitions cited herein.

come from JED. *See Barbara's Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1288 (TTAB 2007) (possessive element BARB'S found similar to BARBARA'S).

Prospective customers encountering Applicant's mark are likely to notice the lead term JED'S, to remember it, and to look for it when shopping for Applicant's goods. *See Palm Bay Imps.*, 73 USPQ2d at 1692; *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions).

Applicant contends that its additional term, JERKY, distinguishes the marks in sight, sound, and commercial impression, as it “immediately conveys that Applicant's product is jerky, and specifically not barbeque sauce as sold by Registrant.”<sup>4</sup> However, this additional term merely describes its goods, and is disclaimed, as it is not distinctive. *See In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed, highly descriptive matter is “less significant in creating the mark's commercial impression”). We are mindful that 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) *quoted in Bond v. Taylor*, 119 USPQ2d

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<sup>4</sup> Applicant's brief, p. 7, 4 TTABVUE 8.

1049, 1055 (TTAB 2016).

Additionally, Applicant's JED'S JERKY mark incorporates Registrant's JED'S mark in its entirety. Applicant contends that even if a junior mark contains the senior mark, that does not necessarily mandate a finding that the two marks are confusingly similar. While it is true that the incorporation of one mark into another does not dictate a finding of likelihood of confusion, it does increase the similarity between the marks under the first *DuPont* factor. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257 (Fed. Cir. 2010) (applicant's mark ML is similar to registrant's mark ML MARK LEES); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266 (TTAB 2009) (applicant's mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084 (TTAB 2016). Far from distinguishing Applicant's mark, the addition of JERKY to JED'S merely suggests another product line emanating from the same source. *See In re Collegian Sportswear, Inc.*, 224 USPQ 174, 176 (TTAB 1984).

For these reasons, the first *DuPont* factor strongly favors a finding of likelihood of confusion.

#### **B. Relationship of the Goods and Channels of Trade**

We next consider the relatedness of Applicant's and Registrant's respective goods and channels of trade. *DuPont*, 177 USPQ 567. Applicant's goods are jerky, which is meat that has been cut into long strips and dried.<sup>5</sup> Registrant's identified goods are

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<sup>5</sup> Merriam-Webster.com.

barbecue sauce, which is “any of various sauces usually containing vinegar, ketchup, spices, and a sweetening agent, used as a marinade or condiment especially for barbecued meat.”<sup>6</sup>

Applicant argues that:

Here, while both Applicant’s and Registrant’s goods can broadly be described as foodstuffs, they are non-competitive and non-related. Applicant sells jerky. Registrant, on the other hand, sells barbecue sauce, which Applicant specifically does not sell. Jerky is a cured meat product which is consumed by itself, generally as a snack. Barbecue sauce, in contrast, serves as either a sauce or condiment. Unlike Applicant’s jerky, barbecue sauce is not consumed by itself. Rather, it is merely an ingredient, used in association with other food items to provide a specific flavor. Given the disparate nature of the products and their intended use, there is little likelihood of confusion between them.<sup>7</sup>

The issue, though, is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the *source* of those goods. *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1471 (TTAB 2016). Based on the evidence of record, we must determine “if the respective products are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

The Examining Attorney has introduced evidence that beef jerky can be made with barbecue sauce, and that jerky and barbecue sauce can emanate from the same source:

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<sup>6</sup> American Heritage Dictionary, AHDictionary.com.

<sup>7</sup> Applicant’s brief, p. 8, 4 TTABVUE 9.

- JACKLINK'S meat snacks "KC MASTERPIECE BARBECUE BEEF JERKY" ("Prepare your taste buds for a marriage made in barbecue heaven.")<sup>8</sup>



## KC MASTERPIECE BARBECUE BEEF JERKY

Prepare your taste buds for a marriage made in barbecue heaven.



+ ALL NUTRITION FACTS

- "Savage Jerky Co.'s Sweet Sriracha BBQ beef jerky."<sup>9</sup>



We've created a completely homemade barbecue sauce that compliments the sweet side of sriracha incredibly well. With very little spice, this flavor is going to appeal to anyone that is a fan of jerky providing swaths of brown sugar, molasses cut by apple cider vinegar and a special blend of spices.



ONE-TIME PURCHASE

RECURRING PURCHASE

15 Days

+ QUANTITY

\$ 7.99

- "Sweet Baby Ray's Original beef jerky and barbecue sauce"<sup>10</sup>



<sup>8</sup> JackLinks.com 4/8/2016, Office Action of April 8, 2016, p. 21. *See also* "Honey Barbecue Beef Jerky Recipe", HowToMakeJerky.org 4/8/2016, *Id.* at 12; "Bourbon BBQ Sauce Beef Jerky Recipe", AmazingFoodMadeEasy.com, 4/8/2016, *Id.* at 15.

<sup>9</sup> SavageJerky.com, 6/24/2016, Office Action of June 24, 2016, p. 16.

<sup>10</sup> Office Action of June 24, 2016, pp. 6-8.

- “Stubb’s Beef Brisket Strips – Spicy Bar-B-Q”<sup>11</sup>



- “Wild Joe’s Beef Jerky and Barbecue Sauce”<sup>12</sup>

### Beef Jerky

We make the same jerky that Wild Joe was making in his butcher shop more than 30 years ago, and people continue to love our nutritious snacks. Our beef jerky is high in protein, sugar-free, all-natural, and made with no preservatives. All our jerky is gluten-free, except for the prime rib flavor. Every batch is made to order, fresh, and ready to go for our customers. Our prime rib jerky is our most popular product because it is so tender, and marinated in Wild Joe's "secret recipe." We offer a variety of beef jerky flavors, which cost \$17.99 for half a pound including:

- Cajun
- Cracked Pepper
- Hot
- XXX Hot
- Lemon Pepper
- Mesquite
- Natural
- Prime Rib

### Barbecue Sauce

Add tons of flavor to your next cookout with our finger-licking barbecue sauces. They come in three unique flavors: Bourbon, Tangy, and Old-Fashioned. Our Tangy sauce has a bit of a kick to it. Great for chicken, pork, and ribs, you can taste the bourbon in our Bourbon sauce. Our Old-Fashioned barbecue sauce is the perfect mop, a plain ol' sauce you'd enjoy back in the day. Each sauce comes in a 19-ounce bottle, and is priced at \$7.50.



<sup>11</sup> BestBeefJerky.org, 6/24/2016, Office Action of June 24, 2016, p. 10.

<sup>12</sup> WildJoesBeefJerky.us, 6/24/2016, Office Action of June 24, 2016, pp. 14-15.



This evidence supports a finding that the respective goods are related products. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Toshiba Med. Sys.*, 91 USPQ2d at 1268-69. Applicant acknowledges the Examining Attorney’s evidence, but urges that “overlaps between some brands and products do not suggest that consumers will assume certain types of products always stem from the same source.”<sup>13</sup> That misses the point, for it is not the relatedness of goods alone that engenders confusion; it is the related goods bearing very similar marks. The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of similarities or differences in the essential characteristics of the goods and the marks. *See Federated Foods*, 192 USPQ at 29.

Applicant asserts that “Registrant’s barbeque sauce is sold in large part as promotional goods for Registrant’s restaurants”<sup>14</sup>--an assertion it backs with a web page purportedly taken from Registrant’s website:<sup>15</sup>



We are left to guess at how this web page limits Registrant’s channels of trade to

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<sup>13</sup> Applicant’s brief, p. 9, 4 TTABVUE 10.

<sup>14</sup> Applicant’s brief, p. 7, 4 TTABVUE 8.

<sup>15</sup> JedsBarbequeAndBrew.com, June 2, 2016 Response to Office Action, p. 16, exhibit A.

restaurant promotion. Suffice to say that Applicant's and Registrant's respective goods must be compared as they are identified in the application and the cited registration, *see Stone Lion*, 110 USPQ2d at 1161, and we decline to read such a limitation into the registration. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) *quoted in In re Mr. Recipe*, 118 USPQ2d at 1091. Moreover, "it is common knowledge that restaurants sometimes market their house specialties... through retail outlets." *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1469 (TTAB 1988). Applicant asserts that "wherein Applicant's and Registrant's goods are sold in the same retail venue, they are so distinct in nature they will likely be sold in different departments of the store and never appear alongside one another."<sup>16</sup> Applicant presents no evidence in support of this assertion, but even if it were so, it would not mitigate the likelihood of confusion. As the Board explained in *Mucky Duck*: "a purchaser who sees one mark and later encounters the other is likely to think, if the two marks are applied to the same or related goods and/or services, that the second mark is the same mark he had seen earlier, or, if he realizes that there are some differences in the marks, that the second is simply a slightly varied version of the first, with both serving to indicate origin in the same source." *Id.* at 1468.

Based on the record evidence, we find that the second and third *DuPont* factors favor finding a likelihood of confusion.

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<sup>16</sup> Applicant's brief, p. 8, 4 TTABVUE 9.

### C. Concurrent Use Without Evidence of Actual Confusion

The eighth *DuPont* factor is the length of time during and conditions under which there has been concurrent use of Applicant's and Registrant's marks without evidence of actual confusion. *DuPont*, 177 USPQ at 567.

Applicant asserts that "The two brands have coexisted for at least nine years. During this lengthy period of coexistence, Applicant is unaware of any instance of actual consumer confusion between its 'JED'S JERKY' brand and Registrant's 'JED'S.' Furthermore, during this time, Registrant has not contacted Applicant or taken any action to prevent Applicant's continued use of the "JED'S JERKY" name. It is therefore unlikely that Registrant has encountered any instance of confusion between its brand and Applicant's."<sup>17</sup>

Applicant offers no evidence in support of these assertions. Such "uncorroborated statements of no known instances of actual confusion are of little evidentiary value." *Majestic Distilling*, 65 USPQ2d at 1205. This is especially true in an *ex parte* context.

*Id.* As the Board has observed:

[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 the registrant has no chance to be heard from (at least in the absence of a consent agreement, which applicant has not submitted in this case). ... Moreover, the test under Section 2(d) of the Statute is not actual confusion but likelihood of confusion.

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<sup>17</sup> Applicant's brief, p. 10, 4 TTABVUE 11.

*In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984) (citations omitted).

Here, as in *In re Kangaroos*, we have no evidence of the extent and nature of Applicant and Registrant's contemporaneous advertising, marketing and sales of their goods under their respective brands, and cannot determine whether there has been an opportunity for confusion to have occurred. Moreover, Registrant has not been afforded the opportunity to controvert Applicant's assertions; in the absence of a consent agreement, we cannot presume that it consents to Applicant's use of the mark or agrees that confusion of the public by Applicant's concurrent use of the mark is unlikely. *Id.*; *Majestic Distilling*, 65 USPQ2d at 1205. In sum, Applicant's unsupported assertions regarding lack of actual confusion do not reduce the likelihood of confusion between the two marks. The eighth *DuPont* factor is therefore neutral.

## **II. Conclusion**

After considering all of the evidence of record and arguments pertaining to the *DuPont* likelihood of confusion factors, the first, second and third *DuPont* factors favor a finding of likelihood of confusion, and the eighth factor is neutral. Accordingly, we find that there is a likelihood of confusion between Applicant's and Registrant's marks for the identified goods.

**Decision:** The Section 2(d) refusal to register Applicant's mark JED'S JERKY for "jerky" is affirmed.