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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Western Sizzlin Corporation

v.

Hi Mountain Jerky, Inc.

Opposition No. 91165983 to application
Serial No. 76399174 filed on April 23, 2002

Samuel D. Littlepage and Jeffrey S. Molinoff of Dickinson
Wright PLLC for Western Sizzlin Corporation.

Ramon L. Pizarro, Esq. for Hi Mountain Jerky, Inc.

Before Hohein, Zervas and Cataldo, Administrative Trademark
Judges.

Opinion by Zervas, Administrative Trademark Judge:

On April 23, 2002, Hi Mountain Jerky, Inc. filed an
application for registration of the following mark on the
Principal Register for "spices and seasonings" in
International Class 30:



Applicant has claimed dates of first use anywhere and first use in commerce of April 20, 1992; has described its mark as consisting of "the words 'WESTERN SIZZLE' imbedded in a frame with a highly decorative Western motif"; and has disclaimed the term WESTERN.

Western Sizzlin Corporation has opposed registration of applicant's mark. In its amended notice of opposition, opposer pleaded ownership of the following eight registrations for various WESTERN SIZZLIN marks:

Registration No. 1362691, issued on September 24, 1985 and twice renewed, for the mark WESTERN SIZZLIN (in typed or standard character form) for "restaurant services" in International Class 42;

Registration No. 1360991, issued on September 17, 1985 and twice renewed, for the mark WESTERN SIZZLIN STEAK HOUSE (in typed or standard character form) for "restaurant services" in International Class 42, with a disclaimer of STEAK HOUSE;

Registration No. 1362680, issued on September 24, 1985 and twice renewed, for the mark



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for "restaurant services" in International Class 42 with a disclaimer of STEAK HOUSE;

Registration No. 1126269, issued on October 23, 1979 and twice renewed for the mark



for "restaurant services" in International Class 42 with a disclaimer of STEAK HOUSE;

Registration No. 1584119, issued on February 20, 1990 and once renewed for the mark



for "restaurant services" in International Class 42 with a disclaimer of STEAK & MORE and RESTAURANT;

Registration No. 2621596, issued on September 17, 2002 for the mark WESTERN SIZZLIN WOOD GRILL (in typed or standard character form) for "restaurant services" in International Class 42 with a disclaimer of WOOD GRILL;

Registration No. 2355500, issued on June 6, 2000 for the mark WESTERN SIZZLIN WOOD GRILL BUFFET (in typed or standard character form) for "restaurant services" with a disclaimer of WOOD GRILL BUFFET; and

Registration No. 1977804, issued on June 4, 1996 and once renewed for the mark WESTERN SIZZLIN COUNTY FAIR BUFFET AND BAKERY (in typed or standard character form) for "restaurant services" in International Class 42 with a disclaimer of BUFFET AND BAKERY.

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Opposer alleges that applicant's mark so closely resembles opposer's WESTERN SIZZLIN marks as to be likely to cause confusion, mistake or deception in violation of Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d).

Applicant has answered the amended notice of opposition by denying the salient allegations thereof and asserting various affirmative defenses.

The record consists of the pleadings; the file of the involved application; and, pursuant to opposer's two notices of reliance, a certified copy of each of opposer's pleaded registrations showing that the registration is subsisting and owned by opposer, an admission against interest made in applicant's response to opposer's summary judgment motion in this proceeding, a redacted copy of applicant's response to opposer's first set of interrogatories, and a redacted copy of applicant's responses to opposer's requests for admissions nos. 22 and 24 in which applicant has admitted the authenticity of copies of applicant's labels and one of applicant's advertising brochures. Additionally, opposer has submitted the testimonial deposition with exhibits of Michelle DiCarlo, a paralegal with opposer's law firm.

Applicant did not submit any trial testimony or other evidence during its testimony period.

Both parties have filed briefs.

Preliminary Matters

Applicant has objected to Ms. DiCarlo's testimony because the "USPTO's TTABVUE internet posting for this case [did] not show that the transcript of Ms. DiCarlo's deposition was filed ..." at the time applicant filed its brief on July 12, 2007. Brief at fn. 2, p. 3. In its reply, opposer maintains that it did file the deposition transcript with the Board on July 11, 2007, and opposer served applicant's copy of the deposition transcript on applicant on or about December 26, 2006. Trademark Rule 2.123(h), 37 C.F.R. § 2.123(h), the rule regarding filing depositions with the Board, does not specify a filing date for depositions. Also, applicant has not contended that it has suffered any prejudice by the filing of the transcript with the Board just prior to the filing of applicant's brief and has not contended that it has not received a copy of Ms. DiCarlo's deposition transcript prior to preparing its brief. In view thereof, applicant's objection is overruled.

Additionally, applicant contends that even if Ms. DiCarlo's testimony is part of the trial record, the exhibits she introduced are "types of Internet printouts ... specifically prohibited as being inherently unreliable unauthenticated records and inadmissible hearsay," relying on TBMP § 704.08 and Trademark Rule 2.122(e), 37 C.F.R. 2.122(e). Applicant's contention is not correct; Ms.

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DiCarlo was the individual who downloaded the printouts from the Internet and by her testimony has authenticated these materials. Moreover, opposer is not using them for the truth of the statements contained therein, and we have not used the printouts for this purpose. Further, the authority applicant cites to concerns notices of reliance, and opposer has not introduced the printouts pursuant to a notice of reliance. Thus, applicant's objection to the printouts is overruled.

Applicant's objection to the TESS printouts from one of the U.S. Patent and Trademark Office's electronic databases introduced by Ms. DiCarlo is without merit and therefore is also overruled. Ms. DiCarlo testified that she obtained these printouts from the Office's database on a particular date. DiCarlo dep. at pp. 5 - 8.

Opposer, in its reply brief, has cited instances where applicant has made representations not supported by evidence. Opposer's objections are noted. See TBMP §801.01 (2d ed. rev. 2004), which states in relevant part that "the facts and arguments presented in the brief must be based on the evidence offered at trial"; and TBMP §704.06(b) (2d ed. rev. 2004), which sets forth in pertinent part that: "[f]actual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial."

Standing/Priority

Because opposer has properly made its pleaded registrations of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982). Also, because opposer's pleaded registrations are of record, priority is not an issue in this case. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he 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." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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We first consider the similarity and dissimilarity of the marks, determining 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). While we must consider the marks in their entireties, 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. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In view thereof, and because purchasers will use the literal portions of the marks to refer to applicant's and opposer's goods and services, we accord greater weight to the literal portions of applicant's mark and those of opposer's marks which have both word and design components, such as opposer's WESTERN SIZZLIN STEAK HOUSE and design mark. See *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Additionally, the Federal Circuit, our primary reviewing court, has recognized that descriptive matter may have less significance in likelihood of confusion determinations. See *Cunningham v. Laser Golf Corp.*, 55 USPQ2d at 1846, quoting, *In re National Data Corp.*, 24 USPQ2d at 752 ("Regarding

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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"). See also *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often "less significant in creating the mark's commercial impression"). Accordingly, in those of opposer's asserted marks having disclaimed terms, e.g., WOOD GRILL in Registration No. 2621596, we accord more weight to the WESTERN SIZZLIN portion of those marks, which has not been disclaimed. The descriptive wording is unlikely to be used to distinguish the marks.

In applying the above principles to the marks before us, we find that (i) WESTERN SIZZLIN is the dominant term in opposer's marks containing WESTERN SIZZLIN and other wording, and dominates over the design components in opposer's WESTERN SIZZLIN and design marks, and (ii) that WESTERN SIZZLE is the dominant term in applicant's mark.

In considering the dominant terms of the marks, as well as opposer's WESTERN SIZZLIN mark per se, we find that the marks are highly similar in sound, slightly differing only by the last syllable in SIZZLIN and SIZZLE. Additionally, the marks are highly similar in meaning, with the second word in applicant's mark being the verb SIZZLE and the second word in opposer's marks being a form of the same

verb.¹ These minor differences between opposer's marks and applicant's mark are not likely to be recalled by purchasers seeing the marks at separate times. The recollection of the average purchaser is normally a general rather than a specific impression of the many trademarks encountered, and the purchaser's fallibility of memory over a period of time must also be kept in mind. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988); *Puma-Sportschuhfabriken Rudolf Dassler KG v. Roller Derby Skate Corporation*, 206 USPQ 255, 259 (TTAB 1980). With regards to the commercial impressions of the respective marks, they are highly similar because both applicant's and opposer's marks evoke Western cooking, and specifically the sizzling noise made by food when cooking on a grill. See brochure submitted as Exhibit E to opposer's notice of reliance, which refers to grilling; "I don't even think about starting up the grill without my Western Sizzle Seasonings. I have the complete selection, so I always have the perfect seasoning no mater what I am grilling."

¹ Applicant maintains that because "sizzle" or "sizzling" "includes the hissing sound made while frying ..., the variants of the word "sizzle" are particularly weak when used with services that involve cooking, such as restaurant services." Brief at p. 2. We disagree. The term does not merely describe a feature of restaurant services.

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Thus, with respect to applicant's mark and opposer's marks which do not have design components, i.e., the marks of Registration Nos. 1362691, 1360991, 2355500, 1977804 and 2621596, we find them to be similar. With respect to those of opposer's marks that have design components, i.e., Registration Nos. 1362680, 1126269 and 1584119, we find applicant's mark to be similar to such marks even though the design components differ, due to the similarity between the wording WESTERN SIZZLIN and WESTERN SIZZLING. Any differences in appearance of the parties' marks are outweighed by the significant similarities in the sound, meaning and commercial impressions of the marks due to the highly similar wording in the marks. Thus, we resolve the *du Pont* factor regarding the similarity of the marks in opposer's favor.

We next consider the goods identified in the application and the services identified in opposer's registrations. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in an applicant's application vis-à-vis the services recited in an opposer's registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ 2d 1715 (TTAB 1991). Further, it is a general rule that goods or services need

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not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which would give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each party's goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991), and the cases cited therein.

Opposer's evidence establishes that restaurants offer spices and seasonings under the same mark used for restaurant services. Ms. DiCarlo, in her deposition, testified that she located in an Internet search numerous websites in which restaurants offer spices and seasonings under the same mark. See, e.g.:

BIG BUBBA'S BAD BBQ	seasonings and restaurant services
RED HOT & BLUE	seasonings and restaurant services
LA MADELEINE	"chicken spice" and restaurant services
FAMOUS DAVE'S	spices and restaurant services

Ms. DiCarlo also introduced into evidence photographs of containers for spices, seasonings and sauces purchased on-line or in a supermarket. According to Ms. DiCarlo, the

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owner of the mark also provides restaurant services.² See, e.g.:

BIG BOB GIBSON	barbecue sauce ³ and restaurant services
SHULA'S	steak sauce and restaurant services
RED HOT & BLUE	dry rub seasonings and restaurant services
BIG BUBBA'S BAD BBQ	barbecue sauce and restaurant services
MEMPHIS BARBECUE	magic dust all-purpose seasoning and restaurant services
TACO BELL TACO SAUCE	taco sauce and restaurant services ⁴

In addition, through Ms. DiCarlo's deposition, opposer has introduced copies of third-party registrations. Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

See, e.g.:

² DiCarlo Dep. at p., 17.

³ We accept that a sauce such as barbeque sauce or taco sauce is a "seasoning" in view of the following definition of "seasoning" taken from *Merriam-Webster's Online Dictionary* (from bartleby.com), of which we take judicial notice; "something that serves to season, *especially*: an ingredient (as a condiment, spice, or herb) added to food primarily for the savor that it imparts." The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See *In re CyberFinancial.Net Inc.*, 65 USPQ2d 1789 (TTAB 2002). See also *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

⁴ DiCarlo Dep. Exhibits E - K.

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Registration No. 3020149 for the mark THINK OUTSIDE THE BUN for, inter alia, taco seasoning mix, taco sauce, seasoning mix, and restaurant services;

Registration No. 3016077 for the mark MAMA DP'S KITCHEN for, inter alia, barbecue sauce and restaurant services;

Registration No. 2983920 for the mark STOP AND SMELL THE BREADSTICKS for, inter alia, spices, sauces and restaurants;

Registration No. 2777983 for the mark FAT WILLY'S for, inter alia, spices, sauces and restaurant services;

Registration No. 2978028 for the mark TARA STEAK AND LOBSTER HOUSE for, inter alia, steak sauce and restaurant services;

Registration No. 2959167 for the mark MALIA for, inter alia, herb mixes, spices and restaurant services;

Registration No. 2934344 for the mark BOTEJYU and design for, inter alia, Worcestershire sauce, and restaurant services; and

Registration No. 2830511 for the mark SIOUX CITY STEAKHOUSE and design for, inter alia, steak sauce, barbecue sauce and restaurant services.

This evidence establishes that the same source may provide both goods and services and hence that prospective purchasers would be likely to regard such goods and services as being commercially related to each other. This evidence also satisfies the requirement set forth in *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982) that "a party ... show something more than that similar or even identical marks are used for food

products and for restaurant services" to establish likelihood of confusion. Hence, we conclude that opposer has established prima facie that opposer's restaurant services are related to applicant's spices and seasonings and resolve this *du Pont* factor in opposer's favor.

We now consider the similarity or dissimilarity of the parties' trade channels. Inasmuch as there are no restrictions with respect to trade channels in either the application or the pleaded registrations, we must assume that the goods and services travel in all the normal channels of trade for such goods and services. See *Schieffelin & Co. v. Molson Companies Ltd.*, 9 USPQ2d 2069 (TTAB 1989). Ms. DiCarlo has testified that she purchased certain seasonings on restaurant websites and in a retail grocery store, and that the seasonings bear the names of restaurants. DiCarlo dep. at pp. 16 - 17. We thus conclude that it is not uncommon for restaurants to also sell spices and seasonings under the same mark, at least on restaurant websites and at grocery stores and supermarkets, and thus purchasers are accustomed to viewing such goods and services as related in that they share overlapping or similar channels of trade. We therefore conclude that the trade channels of the parties' goods and services overlap and resolve the *du Pont* factor regarding the trade channels in opposer's favor.

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We add too that the nature of the goods and services involved here are such that they may be purchased upon impulse by members of the general public, with little or no deliberation in their purchasing decisions.

Applicant has noted at p. 8 of its brief that it knows of no instances of actual confusion. Because the record does not include information such as the volume of applicant's or opposer's sales of their respective goods and services under the marks in issue, or whether both parties are doing business in the same geographic areas, it is not apparent that the conditions were such that confusion could occur. The *du Pont* factor regarding actual confusion is therefore not applicable.

Thus, in view of the similarities between the marks, the relationship between the goods and services, and the overlapping trade channels, we conclude that applicant's mark, when used in connection with seasonings and spices, is likely to cause confusion with opposer's pleaded marks as used in connection with restaurant services.

DECISION: The opposition is sustained and registration to applicant is refused.