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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 Ingles Markets, Inc.

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Serial No. 76580348

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Richard M. Moose of Dority & Manning for Ingles Markets, Inc.

Patricia M. Evanko, Trademark Examining Attorney, Law Office 117 (Loretta Beck, Managing Attorney).

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Before Quinn, Hairston and Kuhlke, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Ingles Markets, Inc. seeks registration on the Principal Register of the mark SAV-MOR FOOD & DOLLAR (standard character claimed) for services identified as "retail grocery store services" in International Class 35.[1]

Registration has been refused under Section 2(d) of

[1] Application Serial No. 76580348, filed March 11, 2004, alleging first use and use in commerce on May 12, 2004 under Trademark Act Section 1(a). 15 U.S.C. §1051(a).

the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when used with its identified services, so resembles the registered mark SAVE MORE (in typed form) for "retail store services featuring convenience store items and gasoline" in International Class 35 as to be likely to cause confusion, mistake or deception.[2] In addition, the examining attorney also made final her requirement that applicant disclaim the wording FOOD & DOLLAR on the ground that it is merely descriptive of applicant's goods within the meaning of Section 2(e)(1) of the Trademark Act, 15 U.S.C. 1052(e)(1). While applicant submitted a disclaimer for the word FOOD, applicant did not agree to a disclaimer of the entire phrase FOOD & DOLLAR. Consequently, pursuant to Section 6(a) of the Trademark Act, the examining attorney has issued a final refusal of registration. 15 U.S.C. 1056(a).

When the refusals were made final, applicant appealed and briefs have been filed. We affirm the refusals to register.

We first consider the disclaimer requirement. An examining attorney may require an applicant to disclaim an unregistrable component of a mark otherwise registrable.

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[2] Registration No. 2638469, issued October 22, 2002.

Trademark Act Section 6(a). Merely descriptive terms are unregistrable, under Trademark Act Section 2(e)(1), and, therefore, are subject to disclaimer if the mark is otherwise registrable. Failure to comply with a disclaimer requirement is grounds for refusal of registration. See In re Omaha National Corp., 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987); In re Richardson Ink Co., 511 F.2d 559, 185 USPQ 46 (CCPA 1975); In re National Presto Industries, Inc., 197 USPQ 188 (TTAB 1977); and In re Pendleton Tool Industries, Inc., 157 USPQ 114 (TTAB 1968).

A term is deemed to be merely descriptive of goods or services, within the meaning of Section 2(e)(1), if it forthwith conveys an immediate idea of an ingredient, quality, characteristic, feature, function, purpose or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987), and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978). A term need not immediately convey an idea of each and every specific feature of the applicant's goods or services in order to be considered merely descriptive; it is enough that the term describes one significant attribute, function or property of the goods or services. See In re H.U.D.D.L.E., 216 USPQ 358 (TTAB 1982); In re MBAssociates, 180 USPQ 338 (TTAB 1973).

Whether a term is merely descriptive is determined not in the abstract, but in relation to the goods or services for which registration is sought, the context in which it is being used on or in connection with those goods or services, and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of its use. That a term may have other meanings in different contexts is not controlling. In re Bright-Crest, Ltd., 204 USPQ 591, 593 (TTAB 1979).

In support of the refusal, the examining attorney submitted the following dictionary definitions:

> Food: 1. source of nutrients: material that provides living things with the nutrients they need for energy and growth 2. sold nourishment: substances, or a particular substance, providing nourishment for people or animals, especially in solid as opposed to liquid form.
>
> Dollar Store: store selling inexpensive items: a retail establishment selling inexpensive items, many at one dollar or less.
>
> Dollar: 1. common unit of currency: a unit of currency used in the United States, Canada, Australia, New Zealand, and several other countries.

Encarta World English Dictionary North American Edition (2005).

In addition, the examining attorney submitted a listing of search result summaries from the Google search engine. While search result summaries are of limited

probative value, In re Fitch IBCA, Inc., 64 USPQ2d 1058 (TTAB 2002), given the context provided by some of the summaries that place use of FOOD & DOLLAR under the headings "Discount Stores" (Mlps Food & Dollar Store Market), "Dallas Groceries" (Davis Food & Dollar Store), "Grocery Stores" (Issa Food & Dollar) and "Shopping Directory" (M Food & Dollar Plus), this summary has some probative value, particularly in combination with the dictionary definitions of "Food" and "Dollar Store." We find that the examining attorney has made a prima facie case that the phrase FOOD & DOLLAR used in connection with applicant's retail grocery store services is descriptive. We are not persuaded by applicant's argument that there is an incongruity with & DOLLAR juxtaposed against FOOD to convey a suggestive rather than descriptive commercial impression. There is nothing incongruous about FOOD & DOLLAR. This phrase clearly describes a feature of the grocery store services, namely, that they provide food at an inexpensive price or discount. Thus, the disclaimer requirement is appropriate.

We now turn to the refusal under Section 2(d). Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in

evidence that are relevant to the factors set forth in 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 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).

As to the services, we find that they are related. The evidence of record clearly establishes the relatedness of the services such that use of similar marks in connection with the respective services would create a likelihood of confusion. It is well settled that services need not be similar or competitive in nature to support a finding of likelihood of confusion. The question is not whether purchasers can differentiate the services themselves, but rather whether purchasers are likely to confuse the source of the services. See Helene Curtis Industries Inc. v. Suave Shoe Corp., 13 USPQ2d 1618 (TTAB 1989). Further, we must consider the applicant's services and the cited registrant's services as they are described

in the application and registration. See Hewlett-Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1987).

In support of her position, the examining attorney submitted evidence in the form of third-party use-based registrations to show that applicant's retail grocery stores are related to registrant's retail store services featuring convenience store items and gasoline. See, e.g., Reg. No. 1993729 (ALL STAR EXPRESS for retail grocery store services; namely, convenience store services); Reg. No. 2016307 (FARM STORES EXPRESS for retail convenience stores and retail grocery stores services); Reg. No. 2274501 (NOT JUST IN YOUR COMMUNITY BUT PART OF IT for retail grocery and convenience store services); Reg. No. 2604604 (DODGE'S for retail grocery and convenience store services); Reg. No. 2933570 (KWIK FARMS for grocery and convenience store services); and Reg. No. 2964520 (YOU CAN'T BEAT…WAGNER'S MEAT for, inter alia, retail store services featuring convenience store items and gasoline, and retail grocery store services). Third-party registrations which individually cover a number of different services, and which are based on use in commerce, may serve to suggest

that the listed services are of a type which may emanate from a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783 (TTAB 1993).

We find the third-party registrations sufficiently persuasive to conclude that applicant's and registrant's services are related. We are not persuaded by applicant's argument that "the particular specifying language of 'convenience store items'" has meaning such that it includes only "pre-prepared or otherwise 'ready to eat' food items" and excludes "a sack of flour or sugar...such as one would expect to find at a grocery store." Br. p. 10. Even if we apply this interpretation of "convenience items," such items are also available at a grocery store; it simply does not serve to distinguish the services.

Considering the channels of trade, inasmuch as there are no limitations in the registration we presume that the services will be provided in some of the same channels of trade and share the same classes of purchasers. See Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); and In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994).

In view of the above, the du Pont factors of the similarity of the services and the channels of trade favor

a finding of likelihood of confusion as to the cited registration.

We now consider whether applicant's mark, SAV-MOR FOOD & DOLLAR, and the mark in the cited registration, SAVE MORE, are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. In making this determination, we recognize that the closer the relationship between the goods or services, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), cert. denied 506 U.S. 1034 (1992).

Examining the marks in terms of their appearance, sound, meaning, and commercial impression, we find the marks to be similar. 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). We must determine whether the marks are sufficiently similar that there is a likelihood of confusion as to source and, in making this determination, we must consider the recollection of the average purchaser

who normally retains a general, rather than specific, impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

Applicant's mark encompasses the whole of the mark in the cited registration. The SAV-MOR element in applicant's mark is phonetically identical to the mark in the cited registration. The only distinguishing features of this element are the absence of the E and the addition of the hyphen in applicant's mark. Trademarks may be confusingly similar in appearance despite the addition, deletion or substitution of letters. Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 81 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In addition, it is undisputed that SAVE MORE and SAV-MOR have the same meaning in the context of grocery and convenience stores, i.e., consumers can save money shopping in those stores. We find that because applicant's mark begins with the mark in the cited registration, the marks have the same overall commercial impression and the addition of the descriptive wording FOOD & DOLLAR in applicant's mark does not serve to distinguish the marks. This wording, FOOD & DOLLAR, merely serves to underscore the overall connotation of both marks to further describe the services, i.e., stores where consumers save money buying food. We are not persuaded by applicant's

argument that FOOD & DOLLAR is incongruous and distinctive. As discussed above, this phrase is used to merely describe a type of store.

Applicant also argues that the mark in the cited registration is weak. Applicant's evidence is of little probative value inasmuch as it consists of mere listings of registrations without the goods or services listed. In addition, most of the listings only contain either SAVE or MORE. Only five listed registrations combine both SAVE and MORE, but again, the goods or services are not listed. However, even if we consider SAVE MORE a suggestive mark, and, thus, not afforded a broad scope of protection, given that the services are related and are directed towards the same general consumers seeking savings and choosing these services without a great deal of care, the protection afforded this mark certainly encompasses these circumstances. King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) (even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services).

Finally, applicant's arguments regarding another application do not persuade us to a different result. While consistency in examination is desired, prior decisions of examining attorneys are not binding on the

agency and each case must be decided on its own merits. In re Sunmarks, Inc., 32 USPQ2d 1470 (TTAB 1994).

In conclusion, we find that because of the related services and the close similarities in the marks, confusion is likely between applicant's mark and the mark in the cited registration. To the extent there are any doubts, we resolve them, as we must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusals to register under Section 2(d) of the Trademark Act and based on applicant's failure to disclaim & DOLLAR are affirmed. However, if applicant submits the required disclaimer of FOOD & DOLLAR to the Board within thirty days, this decision will be set aside as to the affirmance of the disclaimer requirement.[3] See Trademark Rule 2.142(g), 37 C.F.R. §2.142.

[3] The standardized printing format for the required disclaimer text is as follows: "No exclusive right to use FOOD & DOLLAR is claimed apart from the mark as shown." TMEP §1213.08(a) (4th ed. April 2005).