

This Opinion is not a
Precedent of the TTAB

Mailed: January 20, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Sunnygem LLC
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Serial No. 86547753

Tracy A. Agrall, of Wild, Carter and Tipton, APC,
for Sunnygem LLC.

Lauren Dantzler, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

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Before Bergsman, Wellington and Gorowitz,
Administrative Trademark Judges.

Opinion by Gorowitz, Administrative Trademark Judge:

SunnyGem LLC (“Applicant”) seeks registration on the Principal Register of the
mark GEM ALMONDS (in standard characters) for

Blanched nuts; candied nuts; ground almonds; processed
almonds; roasted nuts, namely, almonds, in International
Class 29; and

Fresh almonds, in International Class 31.¹

¹ Application Serial No. 86547753 was filed on February 26, 2015, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). The word “ALMONDS” is disclaimed.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the mark GOURMET GEMS (in standard characters) for "processed nuts, candied nuts, fruit-based snack foods, nut-based snack foods, dried fruit and processed edible seeds," in International Class 29 and "candy, cookies, crackers, pretzels, chocolate, chocolate covered nuts, cereal-based snack foods, rice-based snack foods and wheat-based snack foods," in International Class 30² as to be likely to cause confusion, mistake or deception.

When the refusal was made final, Applicant appealed. We affirm the refusal to register.

I. Evidentiary Issue.

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant submitted several exhibits with its appeal brief (webpages from its website, a plain copy of a registration certificate for the mark SunnyGem Simply Almonds & design, and a webpage from the midnitesnax.com website). Evidence submitted after an appeal has been filed is untimely and will not be considered by the Board. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Therefore, this evidence has not been considered.

² Registration No. 3225399 issued April 3, 2007; Combined Sections 8 and 15 declaration accepted and acknowledged April 17, 2013.

II. Likelihood of Confusion.

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.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, 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). *See also, In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

A. Similarity of services, channels of trade and classes of customers.

We start our analysis with the second and third *du Pont* factors, the similarity of the goods, the channels of trade, and the classes of customers. Applicant argues that its mark “will be used exclusively in connection with almonds,” while Registrant’s goods include other nut and food items. Appeal Brief, 4 TTABVUE 6. Applicant also argues that the goods are sold in different channels of trade. *Id.* at 7. The argued distinctions are not relevant to our determination.

It is well settled that the issue of likelihood of confusion between applied-for and registered marks must be determined on the basis of the goods as they are identified in the involved application and cited registration, rather than on what any evidence may show as to the actual nature of the goods, their channels of trade and/or classes of purchasers.

In re Total Quality Group Inc., 51 USPQ2d 1474, 1476 (TTAB 1999). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014).

Class 29

“Processed nuts” in the description of goods in the cited registration include or encompass “processed almonds” in the Class 29 description of goods in Applicant’s application. Therefore, Applicant’s description of goods in Class 29 is in part identical to the goods in the cited registration. Under this *du Pont* factor, the Trademark Examining Attorney need not prove, and we need not find, similarity as to each and every product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1745 (TTAB 2014).

Because Applicant’s Class 29 description of goods is in part identical to the goods in the cited registration, we must presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *American*

Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute, 101 USPQ2d 1022, 1028 (TTAB 2011).

Class 31

To establish the relationship between Applicant's Class 31 goods, "fresh almonds" and the goods in the cited registration, the Examining Attorney has attached nine use-based third-party registrations that include both fresh nuts (which include almonds) and processed nuts³; these include:

Reg. No. 3278027 for the mark PURITY ORGANICS
Goods: "processed nuts"; and "fresh nuts."

Reg. No. 3984224 for the mark WONDERFUL
MINIALMONDS
Goods: "prepared nuts; processed almonds; processed nuts;
roasted nuts; seasoned nuts"; and "fresh nuts; raw nuts;
and unprocessed nuts."

Registration No. 4187934 for the mark AGRIFARMS
Goods: "candied nuts; prepared nuts; processed nuts; and
roasted nuts"; and "fresh nuts; raw nuts; and unprocessed
nuts."

Registration No. 4607141 for the mark ITALIAN
HERITAGE CALIFORNIA SOIL
Goods: "dried fruits; olive oils; and processed nuts"; and
"fresh fruits and fresh nuts."
(TSDR p. 18)

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 are of a type which may emanate from a single source. *In re Sela Prods., LLC*, 107 USPQ2d 1580, 1586 (TTAB 2013) *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783

³ Attached to the Office Action dated January 28, 2016.

(TTAB 1993). Applicant has not submitted any evidence to rebut the third-party registrations.

With respect to the Class 31 goods, while there is evidence that they are related, there is no evidence about the channels of trade in which they travel. As such, we treat this *du Pont* element as neutral.

We find the second *du Pont* factor strongly favors a finding of likelihood of confusion. With respect to the Class 29 goods, the third *du Pont* factor also strongly favors a finding of likelihood of confusion.

B. Similarity or dissimilarity of the marks.

We next determine the similarity or dissimilarity of the marks in their entireties, keeping in mind that “[w]hen marks appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likelihood of confusion declines.” *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Moreover, the emphasis

must be on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645 (TTAB 2009), *citing Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Because the goods at issue are nuts, the average purchaser is an ordinary consumer.

The marks at issue here are standard character marks GEM ALMONDS and GOURMET GEMS. Applicant's mark is a combination of the word "GEM" with the word "ALMONDS," which was disclaimed because it is generic when used in connection with almonds. The cited mark is a combination of the word "GEMS" and "GOURMET," which was disclaimed presumably because it is descriptive or a quality of nuts. The common word is "gem." The marks are different because Applicant's mark, GEM ALMONDS, includes the generic word "almond" and Registrant's mark, GOURMET GEMS, includes the descriptive word "gourmet." Because the word "Gem" is an arbitrary word when used in connection with the goods at issue and the other words "almonds" and "gourmet" have little, if any, trademark significance, the word GEM(S) is the dominant portion of both marks and thus given more weight in our analysis. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) (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 entirety.). There is no significance in Applicant's use of the singular GEM and Registrant's use of the plural GEMS." *Swiss Grill Ltd., v. Wolf Steel Ltd.*, 115 USPQ2d 2001, 2011 n.17 (TTAB

2015) (“[I]t is obvious that the virtually identical marks [the singular and plural of SWISS GRILL] are confusingly similar”).” *See also, Wilson v. DeLaunay*, 245 F.2d 877, 114 USPQ 339, 341 (CCPA 1957) (“It is evident that there is no material difference, in a trademark sense, between the singular and plural forms of the word ‘Zombie’ and they will therefore be regarded here as the same mark.”); *In re Sarjanian*, 136 USPQ 307, 308 (TTAB 1962).

Comparing the marks in their entireties, and giving greater weight to the word GEM, which is the dominant element of each mark, we conclude that the marks are similar in appearance, sound, and meaning. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, at 1692 (affirming TTAB’s holding that contemporaneous use of appellant’s mark, VEUVE ROYALE, for sparkling wine, and appellee’s marks, VEUVE CLICQUOT and VEUVE CLICQUOT PONSARDIN, for champagne, is likely to cause confusion, noting that the presence of the “strong distinctive term [VEUVE] as the first word in both parties’ marks renders the marks similar, especially in light of the largely laudatory (and hence non-source identifying) significance of the word ROYALE”); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1343, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) (“Viewed in their entireties with non-dominant features appropriately discounted, the marks [GASPAR’S ALE for beer and ale and JOSE GASPAR GOLD for tequila] become nearly identical.”); and *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1266, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (finding that even though applicant’s mark PACKARD TECHNOLOGIES (with

“TECHNOLOGIES” disclaimed) does not incorporate every feature of opposer’s HEWLETT PACKARD marks, a similar overall commercial impression is created).

Accordingly, we find that the first *du Pont* factor favors a finding of likelihood of confusion.

C. No actual confusion.

Applicant also argues that there is no evidence of actual confusion between Applicant’s registered mark SUNNYGEM SIMPLY ALMONDS & design and the cited mark GOURMET GEMS despite a period of years of co-existence, which is “also indicative that there is no likelihood of confusion between the marks at issue...” Appeal Brief, 4 TTABVUE 7. Applicant’s argument is not persuasive.

As the Examining Attorney noted, the mark at issue is GEM ALMONDS not SUNNYGEM SIMPLY ALMONDS. As such, Applicant’s argument about the co-existence of its SUNNYGEM SIMPLY ALMONDS mark and the GEM ALMONDS mark is irrelevant.

The application at issue was based on Applicant’s *bona fide* intention to use the mark; no evidence of use was introduced. As such, there can be no evidence of overlapping use, which has the effect of foreclosing opportunities for instances of actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Further, the lack of evidence of actual confusion carries little weight, especially in an *ex parte* context. *See J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 144 USPQ 435, 438 (CCPA 1965).

D. Conclusion.

After considering all the evidence and argument on the relevant *du Pont* factors regarding likelihood of confusion between Applicant's mark GEM ALMONDS (in standard characters) for "blanched nuts; candied nuts; ground almonds; processed almonds; roasted nuts, namely, almonds; and fresh almonds" and the cited mark GOURMET GEMS (in standard characters) for "processed nuts and candied nuts," we find that there is a likelihood of confusion.

Decision: The refusal to register Applicant's mark GEM ALMONDS is affirmed with respect to both classes.