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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 Nkhil Joshi

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Application No. 78851043

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Joseph Agostino and John K. Kim (on brief) of Greenberg  
Traurig, LLP for applicant.

Cheryl Clayton, Trademark Examining Attorney, Law Office 102  
(Karen M. Strzyz, Managing Attorney).

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**Before Quinn, Hohein, and Wellington,  
Administrative Trademark Judges.**

**Opinion by Wellington, Administrative Trademark Judge:**

On March 31, 2006, Nkhil Joshi, an individual and  
citizen of India, filed an application to register the mark  
"Chai Time" (in standard character format) on the Principal  
Register for "black tea; fruit teas; green tea; tea pods" in  
International Class 30.<sup>1</sup> Applicant disclaimed the term  
CHAI.

Registration has been finally refused under Section  
2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground  
that applicant's mark, when used on his identified of goods,  
would so resemble the registered mark CHAI TIME (in standard

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<sup>1</sup> Application Serial No. 78851043, alleging a *bona fide* intent to  
use the mark in commerce. Trademark Act § 1(b).

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characters) for "milk and milk products excluding ice cream, ice milk and frozen yogurt; dairy based beverages" in International Class 29 and "juice based beverages containing granular tea and/or tea flavor" in International Class 32,<sup>2</sup> as to be likely to cause confusion, mistake or deception. Applicant has appealed, and briefs have been filed. We affirm the refusal to register. In reaching this conclusion, we have followed the guidance of the Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Turning first to a consideration of the marks, applicant's mark and the registered mark are legally

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<sup>2</sup> Registration No. 3134055, issued August 22, 2006. The claimed date of first use (for both classes of goods) is July 1, 2005. The term CHAI is disclaimed.

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identical, both consisting of the words CHAI TIME in standard character format.<sup>3</sup> The respective marks are identical in sound, appearance, connotation, and overall commercial impression.

This factor strongly supports a finding of likelihood of confusion. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (use of identical mark "weighs heavily against applicant").

We turn next to the *du Pont* factor involving the similarity or dissimilarity and nature of the goods. We begin our analysis as to this factor with the premise that, because the marks at issue are legally identical, the extent to which the applicant's and registrant's goods must be similar or related to support a finding of likelihood of confusion is lessened. *See In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001). It is only necessary that there be a viable relationship between the goods to support a finding of likelihood of confusion. *See In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983).

Also, it has been repeatedly held that, when evaluating the issue of likelihood of confusion in Board proceedings

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<sup>3</sup> The fact that applicant's mark (as it appears on the application drawing page) combines upper and lower case lettering is irrelevant inasmuch as applicant claims standard character format. See TMEP Section 807.03(e) ("If the applicant submits a claim of standard character format, the mark shown in the drawing does not necessarily have to appear in the same font style, size, or color as the mark shown on the specimen of use.")

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regarding the registrability of marks, the Board is constrained to compare the goods as identified in the application with the goods as identified in the cited registration. See *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N. A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

In this case, the registered mark is for "juice based beverages containing granular tea and/or tea flavor" as well as "milk and milk products excluding ice cream, ice milk and frozen yogurt; dairy based beverages." The subject application covers "black tea; fruit teas; green tea; tea pods." There appears to be some disagreement between applicant and the examining attorney as to the scope of applicant's identified goods. Applicant contends that the term "tea" refers only to "dry tea and powders for use as flavorings." Brief, p. 5. On the other hand, the examining attorney argues that "tea" potentially includes ready-made tea drinks as well as dry tea. Brief, (unnumbered) page 5. Because there is no limitation on applicant's identified goods, we agree with the examining attorney. Except for "tea pods", we construe the term "tea(s)" in the application as connoting goods in the nature

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of dry tea and as ready-made tea beverages.<sup>4</sup> The evidence submitted by the examining attorney shows that third-party providers of tea-based beverages (and tea pods) may refer to beverages simply as "black tea" or "green tea."<sup>5</sup> And, inasmuch as both registrant's and applicant's goods include beverages, they are clearly related. The additional factor that the respective goods are either tea-based or tea-flavored increases the degree of similarity.

Even if we were to accept applicant's narrower interpretation of his identification of goods, i.e., as not including ready-made drinks, we would still find a relationship between dry tea and registrant's tea-flavored juice beverages because the obvious purpose of dry tea is to prepare a tea or tea-based beverage. We agree with the examining attorney that "it is likely that a purchasing consumer who came upon the registered goods could wrongfully presume a connection between applicant's teas and the registrant's juice-based beverage containing tea, assuming that applicant's CHAI TIME tea was the flavoring used in the

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<sup>4</sup> In this regard, we take judicial notice that "tea" is defined as "the dried and prepared leaves of a shrub, *Camellia sinensis*, from which a somewhat bitter, aromatic beverage is prepared by infusion in hot water" and as "the beverage so prepared, served hot or iced." Random House Unabridged Dictionary (2006). The Board may take judicial notice of dictionary evidence. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>5</sup> Lipton website printouts attached to April 6, 2007 Office Action.

registered CHAI TIME beverage containing tea." Brief, (unnumbered) p. 4. The examining attorney also provided evidence that some purveyors of loose tea also sell tea beverages.<sup>6</sup> We have no doubt that, in the minds of consumers of the respective goods, there is a relationship between dry tea (used to make tea beverages) and ready-made tea-flavored, juice beverages.

The examining attorney submitted evidence in support of her refusal showing a relationship between applicant's and registrant's goods, including seven (7) use-based, third-party registrations covering at least some of applicant's goods (tea or tea-based beverages) and some of the cited registrant's goods (fruit juices, dairy-beverages, etc.).<sup>7</sup> Applicant does not address these registrations in his brief. These registrations, while not evidence of use, clearly show that other purveyors have registered the same mark for both tea products, such as applicant's, and tea-flavored juices or dairy-based beverages, such as registrant's. *See In re Albert Trostel & Sons*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1469 (TTAB 1988), *aff'd* (unpublished) No. 88-1444 (Fed. Cir. Nov. 14, 1988) (Third-party registrations which individually cover a number

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<sup>6</sup> See, e.g., ITO EN website printouts attached to April 6, 2007 Office Action.

<sup>7</sup> Attached to April 6, 2007 Office Action; all registrations contain dates of use in commerce.

of different items and which are based on use in commerce may serve to suggest that the listed goods are of a type that may emanate from a single source.) Accordingly, there appears to be an overlap in the market for such goods, such that use of the same mark for these respective products is likely to cause confusion.

Applicant submitted evidence involving the registrant and argued that registrant "manufactures, markets and sells ingredients and chemicals for food products directly to food manufacturers and processors." Brief, p. 7. Applicant therefore contends that "the goods covered by the [cited registration] would, in all likelihood, be sold to food manufacturers and processors and other business entities, and not directly to end consumers."<sup>8</sup> Id. This argument and attempt to distinguish the channels of trade is undercut by the fact that the registration contains no such limitation in the identification of goods. Accordingly, we must assume that registrant's identified goods move in all of the normal trade channels for said goods and are likely to continue to do so. And, because both registrant's and applicant's goods

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<sup>8</sup> Applicant also states that "[i]n fact, there is no reference to [registrant's] CHAI TIME products in actual commercial use." Brief, p. 7. This argument is irrelevant in the context of an *ex parte* appeal as it is an improper attack on the validity of the cited registration. If applicant had wished to pursue such a claim, it should have filed a petition to cancel the cited registration pursuant to Section 14 of the Trademark Act.

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consist, in part, of non-alcoholic beverages, they may be sold through the same channels of trade, including grocery stores, and to the same classes of purchasers, the public at large. See *Chicago Dietetic Supply House v. Perkins Products Co.*, 280 F.2d 155, 126 USPQ 367 (CCPA); *In re H & H Products*, 228 USPQ 771 (TTAB 1986); and *Seven-Up Co. v. Aaron*, 216 USPQ 807 (TTAB 1982). Moreover, the goods are relatively inexpensive products and, as a consequence, may also be purchased on impulse, thus increasing the likelihood of confusion.

In weighing all the relevant likelihood of confusion factors for which we have evidence, we find that because the marks are identical, the goods are closely related, and move in some of the same channels of trade to the same classes of consumers, there is a likelihood of confusion.

**Decision:** The refusal to register under Trademark Act § 2(d) is accordingly affirmed.