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Mailed:
8/5/2008

UNITED STATES PATENT AND TRADEMARK OFFICE

In re Mountain Organic Foods, LLC

Serial No. 78563148

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Michael Kazazian, Trademark Examining Attorney, Law Office 113 (Odette Bonnet, Managing Attorney).

Before Seeherman, Bergsman, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

Mountain Organic Foods, LLC filed an application to register the mark BEAR FRUIT BAR, in standard character format, for "organic fruit bars made from organic fruits and organic vegetable bars made from organic vegetables" in International Class 29.¹

The trademark examining attorney refused registration of the mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's mark so resembles the mark BARE FRUIT, registered for

¹ Application Serial No. 78563148, filed February 8, 2005, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), alleging a bona fide intent to use the mark in commerce, and disclaiming the exclusive right to use the term "FRUIT BAR."

"dried, organic fruits and nuts,"² that when used in connection with applicant's identified goods, applicant's mark will be likely to cause confusion.

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. For the reasons discussed herein, the Board affirms the final refusal to register.

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 Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between 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"). We consider each of the factors as to which applicant or the examining attorney presented arguments or evidence.

² Registration No. 3163402, registered October 24, 2006. Registrant disclaimed the exclusive right to use the term "FRUIT."

The similarity or dissimilarity of the marks
in their entirety

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entirety. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Both marks begin with the phonetically identical words BEAR/BARE FRUIT. These words are also visually very close. The additional word BAR in applicant's mark does not serve to distinguish it from the registered mark, as it is merely a generic term for the product (an "organic fruit bar").

We recognize that, because of the differences in spelling, the word BEAR in applicant's mark would most likely raise in consumers' minds a reference to an animal or perhaps suggest the verb to bear (or "bring forth") fruit. Meanwhile the word BARE in the registered mark means without adornment, suggesting that registrant's product is "simply fruit." Although these words have different connotations, overall we find that this is not sufficient to distinguish the marks. In particular, these goods may be recommended by word-of-mouth, where the difference in spelling of BEAR/BARE would not come into play, and therefore the difference in connotation would have no effect. Further, because these are presumably inexpensive products that may be purchased on impulse and without care, consumers are not likely to notice the difference in spelling and therefore the difference in

connotation. In sum, the marks convey the same commercial impression.

In comparing the marks in their entireties, we find that the similarities outweigh the differences. Accordingly, the first *du Pont* factor weighs in favor of finding that there is a likelihood of consumer confusion.

The similarity or dissimilarity and nature
of the goods and classes of consumers

It is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

The examining attorney has submitted evidence of third-party registrations that include both "fruit bars" as identified in the pending BEAR FRUIT BAR application, and "dried fruit" as identified in the cited registration. The examining attorney has even submitted evidence of third-party registrations that merge the identified goods together as "fruit bars made from dried fruits." These

third-party registrations serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). Further, because both applicant's and the registrant's goods are "organic," and because registrant's products may be an integral component of applicant's goods, we find applicant's goods and the registrant's to be closely related.

Applicant argues that it targets the sophisticated consumer of "organic" products, and that its organic fruit and vegetable bars would be sold in a different aisle from registrant's dried organic fruits and nuts.³ Applicant does not offer any evidence in support of this point, however, and we find it to be unpersuasive. Organic foods are no longer esoteric items that are sold only in health food stores and the like. Rather, they are sold in mainstream grocery stores, and are purchased by the public at large. In any event, even a sophisticated consumer is not immune from source confusion. Since the marks are similar in appearance and sound and used on closely related products, even a careful, sophisticated consumer is not likely to note the differences in the marks. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 948-949 (Fed. Cir. 2000).

³ Even so, if true then consumers would not have the opportunity to make a side-by-side comparison, thus enhancing the similarity of the marks in appearance and sound.

Conclusion

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that applicant's mark BEAR FRUIT BAR for "organic fruit bars made from organic fruits and organic vegetable bars made from organic vegetables" is likely to cause confusion with BARE FRUIT for "dried, organic fruits and nuts." In reaching this conclusion, we point out that to the extent that there may be any doubt on the issue of likelihood of confusion, it is well-established that such doubt is to be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988)."

Decision: The refusal to register is affirmed.