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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Captn's Pack Products, Inc.

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Serial No. 76446011

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Morton J. Rosenberg of Rosenberg, Klein & Lee for Captn's Pack Products, Inc.

Tanya Amos, Trademark Examining Attorney, Law Office 113, (Odette Bonnet, Managing Attorney).

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Before Simms, Seeherman and Bottorff, Administrative Trademark Judges.

Opinion by Simms, Administrative Trademark Judge:

Captn's Pack Products, Inc. ("applicant"), a New York corporation, has appealed from the final refusal of the Trademark Examining Attorney to register the mark shown below for frozen seafood, namely, frozen raw shrimp.<sup>1</sup>

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<sup>1</sup> Serial No. 76446011, filed August 28, 2002, based upon allegations of use since February 1, 2000.



The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 2,608,601, issued August 20, 2002, for the mark BLACKJACK BURGER ("BURGER" disclaimed) for beef burgers. Applicant and the Examining Attorney have filed briefs but no oral hearing was requested.<sup>2</sup>

We affirm.

Briefly, the Examining Attorney argues that the respective marks are very similar because the word portion of applicant's mark consists of the dominant wording of the registered mark, the word "BURGER" in that mark being

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<sup>2</sup> The results of an Internet search submitted for the first time with applicant's reply brief are excluded. See Trademark Rule 2.142(d). We would add that even if this matter were properly of record, it would not change the result in this case.

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generic and containing no source-indicating significance, and that the respective food products are closely related.

More particularly, concerning the card design in applicant's mark, the Examining Attorney argues that that design is not enough to distinguish the marks and, in fact, reinforces the commercial impression of the mark "BLACK JACK," having reference to the card game blackjack, in which the cards shown in applicant's mark are a winning hand. The words in applicant's mark are more likely to be impressed on a purchaser's memory and be used in calling for applicant's goods, the Examining Attorney contends. Also, the registered mark is shown in standard characters, so that registrant's mark could in fact be used in a form similar to the word in applicant's mark, the Examining Attorney argues. As to the respective goods--frozen raw shrimp and beef burgers--the Examining Attorney has submitted third-party registrations which show that the same mark has been registered for both burgers and shrimp. For example, the mark LONG BEACH SEAFOODS COMPANY and design (Registration No. 1,564,839, issued November 7, 1989, Section 8 affidavit accepted) is registered to the Long Beach Seafood Company, Inc. for goods which include seafood, fresh fish, shrimp, salmon, swordfish, lobsters, clams, crabs, poultry, pork ribs, hamburger patties, veal,

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sausage and meatballs. The same company has registered the mark FAN SEA for the same goods (Registration No. 1,665,145, issued November 19, 1991, renewed). Also, the mark RIVERCAT has been registered to Rivercat Foods, Inc. for such goods as seafood, salmon, shrimp, lobsters, oysters, clams, deli meats, hotdogs, hamburgers, sausages, chicken, liver, bacon and deli sliced cheese (Registration No. 2,509,335, issued November 20, 2001), and HOSSTEAKS.COM - ACCESS TO AMERICA'S FINEST STEAKHOUSE BEEF for such goods as fresh and frozen beef steaks, beef hamburgers, pork ribs, crab cakes, shrimp and lobster tails is registered by Hoss's Enterprises, Inc. (Registration No. 2,506,414, issued November 13, 2001). The Examining Attorney also submitted several registrations owned by well-known restaurant chains showing the same mark registered for hamburgers and seafood including shrimp as well as other food products. The Examining Attorney argues that there is no indication in the registration that registrant's beef burgers are fresh or frozen, and that, accordingly, we must presume that registrant's goods encompass both types of burgers and that they are sold wherever fresh and frozen food is sold in supermarkets. Therefore, both frozen raw shrimp and burgers could be sold in the frozen food aisle of supermarkets, argues the

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Examining Attorney. The Examining Attorney maintains that there is nothing in the cited registration to indicate that registrant's burgers are sold in fast food outlets, as applicant has contended. Because these items are relatively inexpensive food products, the general public is held to a lesser standard of purchasing care, a factor which increases the likelihood of confusion, the Examining Attorney argues. Finally, the Examining Attorney maintains that the third-party registrations (referred to by applicant, *infra*) alone do not establish use of those registered marks and that, even if the registered mark is considered weak, even weak marks are entitled to protection against the registration of marks likely to cause confusion.

Applicant, on the other hand, contends that the Examining Attorney has given too little weight to the allegedly distinguishing design and the stylization of the words "BLACK JACK" in applicant's mark; that the words "BLACK JACK" are not the dominant part of applicant's mark but rather the design element and the stylization are the dominating and distinguishing portions of applicant's mark; that the respective marks have different commercial impressions; that the registered mark suggests the high quality of registrant's goods (because it suggests the best

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hand at blackjack); that the mark BLACKJACK is registered to others for such goods and services as blackeyed pea salsa, beer and ale, chewing gum and restaurant services featuring the home delivery of pizza; that the registered mark is, therefore, "inherently weak" (brief, p. 14) and is entitled to a narrow scope of protection; and that the respective goods are sold in different markets because registrant's goods are "probably" sold in fast food restaurants while applicant's frozen shrimp is sold in grocery stores. Even if these goods are sold in the same supermarkets, applicant argues that frozen seafood would be sold in a separate section from that where beef burgers are sold. Further, applicant argues that "Where a potential purchaser is obtaining a cooked hamburger, such a person would be extremely naïve to confuse such with frozen raw shrimp." Response, p. 10, filed May 20, 2003. Applicant's attorney also indicates that there have been no instances of actual confusion.

Upon careful consideration of this record and the arguments of the attorneys, we agree with the Examining Attorney that confusion is likely.

Our determination of likelihood of confusion under Section 2(d) of the Act is based on an analysis of all of the probative facts in evidence that are relevant to the

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factors bearing on the likelihood of confusion issue. See *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Two key considerations are the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The means of distribution and sale, although certainly relevant, are areas of peripheral inquiry. The fundamental inquiry mandated by [Section] 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

Considering first the marks, it is well settled, of course, that marks must be considered and compared in their entirety, not dissected or split into component parts so that parts are compared with other parts. This is because it is the entire mark which is perceived by the purchasing public and, therefore, it is the entire mark that must be compared to any other mark. See *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992); and *Franklin Mint Corp. v. Master Manufacturing Co.*, 667 F.2d 1005, 212 USPQ 233 (CCPA 1981). However, although marks must be compared in their entirety, there is nothing improper in stating that, for rational reasons,

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more or less weight has been given to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("On the other hand, in articulating reasons for reaching a conclusion on the issue of likelihood 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.").

Moreover, the test to be applied in determining likelihood of confusion is not whether the marks are distinguishable upon a side-by-side comparison, but rather whether the marks, as they are used in connection with registrant's and applicant's goods, so resemble one another as to be likely to cause confusion. That is because, under actual marketing conditions, consumers do not necessarily have the opportunity to make side-by-side comparisons between marks. *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The proper emphasis is thus on the recollection of the average customer, and the correct legal test requires us to consider the fallibility of human memory. The average purchaser normally retains a general, rather than a specific, impression of trademarks. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735

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(TTAB 1991), affirmed in unpublished opinion, Appeal No. 92-1086 (Fed. Cir. June 5, 1992)(SILVER SPOON CAFÉ and SILVER SPOON BAR & GRILL for restaurant and bar services v. SPOONS, SPOONBURGER, SPOONS with cactus design, and SPOONS within a diamond logo design); and *Envirotech Corp. v. Solaron Corp.*, 211 USPQ 724, 733 (TTAB 1981).

When applicant's mark and the registered mark are considered in light of these principles, we agree with the Examining Attorney that the marks are very similar in sound and commercial impression. While, as noted, the marks must be considered in their entireties, the literal portion of applicant's mark plays a more prominent role in designating the source of product. Although the design cannot be ignored, we believe that it does not detract from the commercial impression created by the words "BLACK JACK" because it represents the hand in the card game that is referred to as blackjack. Also, the word "BURGER" in the registered mark names the product involved and does nothing to indicate source. If applicant's mark and the registered mark BLACKJACK BURGER were used on commercially related products, confusion would be likely.

Turning next to the goods, as often stated, Board proceedings are concerned with registrability and not use of a mark and, thus, the identification of goods in the

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cited registration and applicant's application frames the issue. Here, there are no restrictions in the identification of goods in registrant's registration and we do not read limitations into that identification of goods. *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). See also *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"); and *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

It is also true that the respective goods need not be identical or competitive. They need only be related in some manner or the circumstances surrounding their marketing be such that they would likely be encountered by the same persons under circumstances that could give rise to the mistaken belief that they emanate from or are associated with the same source. See *In re Peebles Inc.*,

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23 USPQ2d 1795 (TTAB 1992); and *Chemical New York Corp. v. Conmar Form Systems Inc.*, 1 USPQ2d 1139 (TTAB 1986).

In order to demonstrate relatedness of the goods, the Examining Attorney has made of record a number of third-party registrations. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Moreover, as our primary reviewing Court stated in *Recot Inc. v. M.C. Becton*, 214 F.3d 1332, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000): "Even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis." The same Court reiterated, in the case of *Hewlett-Packard Company v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002): "Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services."

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We agree with the Examining Attorney that frozen shrimp and beef burgers are related food products that could be sold in the same frozen food section of supermarkets. Suffice it to say that a purchaser, who had purchased or at least is aware of registrant's BLACKJACK BURGER beef burgers, who then encounters applicant's BLACK JACK and design frozen shrimp is likely to believe that these food products come from or are licensed or sponsored by the same company.

Furthermore, the third-party registrations referred to by applicant of the mark BLACKJACK are not evidence of use of those marks in the marketplace, and they do not show that the public is familiar with those marks. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) ("The existence of [third party] registrations is not evidence of what happens in the market place or that customers are familiar with them..."). There is no evidence, for example, relating to the nature and extent of the use of these marks. Moreover, while third-party registrations may be looked at in the same manner as a dictionary to determine a term's significance in a particular trade, it is not seen how the several

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registrations of this mark for salsa, beer and ale and pizza delivery services shed any light on this significance, except perhaps to show that the term may have a somewhat laudatory meaning (as the best hand in the card game, rather than the card game itself). Accordingly, we do not believe that the registered mark has been shown to be weak. Even if we deem the protection to be accorded the cited registered mark as being more limited than that for a totally arbitrary mark, it still extends to prevent the registration of a mark which conveys the same commercial impression and which is used for goods which the record shows may emanate from a single source.

Further, without evidence of the nature and extent of the sales and advertising of applicant's and registrant's food products, or of any geographic overlap in the marketing and sale of these goods, we can give relatively little weight to applicant's statement that there have been no instances of actual confusion. That is, the lack of actual confusion is a meaningful factor only where the record demonstrates appreciable and continuous use by an applicant of its mark in the same markets as those served by registrant under its mark. See, for example, *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992); and *Chemetron Corp. v. Morris Coupling & Clamp Co.*,

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203 USPQ 537, 541 (TTAB 1979). Specifically, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur. See *Cunningham v. Laser Golf Corp.*, *supra* at 55 USPQ2d 1847. See also *In re Majestic Distilling Co., Inc.*, *supra*, 65 USPQ2d at 1205 (“The lack of evidence of actual confusion carries little weight ... especially in an *ex parte* context”). And any confusion about sponsorship or affiliation would not necessarily be brought to the attention of either applicant or registrant, where such relatively inexpensive items as food products are involved. Furthermore, because applicant did not commence use of its mark until the year 2000, the period of contemporaneous use has been relatively short. Thus, we do not believe that there has been a meaningful opportunity for confusion to have occurred.

Finally, as noted above, because registrant’s beef burgers and applicant’s frozen shrimp are relatively inexpensive, purchasers may not spend a great deal of time in the purchasing decision, a factor which favors registrant in the likelihood of confusion analysis. It is not, as applicant seems to contend, that a purchaser of registrant’s beef burgers will purchase applicant’s BLACK JACK and design frozen shrimp thinking that he or she has just purchased a beef burger; rather, it is that such a

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purchaser may well believe that applicant's frozen shrimp is produced by or under license from the same source that produces the beef burger under a similar mark.

Of course, if there is any doubt concerning the conclusion of likelihood of confusion, such doubt, in accordance with precedent, must be resolved in favor of the registrant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); and *In re Pneumatiques Caoutchouc Manufacture et Plastiques Kelber-Columbes*, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.