

THIS OPINION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB

Hearing:
August 24, 2006

Mailed:
Sept. 25, 2006

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Aladdin's Eatery, Inc.

Serial No. 76022292

Edward T. Saadi of Edward T. Saadi, LLC for Aladdin's Eatery, Inc.¹

Laura Hammel, Trademark Examining Attorney, Law Office 116 (Michael Baird, Managing Attorney).²

Before Grendel, Holtzman and Walsh, Administrative Trademark Judges.

Opinion by Grendel, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark depicted below

¹ Mr. Saadi was appointed as applicant's attorney in a paper filed on April 17, 2006, subsequent to the briefing in this case but prior to the oral hearing. Mr. Saadi appeared on behalf of applicant at the oral hearing.

² Ms. Hammel is the Trademark Examining Attorney who filed the appeal brief and appeared at the oral hearing on behalf of the Office. Prior to the appeal, the application was handled by two different Trademark Examining Attorneys.



for services recited in the application, as amended, as "restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith."³ Applicant has disclaimed EATERY apart from the mark as shown.

At issue in this appeal is the Trademark Examining Attorney's final refusal to register applicant's mark on the ground that the mark, as applied to the recited services, so resembles three previously-registered marks as to be likely to cause confusion, to cause mistake, or to deceive. Trademark Act Section 2(d), 15 U.S.C. §1052(d).

The first cited registration, Registration No. 1779369 (the '369 registration), is of the mark **ALADDIN** (in

³ Serial No. 76022292, filed April 10, 2000. The application was filed on the basis of intent-to-use under Trademark Act Section 1(b), 15 U.S.C. §1051(b). Applicant filed an Amendment to Allege Use on June 7, 2002, alleging April 15, 1994 as the date of first use of the mark anywhere and the date of first use in commerce.

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standard character form) for "hotel and restaurant services."⁴

The second cited registration, Registration No. 2628932 (the '932 registration), is of the mark depicted below

ALADDIN

for "resort, hotel, restaurant, bar, lounge services; beauty salon and health spa services."⁵

The third cited registration, Registration No. 2632473 (the '473 registration), is of the mark depicted below

ALADDIN


for "resort, hotel, restaurant, bar, lounge services; beauty salon and health spa services."⁶

⁴ Issued June 29, 1993; renewed. Affidavits under Sections 8 and 15 accepted and acknowledged.

⁵ Issued October 1, 2002.

⁶ Issued October 8, 2002.

The appeal is fully briefed, and an oral hearing was held at which applicant's counsel and the Trademark Examining Attorney presented arguments. We affirm the refusal to register as to all three of the cited registrations.

Initially, a procedural and/or jurisdictional issue requires discussion. The relevant facts are as follows.

The Office Action containing the Trademark Examining Attorney's final Section 2(d) refusal in this application was issued on July 12, 2004. On December 13, 2004, applicant filed a request for reconsideration. On January 12, 2005, applicant filed its notice of appeal. Also on January 12, 2005, the Board instituted the appeal, and suspended the appeal and remanded the application to the Trademark Examining Attorney for consideration of applicant's request for reconsideration.

Then, on March 7, 2005, the Office issued a notice of acceptance of applicant's Amendment to Allege Use (which had been filed by applicant on June 7, 2002 but which apparently had never been acted on by the Office). Also on March 7, 2005, and despite the pendency of the ex parte appeal at the Board, the Office approved applicant's mark for publication. A Notice of Publication was issued on

June 8, 2005, and the mark was published for opposition on June 28, 2005.

The prosecution history for the application reflects that, on July 28, 2005, the application was "withdrawn from registration." On July 29, 2005, the Trademark Examining Attorney requested that the Director restore jurisdiction over the application to the Trademark Examining Attorney pursuant to Trademark Rule 2.84(a), 37 C.F.R. §2.84(a).⁷ The request was submitted over the electronic signature of Trademark Examining Attorney Barbara Loughran of Law Office 113, who was one of the Trademark Examining Attorneys who had been handling the application up to then. In its entirety, the request reads as follows:

The trademark examining attorney requests restoration of jurisdiction of Trademark Application Serial No. 76/022292 under 37 C.F.R. §2.84(a). Jurisdiction is requested in order to

⁷ Trademark Rule 2.84(a) provides:

The trademark examining attorney may exercise jurisdiction over an application up to the date the mark is published in the *Official Gazette*. After publication of an application under section 1(a), 44 or 66(a) of the Act, the trademark examining attorney may, with the permission of the Director, exercise jurisdiction over the application. After publication of an application under section 1(b) of the Act, the trademark examining attorney may exercise jurisdiction over the application after the issuance of the notice of allowance under section 13(b)(2) of the Act. After publication, and prior to issuance of a notice of allowance in an application under section 1(b), the trademark examining attorney may, with the permission of the Director, exercise jurisdiction over the application.

permit the transfer of this file to Laura Hammel in Law Office 116, for consolidation of the same with Ms. Hammel's brief in Application Serial Number 76/020517.⁸

The request for jurisdiction was signed on August 11, 2005 by Angela Wilson, Acting Managing Attorney of Law Office 113, and was signed on August 15, 2005 by Sharon R. Marsh, Administrator for Trademark Policy and Procedure. Also on August 15, 2005, the request was approved by Lynne Beresford, Deputy Commissioner for Trademark Examination Policy,⁹ with the notation "JURISDICTION RESTORED."

The application then was reassigned to the new Trademark Examining Attorney, Ms. Hammel of Law Office 116, on August 16, 2005. On September 2, 2005, Ms. Hammel issued an Office Action in which she denied applicant's December 13, 2004 request for reconsideration of the final refusal. She also notified applicant that the June 8, 2005 Notice of Publication was sent to applicant erroneously,

⁸ Application Serial No. 76020517 was applicant's previously-pending application to register the mark ALADDIN'S EATERY in standard character form. Applicant's ex parte appeal of Ms. Hammel's final refusal in the '517 application was instituted by the Board on January 24, 2004, and was pending when the appeal in the current '292 case was instituted on January 12, 2005. On February 7, 2006, the Board affirmed the refusal to register in the '517 application, and that application now stands abandoned. The present '292 application was never consolidated with the '517 application, for purposes of appeal or otherwise.

⁹ We assume that Ms. Beresford acted under delegation of authority from the Director.

that the application therefore was withdrawn from publication, and that the final refusal previously made in the July 2004 Office Action was maintained and continued. She also stated: "There is no longer any time left in the response period; therefore, this case will be forwarded to the Trademark Trial and Appeal Board and the appeal will be resumed."

On September 7, 2005, the Board issued an order in which it noted the Trademark Examining Attorney's September 2, 2005 denial of the request for reconsideration, resumed the appeal, and allowed applicant sixty days in which to file its appeal brief.

On September 27, 2005, applicant filed a "Request for Registration," addressed to the Director, in which it contended that the August 15, 2005 restoration of jurisdiction was procedurally improper because the Office had failed to comply with the provisions of TMEP §§1504.04 and 1504.04(a) governing such requests for restoration of jurisdiction.¹⁰ Specifically, applicant contends that the

¹⁰ TMEP §1504.04 provides, in pertinent part, that "[n]ormally, the Director will restore jurisdiction to the examining attorney [after publication] only if there has been a clear error." TMEP §1504.04(a) provides, in pertinent part, that "[t]he examining attorney's request for jurisdiction should be in the form of a memorandum to the Director, accompanied by the Office action that the examining attorney proposes to send to the applicant. The request should be signed by the examining attorney, the managing

restoration of jurisdiction was improper under the TMEP because (a) the Trademark Examining Attorney had not signed the memorandum requesting restoration of jurisdiction (but, presumably, had submitted it merely over her electronic signature); (b) the memorandum requesting restoration of jurisdiction was not "accompanied by the Office action that the examining attorney proposes to send to the applicant"; (c) "[t]ransfer to another office after allowance and publication is not a specified reason for restoration of jurisdiction"; and (d) no "clear error" warranting restoration of jurisdiction exists, because there is no likelihood of confusion between applicant's mark and the registered marks cited in the Trademark Examining Attorney's Section 2(d) refusal. Applicant contends that because the restoration of jurisdiction was improper, it should be withdrawn, and registration of applicant's mark (which has been published for opposition) should issue.

Applicant has maintained these arguments in its November 1, 2005 appeal brief and in its reply brief, along with its arguments pertaining to the merits of the Section 2(d) refusal on appeal. The Trademark Examining Attorney, in her appeal brief, objects to applicant's September 27,

attorney, and the Administrator for Trademark Policy and Procedure."

2005 "request for registration" on the ground that it is an untimely response to the July 2004 final Office action. In its reply brief, applicant contends that its September 27, 2005 "request for registration" should be considered because it is a timely response to the Trademark Examining Attorney's September 2, 2005 Office action continuing the final refusal.¹¹

We have carefully considered applicant's arguments on this issue, but we are not persuaded. Trademark Rule 2.84(a) provides that, with the permission of the Director, jurisdiction over the application may be restored to and exercised by the Trademark Examining Attorney after publication of the mark. Such permission clearly was granted here, when Lynne Beresford, acting as Deputy Commissioner for Trademark Examination Policy and with delegated authority from the Director, approved the restoration of jurisdiction on August 15, 2006. Trademark Rule 2.84(a)'s requirement for permission of the Director prior to restoration of jurisdiction was met in this case;

¹¹ It does not appear that applicant's September 27, 2005 "request for registration," although addressed to the Director, has ever been considered by the Director. The September 27, 2005 paper was not captioned or filed as a petition pursuant to Trademark Rule 2.146, nor was the applicable petition fee submitted. We therefore do not deem it to be a petition to the Director, and instead have treated it as applicant has treated it in its reply brief, i.e., as a response to (or request for reconsideration of) the September 2, 2005 Office action continuing the final refusal.

the Board will not inquire into whether the Office also correctly followed the procedure outlined or suggested in TMEP §1504.04.

Accordingly, we find that jurisdiction was properly restored to the Trademark Examining Attorney after publication pursuant to Trademark Rule 2.84(a), that the final Section 2(d) refusal remains operative, and that applicant's appeal of that refusal is now properly before the Board. We turn now to the merits of the appeal.

Initially, we note applicant's contention that one of the cited registrations, Registration No. 2628932, is based on an application with a filing date subsequent to the filing date of applicant's involved application. However, we reject applicant's argument that, for that reason, this '932 registration should not or cannot be cited as a Section 2(d) bar to registration of applicant's mark. Applicant cites no authority for its argument, and we are aware of none. Section 2(d) bars registration if applicant's mark is confusingly similar to a previously registered mark; the application filing date of any such previously registered mark is irrelevant to the determination of whether it may be cited in an ex parte case as a Section 2(d) bar to registration. Essentially, applicant is attempting to make a collateral attack on the

validity of the cited registration, which is not permissible in this ex parte proceeding. See generally TMEP §1207.01(d)(iv) (4th ed. 2005), and cases cited therein.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue (the *du Pont* factors). See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the second *du Pont* factor, i.e., the similarity or dissimilarity of the services recited in applicant's application and the services recited in the cited registrations. Applicant's services are recited as "restaurants featuring Middle Eastern cuisine, provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith." The services recited in the '369 registration are "hotel and restaurant services." The services recited

in each of the '932 and '473 registrations are "resort, hotel, restaurant, bar, lounge services; beauty salon and health spa services."

Applicant argues that the "hotel and restaurant services" recited in the cited '369 registration should be deemed to cover only restaurants which are integrated or combined with hotels, and that the "resort, hotel, restaurant, bar, lounge services" recited in the cited '932 and '473 registrations should be deemed to cover only restaurants which are integrated or combined with resort, hotel, bar and lounge services. Applicant argues that because applicant's recitation of services is specifically limited to restaurant services "provided in small, neighborhood or local restaurant establishments having no additional services offered concurrent therewith," its restaurant services are legally distinguishable from the restaurant services recited in each of the cited registrations, which are offered only in combination with hotel or other services.

We are not persuaded by this argument. Rather, we read the "hotel and restaurant services" in the '369 registration as covering both "hotel services" and "restaurant services." The ordinary understanding of the phrase "hotel and restaurant services" is "hotel services

and restaurant services"; under normal parlance, one would omit a repeated reference to services. Likewise, we read the "resort, hotel, restaurant, bar, lounge services" in the cited '932 and '473 registrations as if the word "services" were interposed after each of the words, resulting in, inter alia, "restaurant services."¹² We cannot conclude that, by failing to repetitively use the word "services" after each of the words, the registrant (or the Office) understood and intended that the registrations would not cover "hotel services" per se or, more to the point, "restaurant services" per se. Nor can we conclude that third parties viewing the registrations would understand them to exclude "restaurant services" per se. We note that in a similar situation, the Board in *In re Broadway Chicken Inc.*, 38 USPQ2d 1559 (TTAB 1996) found the applicant's "restaurant services" to be legally identical to the "restaurant and bar services" recited in the prior registration cited as a Section 2(d) ground for refusal.

Thus, we find that the "restaurant" services recited in each of the cited registrations encompass and are legally identical to the more specific type of restaurant

¹² In its February 7, 2006 decision affirming the refusal to register in applicant's co-pending application Serial No. 76020517, the Board reached the same conclusion on this issue, rejecting applicant's argument to the contrary.

services recited in applicant's application. The second *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion.

The third *du Pont* factor involves the similarity or dissimilarity of trade channels. Applicant argues that in actual fact its restaurant services "are small neighborhood storefront restaurants featuring Middle Eastern food specialties. The registrant is a gaming (gambling) company that owns a casino in Las Vegas, Nevada." (Appeal Brief at page 3.) Similarly, applicant argues that "[t]he relevant consumers for the Applicant's services are neighborhood families looking for a place that serves Middle Eastern foods. The relevant consumers for the gaming company services are people traveling to Las Vegas and choosing among casinos on the strip. The marks are used in different channels of trade." (Appeal Brief at page 4.)

We are not persuaded by these arguments. It is settled that "likelihood of confusion must be determined based on an analysis of the mark as applied to the ... services recited in applicant's application vis-à-vis ... the services recited in [a] ... registration, rather than what the evidence shows the ... services to be." *In re Dixie Restaurants, Inc.*, *supra*, 41 USPQ2d at 1534, quoting *Canadian Imperial Bank v. Wells Fargo Bank, N.A.*, 811 F.2d

1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Although applicant has crafted its recitation of services to limit applicant's services to particular trade channels, no such restrictions appear in the cited registrations. We therefore must presume that the services recited in the registrations include all normal types of such services, offered in all normal trade channels for such services and to all normal classes of purchasers for such services. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Applicant's argument that we should limit the scope of the registrant's services to those which are offered in conjunction with a Las Vegas casino is unavailing.

Because the services are legally identical in this case, we find that the trade channels and classes of purchasers likewise are legally identical. Thus, the third *du Pont* factor weighs in favor of a finding of likelihood of confusion.

Under the fourth *du Pont* factor, we find that the restaurant services recited in applicant's application and in the cited registrations would be purchased by ordinary consumers without a great deal of care and sophistication. This factor therefore weighs in favor of a finding of likelihood of confusion.

We turn next to the first *du Pont* factor, which requires us to determine the similarity or dissimilarity of the marks when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imports, Inc., supra*. The test, under the first *du Pont* factor, 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 their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, in cases such as this, where the applicant's goods are identical to the opposer's

goods, the degree of similarity between the marks which is required to support a finding of likelihood of confusion is less than it would be if the goods were not identical.

Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Initially, we find that the dominant feature in the commercial impression created by applicant's mark is the word ALADDIN'S. The word EATERY is generic and disclaimed, and thus is entitled to relatively less weight in our consideration of the mark. The design elements of applicant's mark are largely decorative, contributing relatively little to the source-indicating significance of the mark. It is the word ALADDIN'S which would be perceived and used by purchasers as the source-indicating feature of applicant's mark. We note that applicant, on the menu submitted as its specimen of use, repeatedly refers to itself simply as "Aladdin's." For example: "Our intention at Aladdin's is to provide our customers unique, natural foods..."; "At Aladdin's, eat good, eat healthy." Likewise, several menu items use "Aladdin's" in their names, such as "Aladdin's Kabob Rolled" pita, "Aladdin's Lamb Rolled" pita, "Aladdin's Falaffel Rolled" pita, and "Aladdin's Salad." Moreover, the dominance of ALADDIN'S in applicant's mark is enhanced by the fact that it is an

arbitrary term as applied to restaurant services, or at most is only slightly suggestive of restaurants featuring Middle Eastern cuisine. For these reasons, we find that ALADDIN'S is the dominant feature in applicant's mark, and we accord more weight to that feature in our comparison of the marks under the first *du Pont* factor. *In re Chatam International Inc., supra; In re National Data Corp., supra.* We likewise find that ALADDIN is the dominant feature in the design mark depicted in the '473 registration (ALADDIN and lamp design), and that it is the sole feature in the commercial impression created by the other two cited registered marks.

In terms of appearance, we find that applicant's mark is similar to each of the cited registered marks due to the presence in all of the marks of the word ALADDIN or its possessive form ALADDIN'S. Although the respective marks are not identical in appearance due to the use of the possessive form ALADDIN'S in applicant's mark, the presence of the additional generic word EATERY in applicant's mark, and the differences in the design elements of the marks, those points of dissimilarity are outweighed, we find, by the presence of ALADDIN or ALADDIN'S in both marks.

In terms of sound, we again find that the marks, although not identical, are similar rather than dissimilar

due to the presence of ALADDIN or ALADDIN'S in each mark. The differences in sound owing to the presence of the additional possessive "'S" and the generic word EATERY in applicant's mark do not suffice to render the marks dissimilar in terms of sound when they are considered in their entireties.

In terms of connotation, we find that applicant's mark is highly similar to each of the cited registered marks. In all of the marks, ALADDIN has the same meaning and significance, connoting the boy with the magic lamp in The Arabian Nights.¹³ Applicant's mark also includes the generic word EATERY, but that word does not change the meaning of ALADDIN'S nor does it change the meaning of the mark as a whole in such a way as to distinguish applicant's mark from the previously-registered ALADDIN marks. Likewise, the design element in applicant's mark does not change the connotation of the mark, and the lamp design element in the cited '473 registration merely reinforces the connotation of ALADDIN, i.e., the boy with the magic lamp.

¹³ We take judicial notice that "Aladdin" is defined as "...In the Arabian Nights, a boy who acquires a magic lamp and a magic ring with which he can summon two jinn to fulfill any desire..." The American Heritage Dictionary of the English Language (4th ed. 2000). The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet*

In terms of overall commercial impression, we find that applicant's mark is similar to each of the cited registered marks due to the presence in all of the marks of the arbitrary designation ALADDIN or its possessive form, ALADDIN'S. The fact that applicant's mark presents the term in its possessive form does not suffice to distinguish the marks in terms of overall commercial impression. See, e.g., *In re Chatam International Inc.*, *supra* (JOSE GASPAR GOLD similar to GASPAR'S ALE). Likewise, the presence of the generic word EATERY in applicant's mark does not suffice to distinguish the marks. See *In re Dixie Restaurants*, *supra* (THE DELTA CAFE similar to DELTA). Finally, the decorative design features in applicant's mark and in the cited '473 mark do not suffice to distinguish the marks in terms of their overall commercial impressions.

Viewing the marks in their entirety, we find that they are similar rather than dissimilar. As noted above, where the services at issue are identical, as they are in this case, the degree of similarity between the marks which is necessary to support a finding of likelihood of confusion is less than it would be if the services were disparate. We find that the marks are sufficiently similar

Food Imports Co., 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

in this case that confusion is likely to result from use of the marks on the identical services involved herein. The similarity between the marks which results from the presence of ALADDIN or ALADDIN'S in all of the marks simply outweighs any and all points of dissimilarity between the marks. The first *du Pont* factor weighs in favor of a finding of likelihood of confusion.

The sixth *du Pont* factor requires us to consider the number and nature of similar marks in use on similar services. Applicant has submitted evidence purporting to show such third-party use,¹⁴ but we find it to be of little probative value under the sixth *du Pont* factor. The mere listing of third-party applications and registrations is entitled to no probative value. See *In re Duofold Inc.*,

¹⁴ The Trademark Examining Attorney has objected to consideration of this evidence on the ground that it was never made of record prior to appeal. Applicant contends that these documents in fact were made of record as exhibits to a response filed on June 7, 2002. However, it does not appear from the record that any such "response" was entered on June 7, 2002; the only filing on that date recorded in the application's prosecution history was applicant's Amendment to Allege Use. Frankly, we cannot determine with certainty whether these documents were ever filed; they certainly do not appear to have ever been associated with the application file (or viewed by the Trademark Examining Attorney) prior to applicant's "resubmission" of them with its March 8, 2006 letter, filed the day after applicant's reply brief. We note that the June 7, 2002 "response" to which these documents assertedly were exhibits is not included among the papers submitted by applicant with its March 8, 2006 letter. However, in an abundance of caution and giving applicant the benefit of every doubt, we have considered the documents submitted with applicant's March 8, 2006 letter, for whatever probative value they might have.

184 USPQ 638 (TTAB 1974). Even if the listed registrations were properly made of record, they would not constitute evidence of third-party use under the sixth *du Pont* factor. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). The printout of search summary results from the Google search engine likewise is not probative evidence. See *In re Fitch IBCA Inc.*, 64 USPQ2d 1058 (TTAB 2002).

Finally, the listing of the results of applicant's search of the "Hoover's Online" database for companies with the word ALADDIN, or variations thereof, in their names, does not convince us that use of such ALADDIN marks is so prevalent or widespread in the restaurant field that confusion is unlikely in this case. This "company name" listing, unlike yellow pages evidence, is not evidence that the names are actually being advertised and used as service marks for restaurant services. In any event, even if these names are in use as service marks for restaurant services, their number (one or two dozen nationwide) is not so large as to support a finding that the registered ALADDIN marks are weak or diluted. Distinguish *In re Broadway Chicken*, *supra*, where the number of restaurants using BROADWAY in their marks was in the hundreds. This case also is distinguishable from *In re Broadway Chicken* insofar as

ALADDIN, unlike BROADWAY, has no geographical significance but rather is arbitrary, and thus inherently strong, as applied to restaurant services.

In short, we have considered applicant's evidence of third-party use, but we find that the sixth *du Pont* factor weighs, at best, only slightly in applicant's favor.

Applicant asserts that it is unaware of any instances of actual confusion despite eleven years of concurrent use, and that the seventh and eight *du Pont* factors accordingly weigh in applicant's favor. We are not persuaded. Even assuming that neither applicant nor registrant is aware of any instances of actual confusion, the absence of actual confusion is not dispositive. *In re Majestic Distilling Company, Inc., supra*. Likewise, even assuming that applicant is correct in asserting that the cited registered marks are not famous, the lack of such fame is not dispositive. *Id.* Finally, we note applicant's argument that its mark in fact was published for opposition in this case, and that the owner of the cited registrations did not file a notice of opposition to registration of applicant's mark. We cannot conclude, however, that this fact is entitled to dispositive weight in our likelihood of confusion analysis.

We have carefully considered all of the evidence of record as it pertains to the *du Pont* likelihood of confusion factors. We conclude, for the reasons discussed above, that the weight of the evidence supports a finding of likelihood of confusion. We have considered applicant's arguments to the contrary, but are not persuaded. To the extent that any doubts might exist as to the correctness of our conclusion, we resolve such doubts against applicant. See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, *supra*.

Decision: The refusal to register is affirmed.