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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re SUMESA S.A.

Serial No. 88584024

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for SUMESA S.A.

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Before Taylor, Wolfson, and Shaw,
Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Applicant, SUMESA S.A., seeks registration on the Principal Register of the mark
depicted below:



for “Soup, namely, chicken broth, chicken bouillon concentrates, and soup concentrates” in International Class 29 and “Seasonings for soups” in International Class 30.¹

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 likelihood of confusion with the registered mark RANCHERO (in standard characters) for “Food products and ingredients, namely, bouillon and soup mixes” in International Class 29 and “Seasonings, food ingredients, sauces, and blends of spices, namely, liquid seasoning, Worcestershire sauce, soy sauce and chicken flavoring” in International Class 30.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. 1 TTABVUE, Appeal Brief at 4 TTABVUE. We affirm the refusal to register.

¹ Application Serial No. 88584024 was filed on August 19, 2019, based on Applicant’s allegation of a bona fide intent to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b). The description of the mark reads: “The mark consists of the words ‘SUMESA RANCHERITO.’ The word ‘SUMESA’ appears in white stylized lowercase letters with a stylized white line around it, all inside a red rounded rectangular shape banner. Below the banner is the word RANCHERITO in red-filled letters with a black outline and white space between the red fill and black border. A baby chick is standing to the left of the word ‘RANCHERITO’. The chick is wearing a white chef’s hat and a red and white checkered bandanna. The chick’s fur is yellow, and legs and beak are orange.” The colors white, red, black, orange and yellow are claimed as a feature of the mark. The application includes the translation statement: “The English translation of RANCHERITO in the mark is little rancher.”

Page references to the application record are to the USPTO’s Trademark Status & Document Retrieval (TSDR) system. References to the briefs, motions and orders on appeal are to the Board’s TTABVUE docket system.

² Registration No. 2956636 issued on the Principal Register on May 31, 2005; renewed. The registration includes the translation statement: “The English translation of ‘RANCHERO’ is ‘farmer.’”

I. Likelihood of Confusion

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception of relevant consumers. 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 by the court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); *see also In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). We have considered each *DuPont* factor for which there is evidence and argument. *Guild Mortg.*, 129 USPQ2d at 1161-62; *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (quoting *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010) (“Not all of the *DuPont* factors are relevant to every case, and only factors of significance to the particular mark need be considered.”)).

Two key considerations are the similarities between the marks and the relatedness of the goods. *See 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 and differences in the marks.”); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1672 (TTAB 2018). In this case, we also consider the trade channels for the goods, the classes of consumers to whom the goods are directed and their alleged sophistication.

A. The Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1159 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). In comparing the goods, “[t]he issue to be determined . . . is not whether the goods . . . are likely to be confused but rather whether there is a likelihood that purchasers will be misled into the belief that they emanate from a common source.” *Helene Curtis Indus. Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618, 1624 (TTAB 1989). The third *DuPont* factor concerns “[t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *Stone Lion*, 110 USPQ2d at 1161 (quoting *DuPont*, 177 USPQ at 567).

Applicant argues that “[i]t is error to consider marks likely to be confused based simply on that they may be used on food products.” 4 TTABVUE 14. We agree and must compare the goods as they are identified in the application and registration. *Stone Lion*, 110 USPQ2d at 1162. But here, the descriptions of goods in Applicant’s application and the cited registration broadly identify the products; thus, we may

presume, not that the goods encompass all food products, but that the goods encompass all food products of the type identified. *See In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018); *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

Applicant’s “seasonings for soups” encompass Registrant’s “liquid seasoning” and “chicken flavoring.” In addition, Applicant’s “chicken broth,” “chicken bouillon concentrates,” and “soup concentrates” encompass Registrant’s “bouillon and soup mixes.” Thus, the goods are legally identical in both classes. They are also “presumed to travel in the same channels of trade to the same class of purchasers” because the identifications of goods have no restrictions as to nature, type, channels of trade, or classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (quoting *Hewlett-Packard Co.*, 62 USPQ2d at 1005)). Because Applicant’s broadly identified goods encompass some of Registrant’s more narrowly identified goods and will travel in the same trade channels to the same or overlapping classes of purchasers, the second and third *DuPont* factors strongly support a finding of a likelihood of confusion.


B. The Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of the marks in their entireties, taking into account their appearance, sound, connotation

and commercial impression. *DuPont*, 177 USPQ at 567; *see also Stone Lion*, 110 USPQ2d at 1160; *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess 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 goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016); *Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

We also note that where, as here, the goods are legally identical in part, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (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.”). *See also Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012) (“When the goods are identical, the appearance of a mark of similar sound, appearance, or connotation is more likely to cause confusion than if the goods are significantly different.”); *Mighty Leaf*, 94 USPQ2d at 1260.



In comparing Applicant's composite mark  and the registered mark RANCHERO, the obvious point of similarity is that both include a variation of the term "rancher-", i.e., RANCHERO or RANCHERITO. Due to this shared element, the marks look and sound alike. Further, both marks have similar connotations. Applicant translates "Rancherito" as the diminutive "little rancher" and the cited registration translates "Ranchero" as "farmer." Applicant does not argue a distinction between rancher and farmer, noting that: "In the cited registration, "RANCHERO," alone, according to Merriam-Webster online dictionary, means "rancher." A rancher brings to mind a strong person who works on a ranch. The suffix, "ITO," in "RANCHERITO" of Appellant's mark means "little" in Spanish." 4 TTABVUE 8. However, Applicant argues that a "little rancher" connotes a child pretending to be a rancher, and contrasts the terms on this basis. We are unpersuaded by such argument inasmuch as a diminutive can be used as a token of affection as well.³ Accordingly, we find that RANCHERO and RANCHERITO share a similar connotation as a person who works on a ranch.

³ At https://www.merriam-webster.com/dictionary/diminutive?utm_campaign=sd&utm_medium=serp&utm_source=jsonld, accessed July 1, 2021 : "1*grammar* : indicating small size and sometimes the state or quality of being familiarly known, lovable, pitiable, or contemptible —used of affixes (such as *-ette*, *-kin*, *-ling*) and of words formed with them (such as *kitchenette*, *manikin*, *duckling*), of clipped forms (such as *Jim*), and of altered forms (such as *Peggy*)." The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or regular fixed editions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

The similarities between the marks are particularly evident as the dominant term in Applicant's mark is RANCHERITO, and consumers are likely to focus on this term when viewing Applicant's mark. Although we consider the marks in their entireties, "in articulating reasons for reaching a conclusion on the issue of confusion, 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 consideration of the marks in their entireties." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058, 224 USPQ 749, 751 (Fed. Cir. 1985)).

Applicant argues that consumers will perceive the literal portion of its mark as a unit: SUMESA RANCHERITO, and that "the proximate arrangement of the two terms leads the reader to view the two terms in combination and to read the two as a single entity with the term 'SUMESA' coming first, which negates any potential assumption of weight assigned to the second term." 4 TTABVUE 10. Applicant further argues, "the mark consists of three elements, with SUMESA up top and a chick to the left. It is untrue that RANCHERITO is dominant and should be afforded more weight." Reply Brief, 7 TTABVUE 4. Applicant reasons: "the positioning of the term 'SUMESA' above the term 'RANCHERITO' in combination with the framing of the term 'SUMESA' in a bright red box draws the eye at least equally, if not primarily, to the term 'SUMESA'." 4 TTABVUE 10. Although we agree that the term SUMESA forms a separate impression within the mark, and will be perceived as a unique element within the mark as a whole, the dominant term in Applicant's mark is

RANCHERITO because it is the largest term in the mark, is prominently outlined in a black border, and is centrally located in the mark. However, even if SUMESA and RANCHERITO were accorded equal weight, confusion would be likely because consumers are likely to mistakenly perceive Applicant's mark as identifying an extension of the RANCHERO brand to a line of soups or seasonings sold by SUMESA S.A.

Along these lines, the Examining Attorney argues that the addition of the SUMESA house mark "will not obviate the similarities of the other elements of the marks." 6 TTABVUE 8. Applicant disagrees, arguing that "the addition of Applicant's house mark does significantly alter the similar commercial impressions created by RANCHERO and RANCHERITO." 7 TTABVUE 4. Whether the addition of a house sufficiently obviates the overall similarities of the other elements of a mark to avoid a likelihood of confusion depends on whether the marks in their entirety convey significantly different commercial impressions. This may be shown by evidence demonstrating that the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted. *Compare, e.g., In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (holding VANTAGE TITAN for MRI diagnostic apparatus, and TITAN for medical ultrasound device, likely to cause confusion) *with In re Shawnee Milling Co.*, 225 USPQ 747, 749 (TTAB 1985) (holding GOLDEN CRUST for flour, and ADOLPH'S GOLD'N CRUST and design (with "GOLD'N CRUST" disclaimed) for coating and seasoning for food items, not likely to cause confusion). *See also Citigroup Inc.*, 98

USPQ2d at 1261 (affirming the Board's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial services, is not likely cause confusion, based, in part, on findings that the phrase "City Bank" is frequently used in the banking industry).

Applicant has not adduced any evidence in support of an argument that the term RANCHERO is weak or diluted. Applicant's house mark forms its own, separate, commercial impression apart from the rest of the mark, which makes it likely consumers will believe the mark identifies the "Rancherito" line of "Ranchero" products from Sumesa. The RANCHERITO portion of Applicant's mark is dominant. For these reasons, the overall commercial impressions of both marks are similar.

Applicant further argues that the unique color scheme and baby chick design of its mark distinguish the marks: "looking at [Applicant's] marks (sic) as a whole, it is a distinctive design [distinguishable] from the standard characters of the cited registration. . . . The colors white, red, black, orange, and yellow are claimed as a feature of the mark. . . . A baby chick is standing to the left of the word 'RANCHERITO', which further emphasizes the diminutive and fanciful meaning of the word." 4 TTABVUE 11.

"In the case of a composite mark containing both words and a design, 'the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.'" *Viterra*, 101 USPQ2d at 1908 (quoting *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir 1983)); *Joel Gott Wines, LLC v. Rehoboth*

Von Gott, Inc., 107 USPQ2d 1424, 1431 (TTAB 2013) (finding words normally given greater weight “because they would be used by consumers to request the products”) (citing *In re Dakin’s Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999)); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010) (holding applicant’s mark, MAX with pillar design, and registrant’s mark, MAX, likely to cause confusion, noting that the “addition of a column design to the cited mark . . . is not sufficient to convey that [the] marks . . . identify different sources for legally identical insurance services”). The chick design of Applicant’s mark does not distinguish the marks, but brings to mind the related nature of the goods involved in each, namely, chicken soup and bouillon, and chicken-flavoring soup seasoning.

Moreover, the fact that the cited registered mark is in standard characters allows Registrant to display the mark in any font style, color or size. While this does not necessarily permit Registrant to include a similar chicken design as part of its mark, Registrant may display its RANCHERO mark in the same font style as Applicant utilizes for its RANCHERITO lettering. *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) (“We hold that when we are comparing a standard character mark to a word + design mark for Section 2(d) purposes, we will consider variations of the depictions of the standard character mark only with regard to ‘font style, size, or color’ of the ‘words, letters, numbers, or any combination thereof.’”). Applicant cannot avoid likelihood of confusion with the cited mark on this basis.

We find that the marks are similar in sight, sound, meaning and overall commercial impression. The first *DuPont* factor weighs in favor of finding a likelihood of confusion.

C. Consumer Sophistication

Applicant argues that consumers of soups and seasonings are discerning customers:

Although soups and seasonings are not necessarily expensive items, they are food products that people buy to feed themselves and their families. People are discerning when they are choosing among food products, and especially when it is a food product they will be feeding to their children and families. People today are health conscious, and many scrutinize packaging and nutrition labels to be informed about exactly what they are consuming.

4 TTABVUE 15.

Applicant has provided no evidence to support this assertion and we therefore accord less credence to Applicant's suggestion that conditions of sale mitigate any likelihood of confusion. But even were we to accept Applicant's premise that the relevant class of buyers may exercise care, such "does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods. 'Human memories even of discriminating purchasers ... are not infallible.'" *In re Research and Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), cited in *In re Info. Builders Inc.*, 2020 USPQ2d 10444, *4 (TTAB 2020) (internal quotes omitted). Moreover, soups and seasonings are relatively low-cost items, and

not all consumers are health-conscious consumers. We must base our decision “on the least sophisticated potential purchasers” at issue. *Stone Lion*, 110 USPQ2d at 1163.

This *DuPont* factor is neutral.

II. Conclusion

We have considered of all of the evidence and arguments as they pertain to the relevant *DuPont* likelihood of confusion factors. We find that the applied-for mark is similar to the cited registered mark, that the identified goods are legally identical, and are presumed to travel through the same or overlapping channels of trade to the same or overlapping classes of customers. The consumers have not been shown to be sophisticated. For these reasons, we conclude that Applicant’s applied-for mark



as used in connection with both classes of goods identified in the application, so resembles the cited registered mark RANCHERO as to be likely to cause confusion or mistake, or to deceive relevant consumers under Section 2(d) of the Trademark Act. 15 U.S.C. § 1052(d).

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