

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

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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 SheerBliss Holdings, LLC<sup>1</sup>

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Serial No. 78627052

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Matthew H. Swyers of The Swyers Law Firm, PLLC for  
SheerBliss Holdings.

Won T. Oh, Trademark Examining Attorney, Law Office 114 (K.  
Margaret Le, Managing Attorney).

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Before Holtzman, Drost and Kuhlke, Administrative Trademark  
Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

SheerBliss Holdings, LLC (applicant) seeks  
registration on the Principal Register of the mark  
SHEERBLISS (in standard character form) for "retail store  
services featuring ice cream, truffles, chocolate,  
confectionaries, frozen desserts, and yogurt; wholesale

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<sup>1</sup> We note the assignment from the original applicant, SheerBliss  
Ice Cream, LLC, to SheerBliss Holdings, LLC recorded at  
reel/frame no. 3409/0753.

**Serial No. 78627052**

distributorship services featuring ice cream, truffles, chocolate, confectionaries, frozen desserts, and yogurt" in International Class 35 and "ice cream parlor; cafe and restaurant services" in International Class 43.<sup>2</sup>

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), as to the services in International Class 43 only, on the ground that applicant's mark, when used with its identified services in International Class 43, so resembles the registered mark BLISS (in typed form) for "restaurant and bar services" in International Class 43 as to be likely to cause confusion, mistake or deception.<sup>3</sup>

The appeal is fully briefed. We affirm the refusal to register.

As a preliminary matter, the examining attorney's objection to the evidence submitted for the first time with applicant's appeal brief is sustained. Trademark Rule 2.142(d) (evidentiary record should be complete prior to the filing of an ex parte appeal). Applicant's argument that the file of the cited registration, including the specimens of use from that file, should be considered part

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<sup>2</sup> Application Serial No. 78627052, filed May 10, 2005, alleging a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

<sup>3</sup> Registration No. 3060667, issued February 21, 2006.

of the record without applicant's submission of it during the prosecution of its application is misplaced.

Applicant, noting that in an inter partes proceeding the entire file of the subject registration or application is "automatically" part of the record, "submits that by citing the instant registration the entire file should be deemed as part of the record in the instant matter consistent with TBMP Section 704.03(a) in inter parte matters." Reply Br. p. 2. However, it is applicant's application that is the "subject" of the ex parte appeal, not the cited registration.<sup>4</sup>

In addition, as noted above, the refusal does not pertain to the following services identified in the application: "retail store services featuring ice cream, truffles, chocolate, confectionaries, frozen desserts, and yogurt; wholesale distributorship services featuring ice cream, truffles, chocolate, confectionaries, frozen desserts, and yogurt" in International Class 35. Thus, the issue before us does not include these services and the application will, at a minimum, go forward as to these services.

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<sup>4</sup> We further note that applicant's use of this evidence to limit the scope of registrant's mark is not appropriate. We must make our determination based on the goods and services as identified in the application and registration. *Hewlett-Packard Co. v.*

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 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).

Here, registrant's services are "restaurant and bar services." They are not limited in any manner. We find the services to be legally identical inasmuch as applicant's identification "cafe and restaurant services" is encompassed by registrant's "restaurant and bar services." We note that applicant does not dispute that the services are related.

Further, inasmuch as the services are legally identical, and there are no limitations in the

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*Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).

identification of services, we must presume that the services will be rendered in some of the same channels of trade, and will be used by some of the same 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.

With regard to the conditions of sale, we note that applicant's argument concerning the "sophistication" of the potential consumers is simply part of applicant's argument, discussed below, that the term is weak such that minor variations permit consumers to distinguish between various BLISS marks. There is nothing in the record to support a finding that patrons of restaurants or cafes are anything other than ordinary consumers. Moreover, as noted above, there are no limitations as to the types of customers or trade channels in the application or registration.

We now consider whether applicant's mark, SHEERBLISS and the mark in the cited registration, BLISS, 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 where the

goods or services are virtually identical, "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, 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).

We take judicial notice of the dictionary definitions for the words BLISS and SHEER:<sup>5</sup>

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<sup>5</sup> The Board may take judicial notice of dictionary definitions. University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.,

Serial No. 78627052

BLISS 1. extreme happiness; ecstasy

SHEER 2(a). completely such, without qualification or exception: sheer stupidity; sheer happiness.

The American Heritage Dictionary of the English Language

(4th ed. 2006).

Although applicant's mark has the addition of a modifying term, the word SHEER serves to emphasize the term BLISS and as such applicant's mark does not have a different connotation than registrant's mark. Thus, this modifier, although creating a difference in appearance, does not serve to create an overall different commercial impression. As stated by the examining attorney, "[t]he commercial impression of 'BLISS' and 'SHEERBLISS' is highly similar because the meaning of the mark has not significantly changed. The addition of 'SHEER' only changes the level of degree of the meaning of the mark." Br. p. 6. We are not persuaded by applicant's argument that the addition of SHEER to its mark creates a distinct commercial impression sufficient to permit registration of its mark.

We find that despite the differences in appearance and sound brought by the addition of the term SHEER in

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213 USPQ 594, 596 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

applicant's mark, the similarity in connotation and overall commercial impression outweigh this difference.

In making our determination we have considered applicant's argument that the term BLISS in both marks is weak and as such cannot be the dominant part of applicant's mark in view of widespread third-party use of the term BLISS. In support of its argument, applicant submitted copies of third-party registrations and argued as follows:

The examining attorney held that 17 of the 19 cited registrations for various food items "are not probative for the argument that the wording 'BLISS' is a weak mark for restaurant services."...To the contrary, the nexus between food items and restaurant services is so well recognized that a section of the TMEP has been included to address the same. [citations omitted]

...it is contended that the examining attorney's casual dismissal of BLISS marks registered in connection with food items as having weight herein was in error where the TMEP itself and case law above establishes the relatedness of food items to restaurant services. As such, SheerBliss maintains that the existence of these 19 cited registrations, in conjunction with the Office's prior consistent registration of other BLISS marks, demonstrate that consumers are accustomed to seeing different "BLISS" marks for different goods and services such that consumers have learned to readily distinguish between these marks through small differences in the marks or the associated goods or services.

Applicant's Br. pp. 10-11.

We first note that it is well settled that third-party registrations are not evidence of use in the marketplace

**Serial No. 78627052**

and thus have little probative value on this issue. In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991) ("With respect to the listed third-party registrations, we have on numerous occasions stated the position that such registrations are of little probative value in determining likelihood of confusion in the absence of evidence to establish their use in the market-place.") We further note, that all but two of these third-party registrations are for various foods (primarily sweets) that have no bearing on the question of the strength of the term BLISS in connection with cafe and restaurant services. Of the remaining two, one is the cited registration. This is hardly sufficient evidence upon which to find that the term BLISS is weak in the field of restaurant services. As to the other third-party registration for the mark HAMBURGER BLISS, it is well-established that the Board is not bound by prior decisions of examining attorneys, and must decide each case on its own merits. In re Nett Designs Inc., 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

Applicant misperceives the relevance of the third-party registrations for purposes of our determination in this case. Here, the existence of a term widely used on the register could be an indication that that term has a particular meaning when used with those specific goods and

services. Melville, supra at ("But, it is also true that they may be considered to demonstrate the meaning of a word which comprises the mark, or a portion thereof, to show that there is a well-known and commonly understood meaning of that word and that the mark has been chosen to convey that meaning. [citations omitted] The conclusion to be drawn in such a case is that there is an inherent weakness in a mark comprised in whole or in part of the word in question and that, therefore, the question of likelihood of confusion is colored by that weakness to the extent that only slight differences in the marks may be sufficient to distinguish one from the other.") Thus, even if various food and beverages would be considered sufficiently related to restaurant services for purposes of a likelihood of confusion analysis between two marks, that is not the same as determining whether a particular term has a descriptive or suggestive meaning for a particular good or service. Even if BLISS has a suggestive meaning for foods that does not mean that BLISS has a particular meaning for restaurants or that consumers having seen BLISS used on many foods from different sources would carry that perception over to restaurants.

Applicant cites *In re Shawnee Milling Co.*, 225 USPQ 747 (TTAB 1985) where the Board found that the terms GOLD'N

**Serial No. 78627052**

CRUST and GOLDEN CRUST in the registered and applied-for marks were suggestive and the addition of the house mark ADOLPH'S in registrant's mark was sufficient to distinguish the marks. In this case, there is no house mark to distinguish the marks, merely a modifier that only serves to increase the intensity of the same meaning of BLISS and, as noted above, the record does not support a finding that BLISS is suggestive of restaurant services. Even assuming BLISS is weak in connection with these services and afforded a somewhat lesser scope of protection, given that we have legally identical services which may be purchased without a high degree of care by some consumers as well as similar marks, 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).

In conclusion, we find that because of the legally identical services, the overlap in the trade channels, and the 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

**Serial No. 78627052**

must, in registrant's favor. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed as to applicant's "ice cream parlor; cafe and restaurant services" and the application will proceed to registration as to the remaining services - namely, "retail store services featuring ice cream, truffles, chocolate, confectionaries, frozen desserts, and yogurt; wholesale distributorship services featuring ice cream, truffles, chocolate, confectionaries, frozen desserts, and yogurt."