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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 Phoenix Intangibles Holding Company

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Serial No. 76572153

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David Radack of Eckert Seamans Cherin & Mellott, LLC for  
Phoenix Intangibles Holding Company.

Danielle I. Mattessich, Trademark Examining Attorney, Law  
Office 106 (Mary I. Sparrow, Managing Attorney).

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Before Hohein, Holtzman and Zervas, Administrative  
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Phoenix Intangibles Holding Company has filed, on  
January 22, 2004, an application to register on the  
Principal Register the mark GET IN. GET OUT. GET GOING. for  
"retail convenience store services featuring convenience  
store items and fuel" in International Class 35. The  
application is based on use in commerce under Trademark Act  
Section 1(a), 15 U.S.C. §1051(a), and March 10, 2003 is

claimed in the application as applicant's date of first use of the mark anywhere and first use of the mark in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used in connection with its services, so resembles the previously registered mark GET IN GET IT GET GOING for "retail convenience store services featuring gasoline and convenience store items" in International Class 35 as to be likely to cause confusion, or to cause mistake or to deceive.<sup>1</sup>

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. Applicant did not request an oral hearing.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act 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. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities

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<sup>1</sup> Registration No. 2562470, issued April 16, 2002.

between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We first turn to the similarity or dissimilarity of registrant's and applicant's services, the relevant trade channels and the purchasers of such services. At p. 2 of its response to the first Office action, applicant acknowledged, "the marks are used on identical services." We agree. There is no notable difference between applicant's and registrant's services, as set forth in the respective recitations of services. We therefore find that applicant's and registrant's services are legally identical.

Moving on to the trade channels and the purchasers of the respective services, we find in the absence of any restrictions in the recitation of services in the application and registration that applicant's and registrant's services are marketed in the same, overlapping trade channels to the same classes of purchasers. See *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

We next consider the similarities between the marks, which are both slogans. Specifically, we consider whether

applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, meaning and commercial impression. In cases such this case, where the applicant's services are legally identical to the registrant's services, 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 services were not legally identical. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Both marks have the same construction, i.e., they both consist of three, two-word phases beginning with GET; begin and end with the same words; and have GET IN as the initial phrase, GET GOING as the terminal phrase, GET as the third word in the mark, the same number of syllables, and the same cadence. In fact, the only difference that applicant identifies is "that Applicant uses the phrase 'GET OUT' as opposed to Registrant's use of the phrase 'GET IT.'"<sup>2</sup> The marks hence are highly similar in appearance and sound. In terms of meaning, the marks are highly similar too, if not identical. They both convey to the consumer that items for

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<sup>2</sup> Of course, while the periods in applicant's mark are part of its mark, they do not aid in distinguishing applicant's mark from registrant's mark.

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sale can be purchased quickly, and without hassle or delay. Also, because only the fourth of the six words in the slogans differ, and this fourth word is embedded in the middle of the slogan, it is highly doubtful that consumers, when perceiving the slogans as a whole, will distinguish the slogans from each other based on this one word. As noted by the examining attorney, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison; the question is whether the marks create the same overall impression. *Visual Information Inst. Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980).

In view of the foregoing, we find that the marks are extremely similar in sound and appearance, and possibly even identical in meaning, when considered as a whole. We also find that the commercial impression of the marks is the same.

Applicant argues that registrant's mark should be accorded "very narrow and limited" protection and that "confusion is only likely when the marks are identical or near identical" in view of the following registrations:

Registration No. 1,760,506 for **GET-EM-N-GO** for "restaurant services";

Registration No. 2,454,857 for **GET ON. GO OUT.** for "dissemination for others of advertising and

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promotional matter concerning goods and services over on-line electronic global communications networks; auctioneering services";

Registration No. 2,475,854 for **GET IN. GET OUT. GET ON WITH YOUR LIFE.** for "restaurant and catering services";

Registration No. 1,451,481 for **GET & ZIP** for "convenience store and retail grocery store services";

Registration No. 2,615,095 for **GET ON. GET IN. AND WIN!** for "on-line video arcade game services"; and

Registration No. 2,711,192 for **GET IN. GET OUT. GET AHEAD.** for "educational services, namely, providing courses of instruction and training at the undergraduate and professional levels."

These registrations are of limited value in resolving the question presented in this case because either they concern services unrelated to applicant's services (see services recited in Registration Nos. 2,454,857, 2,615,095 and 2,711,192), or concern marks that differ considerably from applicant's mark (see marks set forth in Registration Nos. 1,760,506 and 1,451,481).

Additionally, third-party registrations are not evidence of commercial use of the marks shown therein, or what happens in the marketplace, or that consumers are familiar with the third-party marks. See *Olde Tyme Foods Inc., v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992); and *Spoons Restaurants Inc. v. Morrison*

*Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd*, Appeal No. 92-1086 (Fed. Cir. June 5, 1992). Thus, applicant's argument is not well taken.

Another point argued by applicant is that the applied-for mark "will almost always appear" with another of applicant's marks, i.e., GETGO FROM GIANT EAGLE, thereby lessening the likelihood of confusion with registrant's mark.<sup>3</sup> In our determination, however, we must compare the marks as shown in the cited registration and involved application. Here, applicant's corporate name does not appear in the mark sought to be registered. Accordingly, applicant's point is irrelevant to our analysis.

In sum, upon review of all of the relevant *du Pont* factors, and particularly the similarities of the marks and the legal identity of the services, and the commonality of purchasers and trade channels, we find that applicant's mark GET IN. GET OUT. GET GOING. for "retail convenience store services featuring convenience store items and fuel" is likely to cause confusion with the registered mark GET

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<sup>3</sup> Applicant submitted a copy of a page from applicant's website depicting applicant's convenience store with the applied-for mark proximate to GETGO FROM GIANT EAGLE. The examining attorney has objected to the submission of this page under 37 C.F.R. 2.142(d) because it was first filed with applicant's appeal brief. The examining attorney's objection is well taken and we have not further considered the copy of the page from applicant's website. See TBMP § 1207.03 (2d ed. rev. 2004) and cases cited therein.

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IN GET IT GET GOING for "retail store services featuring gasoline and convenience store items."

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.