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Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Al-Rabie Saudi Foods Co. Ltd.

Serial No. 77465502

Brent E. Routman and Scott M. Oslick of Merchant & Gould PC for Al-Rabie Saudi Foods Co. Ltd.

Asmat Khan, Trademark Examining Attorney, Law Office 114 (K. Margaret Le, Managing Attorney).

Before Holtzman, Lykos, and Masiello, Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

On May 5, 2008, Al-Rabie Saudi Foods Co. Ltd (“applicant”) filed an application pursuant to Section 1(b) to register the mark displayed below



Serial No. 77465502

for:

Meat, fish, poultry, and game; meat extracts, the preserved, dried and cooked and vegetables and fruits; jams, jellies, eggs; edible oils and fats; pickles; strawberry flavored milk, banana flavored milk, low fat and regular milk in International Class 29;

Coffee, tea, cocoa, sugar, rice, tapioca, and sago extract from special palm tree, prepared coffee and coffee based beverages in International Class 30; and

Beer, ale and porter; mineral and aerated waters and other non-alcoholic juice beverages, namely, grape, raspberry, peach, strawberry, banana, mango, apple, orange, pineapple, apricot, mixed berry, guava nectar, coconut, kiwi, lime, fruit cocktail, and pear juices in International Class 32.

The application includes the following transliteration and translation statements:

“The non-Latin characters in the mark transliterate to ‘ALRABIE’ and this means spring time in English;” “[t]he English translation of ‘AL-RABIE’ in the mark is spring time.”

The description of the mark is as follows:

The mark consists of the colors white and green with the color white appearing in the stylized depiction of a cow's head, in the non-Latin characters and in the wording "AL-RABIE", the color green appears in the rectangular background.

Invoking the doctrine of foreign equivalents, the Trademark Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that applicant's mark so resembles the following registered marks, owned by two different entities, that when used on or in connection with applicant's identified goods, they are likely to cause confusion or mistake or to deceive:

Serial No. 77465502

Registration No. 0750940 for the mark SPRINGTIME owned by Patterson Frozen Foods, Inc., for “frozen fresh fruits and vegetables” in International Class 46,¹

Registration No. 1243036 for the mark SPRINGTIME owned by Southern Beverage Packers, Inc., for “Non-Carbonated Fruit Flavored Soft Drinks” in International Class 32;² and

Registration No. 1890088 for the mark SPRINGTIME also owned by Southern Beverage Packers, Inc. for “bottled drinking water” in International Class 32.³

The examining attorney in her appeal brief has withdrawn the refusal to register as to the following goods: “meat, fish, poultry, and game; meat extracts; jams, jellies, eggs; edible oils and fats; pickles; strawberry flavored milk, banana flavored milk, lowfat and regular milk” in International Class 29, all of the items listed in International Class 30, and “beer, ale and porter” in International Class 32. She now states that the refusal to register the mark under Section 2(d) of the Trademark Act is limited to the following goods: “preserved, dried and cooked and vegetables and fruits” in International Class 29 and “mineral and aerated waters and other non-alcoholic juice beverages, namely, grape, raspberry, peach, strawberry, banana, mango, apple, orange, pineapple, apricot, mixed berry, guava nectar, coconut, kiwi, lime, fruit cocktail, and pear juices” in International Class 32. For the reasons stated below, we affirm the refusal to register as to those remaining goods.

¹ Registered on June 11, 1963; renewed.

² Registered on June 21, 1983; renewed.

³ Registered April 18, 1995; renewed.

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*du Pont*”). *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, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). These factors and the other relevant *du Pont* factors are discussed below.

I. Goods and Channels of Trade

First, we consider the goods and channels of trade. The goods and/or services of the parties need not be identical or directly competitive to find a likelihood of confusion. *See Safety-Kleen Corp. v. Dresser Indus., Inc.*, 518 F.2d 1399, 1404, 186 USPQ 476, 480 (C.C.P.A. 1975); TMEP §1207.01(a)(i). Rather, it is sufficient to show that because of the conditions surrounding their marketing, or because they are otherwise related in some manner, the goods and/or services would be encountered by the same consumers under circumstances such that offering the goods and/or services under similar marks would lead to the mistaken belief that they come from, or are in some way associated with, the same source. *See In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 1566-68, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

With regard to Registration No. 1890088, owned by Southern Beverage Packers, Inc., the goods identified as “bottled drinking water” are sufficiently broad to encompass applicant’s “mineral and aerated waters,” and therefore are legally identical. Moreover, even if the goods are not identical, the examining attorney has submitted evidence to show that the goods are related. See Registration No. 3617489 (“Non-alcoholic beverages, namely, bottled water, mineral water, and spring water”); Registration No. 3442295 (“Bottled water, spring water, mineral water, carbonated water...”).

As to Registration No. 1243036 also owned by Southern Beverage Packers, Inc., for the goods identified therein as “non-carbonated fruit flavored soft drinks,” applicant’s “mineral and aerated waters and other non-alcoholic juice beverages, namely, grape, raspberry, peach, strawberry, banana, mango, apple, orange, pineapple, apricot, mixed berry, guava nectar, coconut, kiwi, lime, fruit cocktail, and pear juices” are related as evidenced by the third-party registrations and website excerpt made of record by the examining attorney. See Registration No. 3501874 (“Fruit beverages; Fruit drinks; Fruit flavored soft drinks; Fruit-flavored beverages; Fruit-flavored drinks; ... Non-alcoholic fruit juice beverages; Soft drinks”); website excerpt from Coca Cola “Product List” (June 27, 2010 Office Action).

Lastly, with regard to Registration No. 0750940 owned by Patterson Frozen Foods, Inc., to show that registrant’s “frozen fresh fruits and vegetables” are related to applicant’s “preserved, dried and cooked and vegetables and fruits,” the examining attorney submitted into the record two third-party registrations

identifying both applicant's and registrant's types of goods. See Registrations Nos. 3259047 and 3080522. Copies of use-based, third-party registrations may serve to suggest that the goods are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). The examining attorney also submitted Internet evidence from Encore Fruit Marketing Inc.'s website showing the sale of both frozen and processed fruits and vegetables. This evidence taken together is sufficient to show that the goods are related.

Because the goods are the same and/or closely related and the involved application and registrations are unrestricted as to trade channels, we must presume that applicant's and registrants' goods travel in the same ordinary trade and distribution channels and will be marketed to the same potential consumers. *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 939 (Fed. Cir. 1983). In other words, there is nothing that prevents applicant from offering for sale its identified goods (once they are in use) through the same channels of trade and to the same consumers who purchase registrants' goods, and vice-versa. Accordingly, we find that these *du Pont* factors also weigh in favor of finding a likelihood of consumer confusion.

II. Comparison of the Marks – Doctrine of Foreign Equivalentents

Next, we shall consider the *du Pont* likelihood of confusion factor regarding the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression and whether it was proper for the examining attorney to invoke the doctrine of foreign equivalentents. At the outset we

note that in instances where the goods or services are legally identical, as with Registration No. 1890088, the degree of similarity between the marks necessary to support a determination that confusion is likely declines. *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1246 (TTAB 2010).

Applicant contends that the doctrine of foreign equivalents should not be applied in this case because the “ordinary American purchaser is unlikely to be familiar with Arabic,” and therefore is unlikely to know that the English translation of “al-rabie” is “spring time.” Applicant’s Brief, p. 8. In addition, applicant argues that because the Arabic letters in applicant’s mark do not look or sound like the English word “springtime” in registrants’ marks, the marks are too dissimilar for application of the doctrine of foreign equivalents.

Applicant’s arguments are misplaced. The doctrine of foreign equivalents is applied when the term is from a common modern language and it is likely that “the ordinary American purchaser would ‘stop and translate [the term] into its English equivalent.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1696 (Fed. Cir. 2005) (“*Palm Bay*”), quoting *In re Pan Tex Hotel Corp.*, 190 USPQ 109, 110 (TTAB 1976). See also *In re Thomas*, 79 USPQ2d 1021 (TTAB 2006). The term “ordinary American purchaser” includes all American purchasers, including those proficient in a non-English language who would ordinarily be expected to translate words into English. *In re Spirits Int’l N.V.*, 563 F.3d 1347, 190 USPQ2d 1489, 1492 (Fed. Cir. 2009). See also *In re*

Thomas, 79 USPQ2d at 1024. Thus, the proper inquiry is not whether the “ordinary American purchaser” is familiar with Arabic; rather, the correct inquiry is whether the ordinary American consumer familiar with Arabic would “stop and translate” “al-rabie” to the English equivalent of “spring time.” In addition, the doctrine has been applied in instances where the foreign wording does not look or sound like the English language equivalent but the English translation is a literal and exact translation of the foreign wording. *See e.g., In re Thomas*, 79 USPQ2d at 1021 (holding MARCHE NOIR for jewelry likely to be confused with the cited mark BLACK MARKET MINERALS for retail jewelry and mineral store services where evidence showed that MARCHE NOIR is the exact French equivalent of the English idiom “Black Market,” and the addition of MINERALS did not serve to distinguish the marks); *In re Ithaca Indus., Inc.*, 230 USPQ 702 (TTAB 1986) (holding applicant’s mark LUPO for men’s and boys’ underwear likely to be confused with the cited registration for WOLF and design for various clothing items, where LUPO is the Italian equivalent of the English word “wolf”). *Cf. Nestle’s Milk Products, Inc. v. Baker Importing Company, Inc.*, 182 F.2d 193, 86 USPQ 80, 82 (CCPA 1950) (“Foreign language words, not adopted into the English language, which are descriptive of a product, are so considered in registration proceedings despite the fact that the words may be meaningless to the public generally.”). In this case, there’s no dispute in the record regarding the transliteration and translation of the literal elements of applicant’s mark. The examining attorney, in applying the doctrine of foreign equivalents, relies on the statements provided by applicant. We

therefore find that the literal elements of applicant's mark are identical in meaning and connotation to each of the registered marks. Furthermore, in light of this undisputed evidence, we must assume that the ordinary U.S. consumer familiar with Arabic would "stop and translate" the literal elements in applicant's mark to "springtime," particularly as used in connection with these identical and/or closely related goods.

As to the additional design elements in applicant's mark, namely the stylized depiction of the cow's head and green and white color features, we find that they fail to mitigate the identical meaning and connotation of the respective literal portions of the involved marks. Applicant is reminded of the often-recited principle that when a mark consists of a literal portion and a design portion, the literal portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods and/or services; therefore, the literal portion is normally accorded greater weight in determining whether marks are confusingly similar. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). *See also CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983); *In re Kysela Pere et Fils, Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011). While acknowledging the distinctions noted by applicant in its brief, we find that applicant overemphasizes the effect of the addition of the design elements in applicant's marks. It is more likely that prospective consumers will overlook these distinctions and instead confuse the marks as identifying goods from the same source, given that the

translation of the literal element in applicant's mark is identical to the sole literal element of registrants' marks.

In sum, upon consideration of applicant's mark in its entirety, we find that it was proper for the examining attorney to apply the doctrine of foreign equivalents. Therefore, we find that the similarities outweigh the differences of the marks as to their connotation and commercial impression, and this *du Pont* factor weighs in favor of finding a likelihood of consumer confusion.

III. Scope of Protection

We next consider the strength of registrants' marks and the number and nature of similar marks in use. Applicant argues that because registrants' marks are weak, they are entitled to a limited scope of protection. In support of this argument, applicant has made of record nine third-party registrations comprised solely of the word SPRINGTIME or composite marks incorporating that term.

We are not persuaded by this evidence. First, we note that three of the third-party registrations relied upon by applicant are the registrations which were cited by the examining attorney in supported of her Section 2(d) refusal; three others are for goods and services which are no longer relevant to the refusal to register in light of the examining attorney's partial withdrawal in her brief. See Registration Nos. 3319574 for the mark SPRINGTIME COFFEE and 3345119 for the mark SPRINGTIME COFFEE COMPANY, both for "coffee supply services for offices, namely, supplying ground coffee;" Registration No. 3612332 for the mark SPRINGTIME CHAMPAGNE POMMERY for "sparkling wines; champagne wines."

Serial No. 77465502

As such, they are of no probative value. Of the remaining three registrations, they are for goods and services which are not closely related to those goods at issue here. Registration No. 2198674 for the mark THE TASTE OF SPRINGTIME for “cheese;” Registration No. 1104283 for the mark SPRINGTIME for “water distillers for domestic use;” and Registration No. 1175540 for the mark RISTORANTE PRIMAVERA and design (translated as "Springtime Restaurant") for “restaurant services.” Thus, on this record, we do not find registrants’ marks to be weak for the identified goods.

To the extent that there are any other relevant *du Pont* factors, we treat them as neutral.

After considering all of the evidence of record and argument pertaining to the *du Pont* likelihood of confusion factors, we conclude that there is a likelihood of confusion between applicant’s mark and the registered marks when used in connection with their identified goods. To the extent there is any doubt, we resolve it, as we must, in registrants’ favor. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

DECISION: The refusal to register is affirmed as to the following goods: “preserved, dried and cooked and vegetables and fruits” in International Class 29 and “mineral and aerated waters and other non-alcoholic juice beverages, namely, grape, raspberry, peach, strawberry, banana, mango, apple, orange, pineapple, apricot, mixed berry, guava nectar, coconut, kiwi, lime, fruit cocktail, and pear juices” in International Class 32.

Serial No. 77465502

The application will move forward to publication for the following goods: “meat, fish, poultry, and game; meat extracts; jams, jellies, eggs; edible oils and fats; pickles; strawberry flavored milk, banana flavored milk, lowfat and regular milk” in International Class 29, “coffee, tea, cocoa, sugar, rice, tapioca, and sago extract from special palm tree, prepared coffee and coffee based beverages in International Class 30; and in International Class 30, and “beer, ale and porter” in International Class 32.