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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 Ferguson Enterprises, Inc.

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Serial No. 78827291

Serial No. 78827490

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Mary F. Love, of Law Office of Mary F. Love, for Ferguson Enterprises, Inc.

Katherine Stoides, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Rogers, Drost, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Ritchie de Larena, Administrative Trademark Judge:

Ferguson Enterprises, Inc. filed an application to register the mark RIVERS COLLECTION, in standard character format, for "plumbing fixtures, namely, bath tubs, pedestal lavatories, toilets, sinks and faucets" in International Class 11.<sup>1</sup> Applicant also filed an application to register

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<sup>1</sup> Application Serial No. 78827291, filed March 2, 2006, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), claiming a bona fide intent to use in commerce, and disclaiming the exclusive right to use "COLLECTION" apart from the mark as shown.

Serial No. 78827291

Serial No. 78827490

the mark RIVERS COLLECTION (and design), shown below, for the same goods.<sup>2</sup>



The trademark examining attorney refused registration of both marks under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. §1052(d), on the ground that applicant's marks so resemble the mark RIVERBATH, registered for "plumbing fixtures, namely whirlpool baths; and replacement parts for the aforesaid goods," that when used in connection with applicant's identified goods, they will be likely to cause confusion.<sup>3</sup>

Upon final refusal of registration, applicant filed a timely appeal. Both applicant and the examining attorney filed briefs. Since these two *ex parte* appeals involve the same applicant, highly similar marks, and common issues of law and fact, we issue this single opinion that discusses both applications. For the reasons discussed herein, the Board affirms the final refusals to register in both cases.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing

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<sup>2</sup> Application Serial No. 78827490, filed March 2, 2006, pursuant to Section 1(b) of the Trademark Act, 15 USC §1051(b), claiming a bona fide intent to use in commerce, and disclaiming the exclusive right to use "COLLECTION" apart from the mark as shown.

<sup>3</sup> Registration No. 2990372, issued August 30, 2005, for a typed drawing in International Class 11, claiming first use and first use in commerce on January 1, 1999.

Serial No. 78827291

Serial No. 78827490

on a 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 the goods. *See Federated Foods, Inc. v. Fort Howard 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.

The similarity or dissimilarity  
and nature of the goods, and channels of trade

Applicant is seeking registration of its marks for certain types of plumbing fixtures including "bath tubs." The cited registration also covers certain types of plumbing fixtures, including "whirlpool baths." The examining attorney has submitted evidence of third-party registrations and web sites to show that the designation "bath tubs" includes and subsumes "whirlpool baths," and that the other plumbing fixtures identified in applicant's recital of goods are also commonly associated with whirlpool baths. Accordingly, we find that the goods at issue are in part identical and otherwise highly related.

Serial No. 78827291

Serial No. 78827490

Applicant does not dispute the similarity of its products to those of registrant.

Turning next to the channels of trade, there is nothing in the recital of goods in the cited registration that limits the channels of trade or classes of consumers for registrant's goods. In the absence of specific limitations in the registration, we must presume that registrant's goods will travel in all normal and usual channels of trade and methods of distribution and be sold to all classes of consumers. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937 (Fed. Cir. 1983). In view of the foregoing, the second and third *du Pont* factors weigh heavily in favor of finding that there is a likelihood of consumer confusion.

The similarity or dissimilarity of the marks  
in their entirety

Preliminarily, we note that the more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion. *Real Estate One, Inc. v. Real Estate 100 Enterprises Corp.*, 212 USPQ 957 (TTAB 1981). 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).

Applicant argues that the marks are dissimilar as a matter of law and that its marks "do not even have a word

Serial No. 78827291

Serial No. 78827490

in common" with the registered mark. We find that argument to be unpersuasive however, since the marks clearly share the word "RIVER." The difference of a space after the word "RIVER" in applicant's marks and the addition of a plural "s" does not significantly affect the sight, sound, or commercial impression of the marks.

Meanwhile, descriptive and disclaimed matter is generally viewed as a less dominant or significant feature of a mark. *In re National Data Corp.*, 224 USPQ 749, 750 (Fed. Cir. 1985) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion'"). Accordingly, we find that the addition of the descriptive and disclaimed word "COLLECTION" to the overlapping word "RIVER(S)" does not create a sufficiently distinct commercial impression to obviate a likelihood of confusion between the marks on the same or highly related plumbing fixtures. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) ("GASPAR'S ALE" and "JOSE GASPAR GOLD"); *Lilly Pulitzer, Inc. v. Lilly Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) ("THE LILLY" and "LILLI ANN"); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) ("CAREER IMAGE" AND "CREST CAREER IMAGES"); *In re Riddle*, 225 USPQ 630 (TTAB 1985) ("ACCUTUNE" and "RICHARD PETTY'S ACCU TUNE"). Similarly, regarding applicant's RIVERS COLLECTION (and design) mark, it is

Serial No. 78827291

Serial No. 78827490

well-established that where a mark consists of words as well as a design, the words are generally considered dominant. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) ("in a composite mark comprising design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed"). That is certainly true here, where the design is not especially elaborate or unusual.

In comparing the marks, we are mindful that 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. See *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 USPQ2d 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. See *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).

The registered mark "RIVERBATH" is suggestive of the movement of water in registrant's whirlpool baths. The

Serial No. 78827291

Serial No. 78827490

included word "bath" is simply a generic term for all types of "baths," including registrant's "whirlpool baths," and is not likely to be relied upon by consumers to distinguish the marks. Applicant argues that therefore "RIVERBATH" is a weak mark entitled to scant protection. In support of its argument, applicant submitted evidence of four registrations that contain the word "RIVER." However, only three of the four identify bath-related products. We do not find that to be probative of the weakness of the registered mark. Furthermore, even a weak mark is entitled to protection against registration of confusingly similar marks. *See Giant Food Inc. v. Roos and Mastacco, Inc.*, 218 USPQ 521 (TTAB 1982).

In view of the foregoing, we find that the first *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.

#### Balancing The Factors

Considering all of the evidence of record as it pertains to the *du Pont* factors, we conclude that the goods are identical in part and otherwise highly related; they are likely to be sold through the same channels; and the marks are similar. It is well-established that any doubts as to likelihood of confusion are to be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988). Accordingly, we

Serial No. 78827291

Serial No. 78827490

find a likelihood of confusion between applicant's marks,  
and the cited registration.

Decision: The refusals to register are affirmed.