

**This Opinion is Not a
Precedent of the TTAB**

Mailed: September 4, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re EP Family, Corp.
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Serial Nos. 87561113 and 87561116
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Songfong Tommy Wang of Wang IP Law Group PC,
for EP Family, Corp.

Andrew Crowder-Schaefer, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

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Before Wellington, Greenbaum, and Dunn,
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

EP Family, Corp. (“Applicant”) seeks registration on the Principal Register of the

standard character mark CHA4TEA and the stylized mark  for

“Instant tea; Tea” in International Class 30.¹

¹ Applications Serial Nos. 87561113 and 87561116 were filed on August 8, 2017, based upon Applicant’s claim of first use of the marks anywhere at least as early as May 1, 2016, and use in commerce since at least as early as May 2015. There is no claim of a color feature in the stylized mark.

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 CHA FOR TEA and design, displayed as:



Food preparation services; preparation of food and beverages; provision of food and drink in restaurants; 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; serving of food and drink/beverages, in International Class 43.²

The wording CHA and FOR TEA are disclaimed and the registered mark is described, in part, as “a rectangle with bamboo borders that is divided into two parts. In the upper portion is a leaf.”

After the refusals were made final, Applicant appealed to this Board. The appeals are fully briefed. For the reasons given herein, we affirm the refusals to register both marks in this decision.³

² Registration No. 5226478 issued on June 20, 2017. Color is not claimed as a feature of the mark.

³ Although the cases have not been consolidated, we issue a single decision because the issues are nearly the same and the records in the appeal proceedings are essentially the same. *In re Pohl-Boskamp GmbH & Co.*, 106 USPQ2d 1042, 1043 (TTAB 2013) (two appeals involving common issues of law and fact decided in a single opinion). All citations to the record (TTABVue and TSDR) in this decision pertain to the record created in connection with Ser. No. 87561113.

I. Applicable Law

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *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 relatedness of the goods and services. See *In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944, 1945-46 (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 characteristics of the goods [or services] and differences in the marks.”). We discuss below these and other relevant factors. See *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1947 (Fed. Cir. 2006) (even within *du Pont* list, only factors that are “relevant and of record” need be considered); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods [or services].’”) (quoting *Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. The similarity or dissimilarity of the marks

Under this factor, we compare Applicant’s CHA4TEA marks (in standard characters and stylized as shown above) with the cited registered mark CHA FOR

TEA (stylized with design) “in their entirety as to appearance, sound, connotation and commercial impression.” *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *du Pont*, 177 USPQ at 567); *see also Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The test is not whether the marks can be distinguished in a side-by-side comparison, but instead whether their overall commercial impressions are so similar that confusion as to the source of the goods and 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) (quotation omitted). Further, marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971).

Although there is no “correct” pronunciation of a mark, *Viterra*, 101 USPQ2d at 1912, we find that consumers are most likely to view each mark and verbalize it in roughly the same manner. That is, Applicant’s CHA4TEA marks are phonetically equivalent to the wording in the cited mark, CHA FOR TEA. Indeed, except for Applicant’s insertion of the number “4” in place of the word “for” and deletion of spaces between the terms, the wording in the marks is virtually the same. The substitution

of numbers or special characters for words or letters has typically been found to be inconsequential to the sound and meaning. *See, e.g., In Home Fed. Savings and Loan Ass'n*, 213 USPQ 68, 69 (TTAB 1982) (TRAN\$ FUND deemed similar to TRANSFUND). It is common knowledge that consumers frequently encounter this practice for a variety of purposes, e.g., on license plates, signage, texting, or graffiti. The numeral “4” is the perhaps the most frequently-used numeral – as an abbreviation in place of the word “for,” as in “4 sale.” The Examining Attorney submitted printouts from the website “Acronym Finder” corroborating that “4” is a well-known abbreviation for the word “for.”⁴

Additionally, the lack of spaces between the terms “CHA” “4” “TEA” in Applicant's mark makes little difference. Consumers will have no trouble recognizing Applicant's mark as consisting of the same (or equivalent wording) found in Registrant's mark and the terms will have the same connotation. *See In re Iolo Technologies, LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010) (The two words [ACTIVE CARE] retain the same meanings when joined as a compound [ACTIVECARE].); *In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (URBANHOUSING found to have same meaning as URBAN HOUSING); *In re L.C. Licensing Inc.*, 49 USPQ2d 1379, 1381 (TTAB 1998) (whether unitary or two separate words, the commercial impression is the same).

⁴ Office Action issued May 31, 2018, TSDR p. 2.

We have given consideration to the differences between the marks. Applicant argues that there are “substantial visual differences” between the marks that “allow consumers to easily distinguish” them and “avoid any potential confusion.”⁵

In comparing the marks, we recognize that we must consider Applicant’s and Registrant’s marks in their entirety, not merely the literal portions. In this regard, we have taken into account all of the differences, including the leaf design and bamboo elements present in the registered mark. The leaf design is indeed relatively prominent in the mark. Nevertheless, we must further keep in mind that with any composite word and design marks, like Registrant’s, the wording will generally play a more vital role because this is what consumers will use to call for the goods or services and helps clearly and readily identify any source of goods or services. *See e.g. In re Viterra Inc.*, 101 USPQ2d at 1911 (“the verbal portion of a word and design mark likely will be the dominant portion”); *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987) (holding that “if one of the marks comprises both a word and a design, then the word is normally accorded greater weight because it would be used by purchasers to request the goods or services” and “because applicant’s mark shares with registrant’s mark that element responsible for creating its overall commercial impression, the marks are confusingly similar”). With respect to Registrant’s mark, consumers who have been exposed to it are likely to recall it by using the wording “Cha for Tea,” rather than trying to verbalize a leaf design.

⁵ 4 TTABVUE 8-9.

We have also considered Applicant's argument that CHA is "conceptually weak" because it is a "commonly used term in association with tea" and "consumers must look to other words, stylization, and design elements to form a commercial impression as to each mark."⁶ In support, Applicant points to a single, third-party registration that the Examining Attorney submitted for the mark CHA TEA. FOOD. BOBA. (stylized with a design) for tea and restaurant services.⁷ All wording in the mark has been disclaimed. Applicant also points to the fact that, and as previously noted, the terms CHA and FOR TEA have been disclaimed in the cited registration. The Examining Attorney does not dispute the conceptual weakness or descriptiveness of the wording in the marks, but argues that "the disclaimed matter in the registered mark 'CHA' and 'FOR TEA,' can be reviewed ... for similarity with the applied-for mark[s]."⁸ The Examining Attorney cites to *Schwarzkopf v. John H. Breck, Inc.*, 340 F.2d 978, 144 USPQ 433 (CCPA 1965), asserting that disclaimers do not remove the disclaimed matter from the mark.

We have no trouble finding that the shared terms CHA and TEA are conceptually weak in connection with both Applicant's tea goods and Registrant's restaurant and provision of beverages services which, as discussed below, must be presumed to

⁶ 7 TTABVUE 8-9. CHA is defined as "slang [for] tea." Definition obtained from www.thefreedictionary.com, with cited reference to Collins English Dictionary – Complete and Unabridged, 12th Edition 2014 HarperCollins Publishers. 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 regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁷ Attached to Office Action issued on November 13, 2017, TSDR pp. 17-19.

⁸ 6 TTABVUE 7.

include the provision of tea. Nonetheless, all elements of the marks are given consideration in evaluating the similarity of the overall marks, and this includes any conceptually weak or disclaimed matter. *See Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984) (SPICE ISLANDS and SPICE VALLEY found confusingly similar for tea despite Applicant's disclaimer of the word SPICE). *See also In re Nat'l Data Corp.*, 753 F.2d 1056, 1059, 224 USPQ 749, 751 (Fed. Cir. 1985); *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 1570, 218 USPQ 390, 395 (Fed. Cir. 1983); *In re MCI Commc'ns Corp.*, 21 USPQ2d 1534, 1538-39 (Comm'r Pats. 1991).

In this case, we find it particularly pertinent that not only does Applicant seek to use the same (or equivalent) terms, albeit comprised of descriptive or highly suggestive wording, but also in the same order as the wording in the registered mark. Applicant's reliance on a single third-party registration for a mark that has "CHA TEA" does not demonstrate that these terms are commonly used together, let alone that any others use the phrase "Cha for tea."⁹

Ultimately, in comparing the marks in their entireties, we find Applicant's marks and the registered mark are overall more similar than not. Despite some differences

⁹ In its brief (4 TTABVUE 15), Applicant relies on a list of third-party registrations for marks comprising or with the suffix -VEX to show that those marks, albeit dissimilar from the involved marks, are able to coexist. Applicant similarly referenced a list of third-party registrations in its May 9, 2018 Response (at TSDR p. 5). The Examining Attorney's timely objections (6 TTABVUE 14-15; and Office Action issued May 31, 2018, TSDR p. 1) to the lists are sustained on the ground that the mere submission of a list of registrations does not make the third-party registrations of record and thus cannot be relied upon. TBMP §1208.02. Regardless of their admissibility, the lists have almost no probative value as to the weakness of the involved marks because they involve registrations for marks that completely dissimilar to the ones at issue.

and bearing in mind that wording is conceptually weak, the marks engender very nearly the same commercial impressions. Accordingly, this *du Pont* factor supports a finding of a likelihood of confusion.

B. Relatedness of the Goods and Services – “Something More” – and Trade Channels

The second *du Pont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *du Pont*, 177 USPQ at 567); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014). “[L]ikelihood of confusion can be found ‘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 Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Here, we look to determine the relationship, if any, between Applicant’s “instant tea; tea” goods with Registrant’s restaurant services as well as its services described as the “preparation [and] provision of beverages.” In cases such as this, where restaurant services are being compared to actual food or drink items, we have pointed out that there is no per se rule that they are related. *Lloyd’s Food Prods., Inc. v. Eli’s, Inc.*, 987 F.2d 766, 25 USPQ2d 2027, 2030 (Fed. Cir. 1993) (no per se confusion, where similar marks are used in connection with restaurant services and food products). Rather, when it comes to restaurant services and beverages, we often state that

“something more” is required (over and above a showing that the goods and services are offered together) because the relatedness of the parties’ respective goods and services may not be evident. *In re Opus One Inc.*, 60 USPQ2d 1812, 1813 (TTAB 2001).

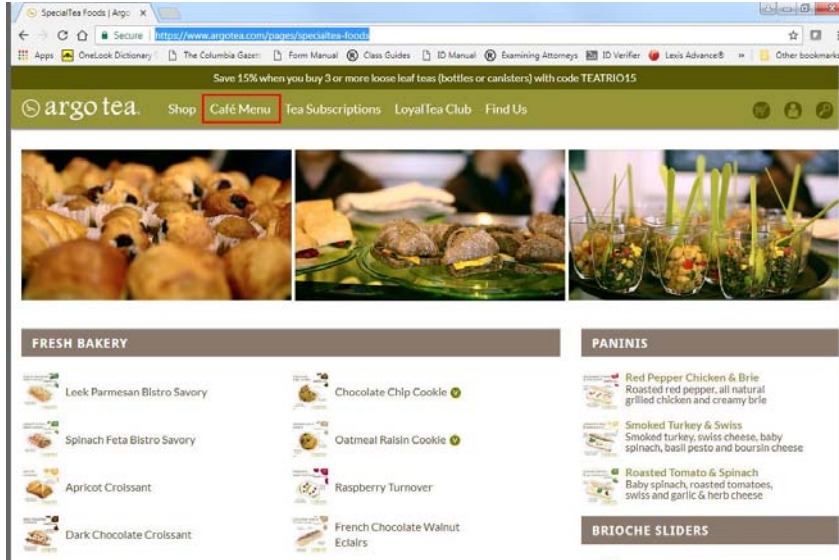
In order to meet this “something more” standard and show that Applicant’s tea goods have a relationship to Registrant’s restaurant and “preparation and provision of beverages” services, the Examining Attorney submitted a number of printouts from third-party commercial websites demonstrating that a single entity is likely to provide or feature tea and tea-based beverages, as well as restaurant services or the preparation and provision of beverages with an emphasis on tea, all under the same mark. For example, LEAFOLOGY is a tea lounge offering “high quality loose leaf teas” for sale as well as a menu of food items including paninis, potstickers, and grilled cheese sandwiches.¹⁰ ARGO TEA is another establishment that advertises both tea:¹¹



and offers a “Café Menu” of food items sold at its locations:

¹⁰ May 31, 2018 Office Action, TSDR 3-8.

¹¹ *Id.*, 9-10.



Other examples of restaurants or entities that offer “preparation and provision of beverages” services, and sell tea under the same mark include: the TIM HORTON’S chain of restaurants,¹² HARNEY & SONS,¹³ SAMOVAR tea lounge,¹⁴ TEAVANA,¹⁵ three TEAISM restaurants,¹⁶ and THE COFFEE BEAN & TEA LEAF store.¹⁷

The Examining Attorney also made of record approximately twenty-four use-based, third-party registrations from the USPTO’s electronic database to show that it is common for a single entity to register the same mark for tea and tea accessories or tea ware that are the same as, or very similar to, those at issue.¹⁸ A few examples

¹² *Id.*, 13-14.

¹³ *Id.*, 15-16.

¹⁴ *Id.*, 11-12.

¹⁵ November 13, 2017 Office Action, TSDR 5-6.

¹⁶ *Id.*, 7-8.

¹⁷ *Id.*, 9-10.

¹⁸ Copies of registrations attached to November 13, 2017 Office Action, TSDR 11-26; and May 31, 2018 Office Action, TSDR 17-77.

include:¹⁹ Reg. No. 5188301 for APANAS identifies tea goods and restaurant services; Reg. No. 5397274 for KAAB TEA GOURMET identifies tea goods and restaurant services; and Reg. No. 5282246 for LEAFOLOGY TEA LOUNGE tea goods and restaurant services.

While third-party registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, such registrations that individually cover a number of different items and are based on use in commerce may have some probative value to the extent that they serve to suggest that the listed services and goods are of a type which may emanate from a single source. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988); *see also In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). In other words, the third-party registrations help show “tea” and “restaurant” services may emanate from the same source under the same mark.

As to the third *du Pont* factor, involving the established, likely-to-continue channels of trade for the goods and services, the identifications in the applications and the cited registration have no restrictions on channels of trade.²⁰ Thus we must presume that Applicant’s tea and Registrant’s restaurant and “preparation and provision of beverages” services will travel in all channels of trade appropriate for

¹⁹ A longer list of examples of the third-party registrations was included in the Examining Attorney’s brief (6 TTABVUE 10-11).

²⁰ Applicant argues that its goods “are sold in a retail setting online, whereas Registrant’s services are offered at a brick and mortar establishment.” 4 TTABVUE 11-12. However, there is no such restriction reflected in the applications.

such goods and services. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)). The aforementioned third-party use evidence demonstrates that tea goods may be sold loose or as a packaged product from entities that render services like that described in the cited registration. Accordingly, we must assume that Applicant's goods would be served in restaurants or places that prepare and provide beverages, like Registrant. Additionally, we cannot assume any higher level of purchasing care inasmuch as Applicant's tea and Registrant's services would be offered to all usual consumers for the goods and services, including the general public.


For the aforementioned reasons, we find that the evidence meets the "something more" burden because it shows that tea goods, on the one hand, and restaurant and "preparation and provision of beverages" services, on the other hand, are the types of goods and services that may emanate from a common source. Moreover, there is some commonality in the channels of trade as the evidence shows that consumers interested in buying tea products, not just a prepared tea beverage, may purchase the goods in restaurants or other places of business that "prepare and provide beverages."

Accordingly, the similarities of the goods and services, and their channels of trade, weigh in favor of a finding of likelihood of confusion.


C. Applicant's Arguments Regarding Priority

In its brief, Applicant argues that its “evidence of [Applicant’s] priority of use is relevant” in this appeal. Any contention by Applicant that it should be considered the senior user is unavailing in this ex parte proceeding. *In re Calgon Corp.*, 435 F.2d 596, 168 USPQ 278, 280 (CCPA 1971) (“As the board correctly pointed out, ‘the question of priority of use is not germane to applicant’s right to register’ in this ex parte proceeding.”). To be clear, the Examining Attorney issued the refusal under Section 2(d) of the Trademark Act, which provides for refusal on the basis of a mark’s resemblance to “a mark registered in the Patent and Trademark Office...,” without regard to the Applicant’s alleged priority. 15 U.S.C. § 1052(d). An ex parte appeal is not the proper forum for challenging the validity of a registration. *Dixie Rests.*, 41 USPQ2d at 1534-35.

II. Conclusion

Having considered all the evidence and arguments bearing on the relevant *du Pont* factors, we conclude that Applicant’s marks: CHA4TEA and  are



very similar to Registrant’s  mark. The record shows that Applicant’s tea is so related to Registrant’s restaurant and “preparation and provision of beverages” services that, when the involved marks are used on or in connection with the respective goods and services, they are likely to cause confusion. The evidence shows that entities that provide restaurant and “preparation and provision of beverages”

services constitute a place or trade channel for the purchase of tea goods, and the services and tea are often sold under the same mark.

We make our ultimate finding with the understanding that the shared terms in the marks CHA and TEA are conceptually weak in the context of the goods and services, but also keeping in mind the entire literal elements of the marks are phonetic equivalents. To the extent we have doubt about how much this weakness narrows Registrant's scope of protection, or the likelihood of confusion between Applicant's and Registrant's marks, we resolve that doubt in favor of Registrant. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002) ("This court resolves doubts about the likelihood of confusion against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks."); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1691 (Fed. Cir. 1993).

Decision: The refusals to register Applicant's CHA4TEA marks, in standard characters and stylized, are affirmed.