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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 Litehouse Incorporated

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Serial No. 78756037

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Mark W. Hendricksen of Wells St. John P.S. for Litehouse Incorporated.

Verna Beth Ririe, Trademark Examining Attorney, Law Office 104 (Chris Doninger, Managing Attorney).

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Before Quinn, Drost, and Wellington, Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Litehouse Incorporated, applicant, filed an application to register the mark RUSTIC RANCH (in standard character form) on the Principal Register for goods ultimately identified as "dips for fresh vegetables, namely ranch flavored dips for fresh vegetables" in International Class 29 and "salad dressings, namely ranch flavored salad

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dressings" in International Class 30.<sup>1</sup> The application contains a disclaimer of the word RANCH.

The examining attorney has refused registration of applicant's mark pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the previously registered mark RUSTIC ITALIAN RECIPE (in standard character form) for "salad dressing" in International Class 30<sup>2</sup>, that, as used on applicant's identified goods, applicant's mark is likely to cause confusion or mistake or to deceive. The cited registration contains a disclaimer of the wording ITALIAN RECIPE.

Applicant appealed the final refusal and briefs were filed. We affirm the 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 Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the similarities

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<sup>1</sup> Application Serial No. 78756037 is an intent-to-use application filed under Section 1(b) of the Trademark Act.

between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We first consider the *du Pont* factors regarding the goods, trade channels and classes of purchasers. In an *ex parte* appeal, 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). Applicant and registrant's goods in International Class 30 are legally identical inasmuch as they both cover "salad dressing." Although applicant has specified a certain type of salad dressing in its identification, i.e., ranch dressing, the registrant's identification of goods is not so limited and thus encompasses all types of salad dressings, including ranch dressing.

The evidence also supports the proposition that some manufacturers of salad dressings offer a variety of types or styles, including ranch and Italian. The examining attorney has provided printouts from several third-party

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<sup>2</sup> Registration No. 2691593 issued February 25, 2003.

salad dressing manufacturers' websites demonstrating that they offer a line of salad dressings.<sup>3</sup> For example, the "Walden Farms" website offers "5 Great Flavors to choose from! Creamy Bacon, Italian, Honey Dijon, Buttermilk Ranch, Thousand Island." The "Hidden Valley" website even identifies an "Italian Ranch" dressing described as "our latest to the family!...combines the great, creamy taste of the Original Ranch® dressing with an Italian accent." This evidence shows that consumers may expect to see a variety or line of salad dressing flavors from one source. Moreover, the "Hidden Valley" website also indicates that Italian and ranch styles of dressings may be combined.

As to applicant's goods in International Class 29, i.e., "dips for fresh vegetables, namely ranch flavored dips for fresh vegetables," we find they are substantially similar in nature to registrant's salad dressing. There is evidence that the same company may offer salad dressings and dips [see the tabs for ranch-flavored salad dressings and "Dry Dressings and Dips" under the "products" menu in the "Hidden Valley" website].<sup>4</sup> Moreover, dips and salad dressings are similar in purpose inasmuch as they both

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<sup>3</sup> Attached to (final) Office Action issued January 9, 2007.

<sup>4</sup> *Id.*

provide flavor to salads (which may include vegetables) or vegetables.

We conclude that applicant's identified goods are identical, in part, and otherwise substantially related to registrant's salad dressing. This factor therefore weighs strongly in favor of finding a likelihood of confusion.

Because the goods in the application and the cited registration are, in part, identical, we must presume that the channels of trade and classes of purchasers at least in part are the same. *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) ("Given the in-part identical and in-part related nature of the parties' goods, and the lack of any restrictions in the identifications thereof as to trade channels and purchasers, these clothing items could be offered and sold to the same classes of purchasers through the same channels of trade"); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers"). Even where the goods are not identical, i.e., salad dressings vis-à-vis vegetable dips, the common trade channels for these goods will be the same such as grocery stores. Likewise, the classes of purchasers for both salad dressings and vegetable dips will also be the

same, including the ordinary consumer exercising an ordinary amount of care. Thus, the *du Pont* factors involving trade channels and classes of purchasers also favor a finding of likelihood of confusion..

This brings us to the similarity of the marks. We keep in mind that when marks would appear on identical goods, as they partially do here, the degree of similarity necessary to support a conclusion of likely confusion declines with respect to that class of goods (in this case, International Class 30). *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). Our focus is on whether the marks are similar in sound, appearance, meaning, and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For example, merely descriptive matter that is disclaimed may be accorded

subordinate status relative to the more distinctive portions of a mark. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997).

In the present case, applicant has disclaimed the word RANCH, while registrant has disclaimed the words ITALIAN RECIPE. The third-party website evidence of record is replete with descriptive usage of the terms "Italian" and "ranch" in relation to salad dressings. Given the highly descriptive, if not generic, nature of these words in the respective marks, each mark is clearly dominated by the identical term, RUSTIC. In addition, the term RUSTIC appears first in each mark and, as such, is the part of each mark that is most likely to be impressed upon the mind of a purchaser and will be remembered and used when calling for the goods. *See Presto Products, Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). We therefore conclude that the dominant feature of both marks is the term RUSTIC, and note that it is identical in sound and appearance.

Although the marks have the same dominant portion, RUSTIC, we must compare the marks as a whole. *M2 Software Inc. v. M2 Communications Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948-49 (Fed. Cir. 2006) ["When comparing the similarity of marks, a disclaimed term...may be given

little weight, but it may not be ignored"]. In this respect, we note applicant's argument that the respective marks, as a whole, take on different connotations and create different commercial impressions. We are not persuaded, however, by applicant's unsupported claims that its mark conjures up "an Old West ranch" and the registered mark has "an overall connotation as being from an old or rural portion of Italy." Brief, pp. 2-3. While it is possible such different commercial impressions may be created by the marks in the abstract, consumers will have the benefit of viewing the marks in connection with salad dressings. Consequently, it is less likely the marks will be perceived in the manner suggested by applicant. Rather, it is more likely that both marks will be perceived as suggesting an old-style ("rustic") type of dressing (either "ranch" or deriving from an "Italian recipe"). Even if we were to allow for a slight difference in the connotations of the marks, we find that, on balance, the *du Pont* factor of the similarities of marks weighs strongly against applicant.

Applicant also seems to argue that the term RUSTIC is weak or should otherwise be accorded less protection. Applicant contends, "the term RUSTIC should not be construed so broad as to give one registrant the exclusive

right to use it for food in general or exclusively for a specific type of food." Brief, p. 3. This argument is not supported by any evidence.<sup>5</sup> Applicant has not submitted, for example, any evidence showing the extent of consumers' exposure to the term RUSTIC in connection with the salad dressings or dips. Accordingly, we are unconvinced to the extent that applicant seeks to persuade us to resolve the *du Pont* factor regarding the weakness or strength of the registrant's mark in applicant's favor; instead, we find this factor to be neutral.

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<sup>5</sup> In its brief, applicant identified three registrations for marks containing the term "Rustic" in connection with bread or bread-related products and requested that we consider them as "examples to what marks may coexist in a particular industry." Brief, p. 4. Inasmuch as this is the first time that applicant identifies these three registrations and did not attach copies thereof, they have not been considered because they are untimely and in an improper format. Trademark Rule 2.142(d) ["[t]he record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed"]; see also *Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992). The mere listing of third-party registrations is not an appropriate way to enter such material in the record, and the Board does not take judicial notice of applications or registrations in the USPTO. *Cities Service Company v. WMF of America, Inc* 199 USPQ 493 (TTAB 1978); and *In re Duofold Inc.*, 184 USPQ 638 (TTAB 1974). We do not hesitate to add that even if we were to consider the third-party registrations, they have limited probative value and our decision would not change in this matter. Specifically, such registrations are not evidence of use of the marks and therefore do not show that consumers are familiar with the marks so as to be accustomed to the existence of similar marks in the marketplace and are thus able to distinguish between the similar marks based on slight differences. *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982).

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When we consider the record and the relevant likelihood of confusion factors, we conclude that, when potential purchasers of applicant and registrant's goods encounter the marks RUSTIC RANCH and RUSTIC ITALIAN RECIPE, respectively, for the goods, they are likely to believe that the sources of these goods are in some way related or associated. As a result, there is a likelihood of confusion.

**DECISION:** The refusal to register the mark under Section 2(d) of the Trademark Act in view of Registration No. 2691593 is affirmed.