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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Port Lincoln Tuna Processors PTY Ltd.

Serial No. 78676129

Louis M. Heidelberger of Reed Smith, LLP for Port Lincoln Tuna Processors PTY Ltd.

Mark Sparacino, Trademark Examining Attorney, Law Office 103 (Michael Hamilton, Managing Attorney).

Before Hairston, Grendel and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Port Lincoln Tuna Processors PTY Ltd. filed an intent-to-use application for the mark G'DAY GOURMET, in standard character format, for goods ultimately identified as "seafood; prepared foods consisting primarily of seafood; prepared and packaged entrees and appetizers consisting primarily of seafood" (Serial No. 78676129). Applicant disclaimed the exclusive right to use the word "gourmet."

The Trademark Examining Attorney finally refused registration on the ground of likelihood of confusion

because applicant's mark, when used in connection with seafood, so resembles the mark GOODAY, in standard character format, for "fish, fish fillets and tuna fish," as to be likely to cause confusion.[1] The Examining Attorney contends applicant's mark is likely to cause confusion with the registered mark for the following reasons:

1. The goods are identical; and,
2. The marks engender the same commercial impression because:
   A. G'DAY is the dominant portion of applicant's mark G'DAY GOURMET;
   B. G'DAY is the phonetic equivalent of GOODAY; and,
   C. G'DAY and GOODAY have the same meaning (*i.e.*, good day).

On the other hand, applicant contends that applicant's mark is not likely to cause confusion with the registered mark because, when considered in their entireties, the marks differ in appearance, sound, meaning and commercial impression. Applicant asserts that the Examining Attorney focused his analysis on the term G'DAY to the exclusion of the entire mark, G'DAY GOURMET, and therefore failed to acknowledge the differences between the marks.

[1] Registration No. 2764248, issued September 16, 2003.

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563, 567 (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 goods and/or services. *See Federated Foods, Inc. v. Fort Howard Co.,* 544 F.2d 1098, 192 USPQ 24 (CCPA 1976); *In re Dixie Restaurants Inc.,* 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. The similarity or dissimilarity and nature of the goods.

It is well settled that likelihood of confusion is determined on the basis of the goods as they are identified in the application and the cited registration. *Hewlett-Packard Co. v. Packard Press Inc.,* 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981); *In re William Hodges & Co., Inc.,* 190 USPQ 47, 48 (TTAB 1976). In this case, applicant's goods, "seafood; prepared foods consisting primarily of seafood;

prepared and packaged entrees and appetizers consisting primarily of seafood," are legally identical to the registrant's goods, "fish, fish fillets and tuna fish," because registrant's goods are seafood.

B. The similarity or dissimilarity of likely-to-continue trade channels and the buyers to whom sales are made.

There are no restrictions or limitations in the description of goods for the application or the cited registration. Absent such restrictions or limitations, we must assume that the goods travel in "the normal and usual channels of trade and methods of distribution." *CBS Inc. v. Morrow,* 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983). *See also Octocom Systems, Inc. v. Houston Computers Services Inc.,* 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed"). Accordingly, both applicant's and registrant's seafood and fish products are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including

the general public. *Venture Out Properties LLC v. Wynn Resorts Holdings LLC,* 81 USPQ2d 1887, 1894 (TTAB 2007); *In re Elbaum,* 211 USPQ 639, 640 (TTAB 1981).

In view of the foregoing, we find that the same consumers would purchase both applicant's and registrant's seafood and fish products and that the goods would be sold in the same channels of trade.

C. The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co., supra.* In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re Lamson Oil Co.,* 6 USPQ2d 1041, 1042 (TTAB 1988). *See also, In re White Swan Ltd.,* 9 USPQ2d 1534, 1535 (TTAB 1988). In comparing the marks, we are mindful that where, as here, the goods are identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Century 21 Real Estate Corp. v. Century Life of America,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Real Estate One, Inc. v. Real Estate 100*

Enterprises Corporation, 212 USPQ 957, 959 (TTAB 1981); *ECI Division of E-Systems, Inc. v. Environmental Communications Incorporated,* 207 USPQ 443, 449 (TTAB 1980).

In addition, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.,* 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.,* 23 USPQ 1735, 1741 (TTAB 1991), *aff'd unpublished,* No. 92-1086 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.,* 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.,* 190 USPQ 106, 108 (TTAB 1975).

We begin our analysis of the marks by noting that the registrant's mark, GOODAY is a strong mark to the extent that it is an arbitrary designation and inherently distinctive, regardless of whether it is perceived as a

surname, as argued by applicant, or as a misspelling of "good day," as argued by the Examining Attorney.

Next, in analyzing applicant's mark, we agree with the Examining Attorney that the term "G'DAY" is the dominant portion of applicant's mark because the word "gourmet" is descriptive when it is used in connection with food products as shown by the third-party registrations attached to the first Office Action, all featuring a disclaimer of the exclusive right to use the word "gourmet." Moreover, applicant has conceded the descriptive nature of the word "gourmet" as applied to seafood by disclaiming it. *In re J.M. Originals Inc.,* 6 USPQ2d 1393, 1394 (TTAB 1988). *See also Quaker State Oil Refining Corp. v. Quaker Oil Corp.,* 453 F.2d 1296, 172 USPQ 361, 363 (CCPA 1972). Therefore, "G'DAY" is accorded more weight in our comparison of the marks. *In re National Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The significance of the term "G'DAY" as the dominant element of applicant's mark is further reinforced by its location as the first word of the mark. *Presto Products Inc. v. Nice-Pak Products, Inc.,* 9 USPQ2d 1895, 1897 (TTAB 1988)("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered"). *See also Palm Bay Imports Inc. v. Vueve*

Clicquot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)("Vueve" is the most prominent part of the mark VUEVE CLICQUOT because "vueve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America, supra* (upon encountering the marks, consumers must first notice the identical lead word).

In comparing the two marks, we note that the applicant's mark contains the equivalent of registrant's entire mark (*i.e.,* GOODAY). Likelihood of confusion is often found where the entirety of one mark is incorporated within another. *In re Denisi,* 225 USPQ 624, 626 (TTAB 1985)(PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publishing Co. v. International Development Ltd.,* 221 USPQ 155, 156 (TTAB 1982)(EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Manufacturing Company, Inc.,* 218 USPQ 479, 480 (TTAB 1983)(LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing). While the addition of the word "gourmet" in applicant's mark may reduce the visual similarities of the marks in a side-by-side comparison, it may increase the likelihood of confusion when the marks are encountered separately because customers and potential

customers may mistakenly believe that applicant's and registrant's products emanate from the same source (*e.g.*, applicant's products are an upscale or gourmet line of seafood).

In view of the inherent strength of the registered mark, the significance of G'DAY in applicant's mark, and applicant's mark incorporating the equivalent of the entire registered mark, we conclude that the marks G'DAY GOURMET and GOODAY are phonetically similar. On the other hand, the marks are visually different. The apostrophe in G'DAY gives the marks a different appearance.

With respect to the meaning of the marks, neither the applicant's evidence, nor the Examining Attorney's evidence, is particularly persuasive. GOODAY could be perceived as a surname, albeit a rare surname. We are not persuaded by applicant's argument that "the only significance associated with the term GOODAY is its use as a surname."[2] In support of this argument, applicant submitted the hit list from a Google search for the term "Gooday." The results showed six surname uses. On the other hand, the Examining Attorney introduced the results of a Yahoo! People Search for the last name "Gooday" that

[2] Applicant's Brief, pp. 4-5; Applicant's May 17, 2006 Response, Exhibit B.

listed only 35 hits.[3] The surname evidence submitted by the applicant and the Examining Attorney shows that "Gooday" is a rare surname.

On the other hand, because G'DAY and GOODAY are phonetically similar, and because GOODAY looks like "Good day," "Gooday" could just as easily be perceived as a slight misspelling of "good day," if the misspelling is even noticed. The slight misspelling of "good day" may not prevent the public from recognizing GOODAY as the equivalent of "good day." *See In re South Bend Toy Manufacturing Company, Inc.,* 218 USPQ 479 (TTAB 1983) (contractions of terms do not alter the essential identity or character and meaning between the full word and its contraction, and therefore "L'il' Lady Buggy," for toy doll carriages is likely to cause confusion with "Little Lady," for dolls and doll clothing); *Henry I. Siegel Co., Inc. v. Highlander, Ltd.,* 183 USPQ 496, 499 (TTAB 1974) (H.I.S., pronounced "his," is likely to cause confusion with the HE for the same products); *In re Strathmore Products, Inc.,* 136 USPQ 81, 82 (TTAB 1962) (GLISTEN is phonetically equivalent to GLISS'N and have the same meaning since GLISS'N is a contraction of GLISTEN).

[3] June 28, 2006 Office Action.

"G'day" is an informal greeting used in Australia for "good day."[4] Because the term "good day" does not have any recognized meaning when used in connection with seafood, and to the extent that GOODAY is perceived as the equivalent of "good day," we find that the meaning of the marks are similar.

As noted above, because the word "gourmet" is descriptive when used in connection with seafood, it will not be regarded as the dominant portion of mark G'DAY GOURMET, and it will be given less source-signifying weight than the arbitrary term G'DAY. Thus, we conclude that to the extent that GOODAY is perceived as the equivalent of "good day," GOODAY and G'DAY GOURMET, both used in connection with seafood, engender similar commercial impressions. We are not persuaded that the addition of the word "gourmet" to applicant's mark is sufficiently distinctive to create a different commercial impression between the marks GOODAY and G'DAY GOURMET.

In considering the marks in their entireties, we find that the similarities between the marks outweigh the differences because in the normal marketing environment,

[4] Excerpt from the Urban Dictionary (URL not provided) attached to the June 28, 2006 Office Action. Applicant also submitted a similar definition from the *Reference.com* website attached to its Brief as Exhibit B

purchasers would not have the luxury of examining the marks in such minute detail. Also, as noted above, the memory of the average purchaser is not infallible, and he/she may retain only a hazy, rather than a specific, recollection of the marks. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1468 (TTAB 1988). Considering the similarities between the marks, a purchaser who sees one mark and later encounters the other is likely to think that the second mark is related to the first mark especially when the marks are applied to identical products.

In view of the foregoing, we find that the similarity of the marks favors finding that there is a likelihood of confusion.

D. Balancing the factors.

In view of our determination that the goods, channels of trade, and classes of consumers are identical and that the marks are similar, we find that applicant's mark G'DAY GOURMET, when used in connection with "seafood; prepared foods consisting primarily of seafood; prepared and packaged entrees and appetizers consisting primarily of seafood," so resembles the mark GOODAY for "fish, fish fillets and tuna fish," as to be likely to cause confusion.

To the extent that any of applicant's arguments raise a doubt regarding the likelihood of confusion, that doubt

must be resolved in favor of the prior registrant. *In re Hyper Shoppes (Ohio), Inc.,* 837 F.2d 840, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.,* 748 F.2d 1565, 223 USPQ 1289, 1290-1291 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.