

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: June 6, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re DPC Pet Specialties LLC
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Serial No. 86951910
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Alexander K. Cox of Knox McLaughlin Gornall & Sennett, P.C.,
for DPC Pet Specialties LLC.

Gidette Cuello, Trademark Examining Attorney, Law Office 125,
Mark Pilaro, Managing Attorney.

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Before Wolfson, Kuczma and Pologeorgis,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

DPC Pet Specialties LLC (“Applicant”) seeks registration on the Principal Register of the mark SAVORY ROASTERS (in standard characters) for:

Pet Food; Pet Treats, in International Class 31.¹

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

¹ Application Serial No. 86951910 was filed on March 24, 2016, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). “SAVORY” is disclaimed.

likelihood of confusion with the registered mark HEARTY ROASTERS (in standard characters) for “pet food” in International Class 31.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney have submitted briefs. As set forth below, the refusal to register is affirmed.

I. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *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 similarities between the goods and/or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). “The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence, but may focus . . . on dispositive factors, such as the similarity of the marks and relatedness of the goods.” *i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)) (internal quotation omitted); *see also Primrose Ret. Cmtys., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1032 (TTAB 2016) (citing

² Registration No. 4254708 issued on December 4, 2012.

Federated Foods, 192 USPQ at 29). We address these factors and any others for which Applicant and the Examining Attorney presented evidence or arguments.

A. The similarity and nature of the goods, channels of trade and classes of consumers

In this case, the goods of Applicant identified in the application and those set forth in the cited Registration are in part identical inasmuch as they both include “pet food.” A likelihood of confusion may be found with respect to a particular class in an application based on any product within the identification of goods for that class. *See In re Wacker Neuson SE*, 97 USPQ2d 1408, 1409 (TTAB 2010) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

Because the goods are identical in part, they must be presumed to travel in the same channels of trade, and to be offered to the same class of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (absent restrictions in the application and registration, identical goods are presumed to travel in the same channels of trade to the same class of purchasers; the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994).

Additionally, Applicant’s pet treat products are related to the pet food listed in Registrant’s registration. As demonstrated by the marketplace evidence submitted by the Examining Attorney, pet food and pet treats are offered by the same parties

under the same marks to the same class of purchasers, i.e., pet owners: for example, “Bravo!” brand raw dinners and “Bravo!” brand treats for dogs, “Purina” brand Alpo meals and “Purina” brand Beggin’ Strips treats for dogs, and “Merrick” brand dog food and “Merrick” brand treats.³ Additionally, the Examining Attorney provided evidence of “Canidae” dog biscuits and dog food with fresh bison, “Castor & Pollux Natural Petworks” dog food and treats, “Diamond” dog food and dog biscuits, “I and love and you” brand dog food and jerky bites dog treats, and “Natural Balance” brand cat food and cat treats;⁴ each of these combinations offered under a single mark by a single company.

Further, it is common for third parties to seek registrations of the same mark for both pet food and pet treats, as shown in several third-party registrations submitted by the Examining Attorney.⁵ Evidence from the USPTO’s databases may be used to show relatedness between the goods of an applicant and registrant. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

³ See July 8, 2016 Office Action at 10-14.

⁴ See January 24, 2017 Final Office Action at 6-7, 8-9, 10-11, 12-13, 14-15.

⁵ See July 8, 2016 Office Action, Registration Nos. 4975818 at 15, 4983828 at 17, 4978759 at 20, 4994162 at 23, 4994198 at 25, 4976378 at 28 (owned by Applicant), 4990174 at 30, 4990189 at 33, 4981999 at 35, and 4993019 at 37, for goods including pet food and pet treats. *See also*, January 24, 2017 Final Office Action, Registration Nos. 5124918 at 16, 5046348 at 18, 5115818 at 21, 5107917 at 24, 5125657 at 26, 5121379 at 28, 5116075 at 31, 5051596 at 33, 5104977 at 36, and 5118648 at 38, whose goods include both pet food and pet treats.

This evidence establishes that the same entity commonly manufactures or offers for sale pet treats and pet food under the same mark. As such, it shows that Applicant's pet treats and Registrant's pet food are considered related for likelihood of confusion purposes. *See, e.g., In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1202-04 (TTAB 2009); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1268-69, 1271-72 (TTAB 2009).

In view of the foregoing, the factors of the similarity of goods and the similarity of trade channels and classes of purchasers strongly favor a finding of likelihood of confusion.

B. Similarity of the marks

When considering the similarity of the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of overall commercial impression so that confusion as to the source of the goods or services offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012); *In re Davia*, 110 USPQ2d 1810, 1813 (TTAB 2014).

Marks are compared “in their entirety as to appearance, sound, connotation, and commercial impression.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1160 (Fed. Cir. 2014) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)).

Applicant's mark is SAVORY ROASTERS. The cited mark is HEARTY ROASTERS. Both marks share the identical term ROASTERS and to that extent are similar in appearance, pronunciation, and connotation. The inclusion of the term SAVORY in Applicant's mark and the word HEARTY in the cited mark does not detract from the similarities of the marks. SAVORY is defined as:

*“adj. 1. Appetizing to the taste or smell: a savory stew;”*⁶

*“adjective ... 1. pleasant or agreeable in taste or smell: a savory aroma.”*⁷

HEARTY is defined as:

*“adj. ... 4.a. Enjoying or requiring much food: a hearty appetite. b. Providing abundant nourishment; substantial: a hearty meal;”*⁸

*“adjective ... 2. (of food) wholesome and substantial. ‘a hearty meal cooked over open flames.’”*⁹

SAVORY and HEARTY are both adjectives used to favorably describe food or its attributes, *i.e.*, “a savory stew,” “a savory aroma,” “a hearty meal.” While the terms HEARTY and SAVORY may convey differing connotations, they have little if any

⁶ July 8, 2016 Office Action at 9, THE AMERICAN HERITAGE DICTIONARY <<https://www.ahdictionary.com/word/search.html?q=savory&submit.x=0&submit.y=0>> 07/08/16.

⁷ January 9, 2017 Response to Office Action, Exhibit B at 9-10. Although Applicant provided no information identifying the website providing the definition shown in Exhibit B, the Examining Attorney made no objection, so we have considered the definition which appears to be from <Dictionary.com>. *See, e.g., In re Mueller Sports Med.*, 126 USPQ2d 1584, 1587 (TTAB 2018).

⁸ July 8, 2016 Office Action at 8, The American Heritage Dictionary, <<https://www.ahdictionary.com/word/search.html?q=hearty&submit.x=0&submit.y=0>> 07/08/16.

⁹ January 9, 2017 Response to Office Action at 5, Exhibit A at 7-8. Although no URL address was provided by Applicant, the Examining Attorney made no objection so we have considered the definition.

source-identifying significance because they are descriptive or at least highly suggestive of pet food products as reflected by Applicant's disclaimer of SAVORY and the dictionary definitions noted above. Disclaimed matter that is descriptive or laudatory of a party's goods is typically less significant or less dominant when comparing marks. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1257 (Fed. Cir. 2011) (when a mark consists of two or more words, some of which are disclaimed, the word not disclaimed is generally regarded as the dominant or critical term); *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (finding "delta" the dominant part of the mark THE DELTA CAFE because CAFE was disclaimed); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Thus, the wording SAVORY in Applicant's mark is less significant given the fact that the wording is, at a minimum, descriptive of Applicant's identified goods, and has been appropriately disclaimed by Applicant. Similarly, although the term HEARTY is not disclaimed in Registrant's mark, the dictionary definitions set forth above show that it is descriptive or at least highly suggestive of Registrant's goods and, therefore, is less significant in creating the commercial impression of Registrant's mark HEARTY ROASTERS. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("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.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Nat'l Data Corp.*, 224 USPQ at 751.

In addressing the similarity of the two marks, Applicant argues that the marks must be compared in their entireties, since the commercial impression of a trademark is derived from the mark as a whole.¹⁰ Applicant contends that “the shared element of the mark[s]—ROASTERS—is clearly designed to be suggestive of the goods being sold,” resulting in the Examining Attorney’s erroneous conclusion that ROASTERS is the dominant aspect of Applicant’s mark.¹¹

We recognize that while more or less weight may be properly assigned to a given component of a mark, we still must consider the marks as a whole in determining likelihood of confusion. *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115

¹⁰ Applicant’s Brief p. 4 (4 TTABVUE 6).

¹¹ Applicant’s Brief pp. 5, 7 (4 TTABVUE 7, 9). At footnote 1, (4 TTABVUE 9), Applicant contends that “the USPTO has previously required disclaimers for the word ‘ROASTERS’ used in conjunction with food goods,” citing to KENNY ROGERS ROASTERS DELICIOUSLY HEALTHY, Serial No. 86239309 for restaurant services and related services and business management and consultancy services; BIG SPOON ROASTERS, Serial No. 85601277 (now registered as Registration No. 4768975) for peanut butter based snack foods and bakery goods; REESE’S ROASTERS, Serial No. 78465829 (now abandoned) for nutritional supplement bars, candied and processed nuts; and CHICKEN ROOSTER ROASTERS, Serial No. 75144089 (now abandoned) for chicken on a stick, noting that the USPTO required disclaimers “for the word ROASTERS used in conjunction with food goods.” See Applicant’s Brief p. 7 n. 1 (4 TTABVUE 9). This evidence is not probative. Only one of the marks Applicant cites is registered. The third-party applications, some of which have been abandoned, have no probative value because they evidence only the fact that they were filed. See *Interpayment Services Ltd. v. Docters & Thiede*, 66 USPQ2d 1463, 1468 n.6 (TTAB 2003); *In re Juleigh Jeans Sportswear, Inc.*, 24 USPQ2d 1694, 1699 (TTAB 1992). More importantly, the goods in this case are pet food, not restaurant services and food for human consumption, as was the case in the marks Applicant cites.

USPQ2d 1671, 1676 (Fed. Cir. 2015). Despite the fact that the leading descriptive element of each mark differs visually and aurally, consumers familiar with Registrant's HEARTY ROASTERS pet food may well conclude that Applicant's SAVORY ROASTERS pet food and pet treats are a new line of pet food from the maker of the HEARTY ROASTERS pet food. *See In re Southern Belle Frozen Foods Inc.*, 48 USPQ2d 1849, 1851 (TTAB 1998) (finding that consumers familiar with registrant's SHRIMP ROYALE packaged shrimp meal may conclude that applicant's SEAFOOD ROYALE frozen crab product is a new line of seafood from the maker of the SHRIMP ROYALE product). This is due to the fact that the proper focus is on the recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem*, 972 F.2d 1353 (Fed. Cir. 1992)); *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015) (citing *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013)).

Moreover, where the goods of the applicant and cited registrant are identical and as closely related as they are in this case, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *See Bridgestone Americas Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010).

While the marks at issue in this case share the identical term ROASTERS, they differ in that each mark includes additional wording not present in the other. Nonetheless, we find that when considered in their entireties, the similarities in the marks outweigh their differences. Although the first term in each mark differs, those initial terms are descriptive or highly suggestive of the identified goods and, therefore, will not likely to be impressed upon potential purchasers as significant distinguishing features. We therefore find that, when considered as a whole, Applicant's mark is sufficiently similar in appearance, sound, connotation and commercial impression to the cited mark for confusion to be likely. Accordingly, the first *du Pont* factor favors a finding of likelihood of confusion.

II. Conclusion

The similar commercial impressions of Applicant's mark SAVORY ROASTERS and Registrant's mark HEARTY ROASTERS, together with the fact that the marks are for identical and closely related goods that are presumed to travel in the same trade channels to the same customers, renders confusion likely.

Decision: The refusal to register Applicant's mark SAVORY ROASTERS under § 2(d) of the Trademark Act is affirmed.