

This Opinion is not a  
Precedent of the TTAB

Mailed: March 2, 2017

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

Carl's Jr. Restaurants LLC

v.

AKM Food Svcs. LLC

Opposition No. 91204459

Steven J. Nataupsky of Knobbe Martens Olson Bear LLP for Carl's Jr. Restaurants LLC.

Andrew H. Ralston Jr. of Gross McGinley LLP for AKM Food Svcs. LLC.

Before Cataldo, Mermelstein and Lykos,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Opposer, Carl's Jr. Restaurants LLC, has filed a notice of opposition to registration of application Serial No. 85437236<sup>1</sup> owned by Applicant, AKM Food Svcs. LLC, for the mark THE GREEN PEPPER, in standard characters, for "restaurant services" in International Class 43.<sup>2</sup>

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<sup>1</sup> Filed on October 1, 2011, seeking registration on the Principal Register based upon Applicant's allegation of its bona fide intent to use the mark in commerce in connection with the identified services.

<sup>2</sup> 1 TTABVUE 1-10.

**Opposition No. 91204459**

Opposer asserts a claim of likelihood of confusion with four pleaded registrations issued on the Principal Register for GREEN BURRITO marks, namely,

Registration No. 3015454<sup>3</sup> for the mark GREEN BURRITO (“BURRITO” disclaimed) in standard characters for “restaurant services” in International Class 43;

Registration No. 2924101<sup>4</sup> for the mark  (“BURRITO” disclaimed) for “restaurant services” in International Class 43;

Registration no. 1689454<sup>5</sup> for the mark  for “restaurant services” in International Class 43; and

Registration No. 3526233<sup>6</sup> for the mark GREEN BURRITO in standard characters for

Food items for consumption on or off the premises, namely, chile relleno, chile verde, grilled fish, grilled shrimp, tortilla soup, menudo, shredded beef known as carne asada, shredded pork known as carnitas, and grilled chicken in International Class 29 and

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<sup>3</sup> Issued on November 15, 2005. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First renewal.

<sup>4</sup> Issued on February 1, 2005. Section 8 affidavit accepted; Section 15 affidavit acknowledged. First renewal. “Color is not claimed as a feature of the mark.”

<sup>5</sup> Issued on May 26, 1992. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Second renewal. “The drawing is lined for the colors red, green and yellow.”

<sup>6</sup> Issued on November 4, 2008 with a claim of acquired distinctiveness under Trademark Act Section 2(f). Section 8 affidavit accepted; Section 15 affidavit acknowledged.

**Opposition No. 91204459**

Food items for consumption on or off the premises, namely, burritos, tacos, tostadas, quesadillas, tamales, chimichangas, enchiladas, fajitas, Mexican style meat pies known as tortas, nachos, taquitos, flautas, rice, corn chips, flour-based chips, taco chips, hard taco shells, tortilla chips, gorditas, churros, flan, corn cakes, salsa, cheese sauces, tomato-based sauces and seasonings in International Class 30.<sup>7</sup>

Opposer also claims that registration of Applicant's mark will dilute the distinctive quality of its marks. Applicant, in its answer, denied the salient allegations in the notice of opposition and asserted as an "affirmative defense" matters that serve to amplify its denials of Opposer's likelihood of confusion claim.<sup>8</sup>

**The Record**

The record includes the pleadings and, pursuant to Trademark Rule 2.122(b)(1), the file of Applicant's involved application.

Opposer introduced the following testimony and evidence:

1. June 7, 2016 Testimony Deposition of Opposer's Senior Vice President and Secretary, Charles A. Seigel, III and Exhibits 1-27;<sup>9</sup>
2. Opposer's June 14, 2016 First Notice of Reliance with Exhibits 1-29. Exhibits 1-4 of Opposer's First Notice of Reliance are copies of Opposer's pleaded U.S. Trademark Registrations and printouts showing the current status and title of the registrations printed from the USPTO's Trademark Electronic Search System (TESS) and

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<sup>7</sup> Opposer further asserts that it has established common law rights in its GREEN BURRITO mark. However, as discussed *infra*, it is not necessary for us to consider these asserted rights in our determination herein.

<sup>8</sup> 4 TTABVUE 1-5.

<sup>9</sup> 64-67 TTABVUE. Opposer also filed the confidential testimony of Charles A. Seigel, III at 68 TTABVUE. In this decision, we will endeavor to discuss truly confidential information only as needed in very general terms.

**Opposition No. 91204459**

Assignment database. Exhibits 5-8 of Opposer's First Notice of Reliance are copies of the file histories for Opposer's pleaded U.S. Trademark Registrations. Exhibits 9-12 are Applicant's Responses to Opposer's Interrogatories and Requests for Admissions. Exhibits 13-29 are printouts from Opposer's website and social media pages featuring the GREEN BURRITO marks and printouts from Applicant's website and social media pages showing use of its THE GREEN PEPPER mark;<sup>10</sup> and

3. Opposer's June 14, 2016 Second Notice of Reliance with Exhibits 30-40. Exhibits 30-40 are copies of Opposer's filings with the United States Securities and Exchange Commission.<sup>11</sup>

Applicant did not submit any testimony or evidence during its assigned testimony period. Only Opposer filed a brief.

**Standing and Priority.**

Standing is a threshold issue that must be proven in every *inter partes* case. *See Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014); *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982) ("The facts regarding standing . . . must be affirmatively proved. Accordingly, [plaintiff] is not entitled to standing solely because of the allegations in its [pleading]."). To establish standing in an opposition, an opposer must show both "a real interest in the proceedings as well as a

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<sup>10</sup> 61-2 TTABUVE.

<sup>11</sup> 63 TTABUVE.

**Opposition No. 91204459**

‘reasonable’ basis for his belief of damage.” *See Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999).

In this case, Opposer made of record by notice of reliance copies of its pleaded registrations showing their current status and title to Opposer.<sup>12</sup> In view thereof, Opposer has established its standing. In addition, priority is not in issue with respect to the marks and the goods and services set out in its pleaded registrations.<sup>13</sup> *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1844 (Fed. Cir. 2000); *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 likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Opposer must establish that there is a likelihood of confusion by a preponderance of the evidence. In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). Varying weights may be assigned to each *du Pont* factor depending on the evidence presented. *Citigroup Inc. v. Capital City Bank Group Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). These evidentiary factors “may play

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<sup>12</sup> 61 TTABVUE 13-400.

<sup>13</sup> Our findings herein are consistent with our May 2, 2016 determination of Opposer’s motion for summary judgment. 60 TTABVUE 4-5.

**Opposition No. 91204459**

more or less weighty roles in any particular determination.” *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687-88 (Fed. Cir. 1993). The relevant *du Pont* factors in the proceeding now before us are discussed below.

We focus our likelihood of confusion analysis on only one of Opposer’s marks inasmuch as this mark is the most similar to Applicant’s mark: Registration No. 3015454 for the mark GREEN BURRITO in standard characters for “restaurant services” in International Class 43. If we find that there is a likelihood of confusion with this mark, there is no need for us to consider the likelihood of confusion with Opposer’s GREEN BURRITO mark for food items or other marks including the wording GREEN BURRITO with a design and/or additional wording. Conversely, if we find there is no likelihood of confusion with this GREEN BURRITO mark, we would find no likelihood of confusion with Opposer’s GREEN BURRITO mark identifying food items or the other marks as they incorporate GREEN BURRITO as part thereof. *See In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

**The similarity or dissimilarity of the services, trade channels and classes of consumers.**

We first consider the *du Pont* factors regarding the similarity or dissimilarity of the parties’ respective services, their channels of trade and classes of consumers. In making our determination, we must look to the services as identified in the involved application and Opposer’s registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Computers Servs., Inc.*, 918 F.2d 937, 16 USPQ2d

**Opposition No. 91204459**

1783, 1787 (Fed. Cir. 1990)); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

As indicated above, Applicant's services are "restaurant services" without restriction as to type, cuisine or price. These services are identical to Opposer's similarly unrestricted "restaurant services."<sup>14</sup> Given the identity of the services, we presume that the services are available through all usual channels of trade and are offered to all normal potential purchasers. *See 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); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith & Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994). *See also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

The identity of the services, trade channels and purchasers are *du Pont* factors that weigh heavily in favor of a finding of a likelihood of confusion.

**Fame of Opposer's GREEN BURRITO Mark and Number and Nature of Similar Marks in Use on Similar Goods or Services.**

We turn next to the fifth *du Pont* factor, which requires us to consider evidence of the fame of Opposer's GREEN BURRITO mark and to give great weight to such

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<sup>14</sup> It is therefore unnecessary for us to consider evidence of record establishing that both Applicant and Opposer provide quick-service Mexican restaurant services.

**Opposition No. 91204459**

evidence if it exists. *See Bose Corp. v. QSC Audio Products Inc.*, 293 F.3d 1367, 63 USPQ2d 1303 (Fed. Cir. 2002); *Recot Inc. v. Becton*, 214 F.3d 1322, 54 F.2d 1894 (Fed. Cir. 2000); *Kenner Parker Toys, Inc. v. Rose Art Industries, Inc.*, 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

Fame of an opposer's mark or marks, if it exists, plays a "dominant role in the process of balancing the DuPont factors," *Recot*, 214 F.3d at 1327, 54 USPQ2d at 1456, and "[f]amous marks thus enjoy a wide latitude of legal protection." *Id.* This is true as famous marks are more likely to be remembered and associated in the public mind than a weaker mark, and are thus more attractive as targets for would-be copyists. *Id.* Indeed, "[a] strong mark ... casts a long shadow which competitors must avoid." *Kenner Parker Toys*, 963 F.2d at 353, 22 USPQ2d at 1456. A famous mark is one "with extensive public recognition and renown." *Id.*

*Bose Corp. v. QSC Audio Products Inc.*, 63 USPQ2d at 1305.

Upon careful review of the record in this case, we are not persuaded that Opposer's GREEN BURRITO mark is famous. It is the duty of a plaintiff asserting that its mark is famous to clearly prove it. *Leading Jewelers Guild Inc. v. LJOW Holdings LLC*, 82 USPQ2d 1901, 1904 (TTAB 2007).

Opposer argues that it has used the GREEN BURRITO mark for over 30 years, and has enjoyed substantial "sales from GREEN BURRITO menu items"<sup>15</sup> during this time. Opposer also argues that its "Carl's Jr. restaurants are the 22<sup>nd</sup> largest quick service restaurant chain in the United States, and about half of those Carl's Jr. restaurants are dual-branded with the GREEN BURRITO mark."<sup>16</sup> Opposer

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<sup>15</sup> 68 TTABVUE 51-53 (confidential); 66 TTABUVE 86-229.

<sup>16</sup> 69 TTABVUE 9. 68 TTABVUE 25, 55 (confidential); 66 TTABUVE 86-435; 67 TTABVUE 2-70.

**Opposition No. 91204459**

further argues that its GREEN BURRITO mark appears in connection with over 600 restaurants in the United States that are owned or franchised by Opposer;<sup>17</sup> that its GREEN BURRITO marks appear in extensive print, radio and television advertisements and on Opposer's Internet webpage;<sup>18</sup> that its Facebook page has over 1.2 million "likes" and its Twitter site has over 77,000 followers, both prominently featuring the GREEN BURRITO mark.<sup>19</sup>

We note that Opposer has not placed its sales and social media figures in a context that would prove fame. *See Bose Corp. v. QSC Audio Products*, 63 USPQ2d at 1309. Nonetheless, even these raw numbers of product sales social media exposure, along with Opposer's additional testimony and evidence, demonstrates that Opposer has enjoyed substantial sales at its restaurants branded under the GREEN BURRITO mark, and has received social media recognition from its customers. However, such evidence falls short of demonstrating the extent to which such sales and social media following translate into widespread recognition of the GREEN BURRITO mark among the general public. In addition, Opposer's annual sales figures are not comparable to annual advertising or sales figures for other marks we have found to be famous. *See, e.g., Motion Picture Assn. of America, Inc. v. Respect Sportswear Inc.*, 83 USPQ2d 1555, 1560 (TTAB 2007) (opposer's member annually spent 4 billion dollars on advertisements and promotion). On the other hand, there is no evidence of use or registration by third parties of marks similar to

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<sup>17</sup> 68 TTABVUE 25 (confidential).

<sup>18</sup> *Id.* at 55.

<sup>19</sup> 67 TTABVUE 80-122.

**Opposition No. 91204459**

GREEN BURRITO or other evidence that GREEN BURRITO is a weak mark entitled to only a narrow scope of protection.

Accordingly, we find on this record that the evidence is insufficient to establish that Opposer's GREEN BURRITO mark is famous for purposes of our likelihood of confusion determination. Nevertheless, we find that the evidence is sufficient to show that Opposer's GREEN BURRITO mark has achieved at least some degree of recognition and strength in the restaurant market and that the mark is therefore entitled to a broader scope of protection than might be accorded a mark with less recognition.<sup>20</sup> This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

**The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.**

We next consider the marks, comparing them for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *See Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity in any one of these elements is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a

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<sup>20</sup> While we have discussed the evidence of fame relating to Opposer's GREEN BURRITO mark, we also point out that the evidence regarding Opposer's other marks is insufficient to show that they are famous. Similarly, we are not persuaded by Opposer's reliance on previous determinations by this tribunal that its Carl's Jr. marks are famous inasmuch as the Carl's Jr. marks are not at issue herein, and any determination of fame must be made on the record adduced in this case, not in another case on a different record.

**Opposition No. 91204459**

finding of similarity as to any one factor (sight, sound or meaning) alone ‘may be sufficient to support a holding that the marks are ... similar.’”) (citations omitted).

Because the services, as discussed above, are virtually identical, the degree of similarity between the marks necessary to find likelihood of confusion declines. *Bridgestone Americas Tire Operations LLC v. Federal Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Coach Servs., Inc. v. Triumph Learning LLC*, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1992).

In this case, Opposer’s mark is GREEN BURRITO. Applicant’s mark is THE GREEN PEPPER. The parties’ marks are similar to the extent that both Opposer’s mark and Applicant’s mark begin with the identical term GREEN. The marks differ to the extent that in Opposer’s mark, the wording GREEN modifies BURRITO and in Applicant’s mark, the wording GREEN modifies PEPPER. The definite article “THE” in Applicant’s mark possesses little source-identifying significance. *See Jay-Zee, Inc. v. Hartfield-Zodys, Inc.*, 207 USPQ 269, 271-2 (TTAB 1980) (“Since the psychological and marketing impact of petitioner’s mark in its earlier version clearly was derived from the word ‘IMAGE,’ the omission of the word ‘THE’ (the definite article serving merely to emphasize ‘IMAGE’) from the later version did not interrupt the continuity of use”); *United States National Bank of Oregon v. Midwest Savings and Loan Assn.*, 194 USPQ 232, 236 (TTAB 1977) (“The definite article ‘THE’ likewise adds little distinguishing matter because the definite article most

**Opposition No. 91204459**

generally serves as a means to refer to a particular business entity or activity or division thereof, and it would be a natural tendency of customers in referring to opposer's services under the mark in question to utilize the article 'THE' in front of 'U-BANK' in view of their uncertain memory or recollection of the many marks that they encounter in their everyday excursion into the marketplace").

We find that the wording GREEN in the parties' marks is the dominant feature thereof. This is because a burrito is a common menu item in Mexican restaurants, served by Opposer and Applicant.<sup>21</sup> As such, the term BURRITO is, at best, highly suggestive of Opposer's services. In addition, the term GREEN modifies the term that follows and denotes a green pepper, an ingredient in many types of foods including Mexican food. It is a well-established principle that, 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, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In addition, the significance of GREEN in the parties' marks is reinforced by its location as the first portion thereof. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897) TTAB 1988) ("It is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered."). *See also Century 21 Real Estate Corp. v. Century Life*

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<sup>21</sup> 61 TTABVUE 534-542; 67 TTABVUE 77.

**Opposition No. 91204459**

*of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

Based upon the above analysis, we find that Opposer's GREEN BURRITO mark is relatively similar to THE GREEN PEPPER in appearance and, to a lesser extent, in sound. Recognizing the obvious differences between the terms in the marks, we find that the similarities, particularly in appearance, outweigh the differences, and that the marks convey similar commercial impressions. Put another way, we find that consumers viewing Applicant's THE GREEN PEPPER mark would believe that Opposer established this mark to denote another restaurant, but nonetheless pointing to the same source as its GREEN BURRITO mark.

Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. *See Krim-Ko Corp. v. The Coca-Cola Co.*, 156 USPQ at 526 ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar.'") (citations omitted)).

In view of the foregoing, we find that Applicant's THE GREEN PEPPER mark is overall more similar to Opposer's registered GREEN BURRITO mark than dissimilar. This *du Pont* factor weighs in favor of a finding of likelihood of confusion.

**Actual confusion.**

Neither party has alleged any instances of actual confusion by consumers as to the source of the services. Opposer argues that “because Applicant’s use of its THE GREEN PEPPER mark has been so geographically limited, there has been little opportunity for actual confusion.”<sup>22</sup> Nonetheless, Opposer is correct that proof of actual confusion is not necessary to show a likelihood of confusion, and its absence is not dispositive. *See Herbko, Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“a showing of actual confusion is not necessary to establish a likelihood of confusion.”); *Weiss Assocs. Inc. v. HRL Assocs. Inc.*, 902 F.2d 1546, 14 USPQ2d 1840, 1843 (Fed. Cir. 1990); *Giant Food Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). *See also Motion Picture Ass’n of Am., Inc. v. Respect Sportswear, Inc.*, 83 USPQ2d 1555, 1564 (TTAB 2007) (actual confusion factor was “neutral” where “applicant ha[d] not introduced any evidence to the extent of its use of the applied-for mark.”) This *du Pont* factor is neutral.

**Applicant’s intent.**

Next, Opposer argues that “the striking similarity between Applicant’s THE GREEN PEPPER mark and Opposer’s GREEN BURRITO Marks and the identical nature of the parties’ services suggests intentional copying.”<sup>23</sup> To the extent Opposer is arguing that Applicant adopted its mark in bad faith, there is insufficient evidence to show or imply Applicant’s motive. And while we find the

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<sup>22</sup> 69 TTABVUE 28.

<sup>23</sup> *Id.*

**Opposition No. 91204459**

marks to be similar, they are not so highly similar as to suggest intentional copying. Mere knowledge of the existence of Opposer's mark does not, in and of itself, constitute bad faith. *See Action Temporary Services Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1310 (Fed. Cir. 1989); *Ava Enterprises, Inc. v. Audio Boss USA, Inc.*, 77 USPQ2d 1783, 1787 (TTAB 2006). The record in this case simply does not show that Applicant intentionally sought to trade on Opposer's good will.

**Balancing the factors.**

After considering all of the applicable *du Pont* factors, we find that Applicant's mark, THE GREEN PEPPER, for restaurant services is likely to cause confusion with Opposer's GREEN BURRITO mark, for virtually identical services that are available through the same channels of trade to the same classes of ordinary consumers.

**Dilution.**

Given our determination above that Opposer has failed to prove the fame of its marks for purposes of its likelihood of confusion claim, Opposer cannot show that its marks are famous for dilution purposes and thus cannot meet its burden of proving dilution. *See Palm Bay Imports Inc.*, 73 USPQ2d at 1694; *Coach Services Inc. v. Triumph Learning LLC*, 96 USPQ2d 1600, 1610 (TTAB 2010) ("Fame for likelihood of confusion and dilution is not the same. Fame for dilution requires a more stringent showing.").

DECISION: The opposition is sustained on the ground of likelihood of confusion. The Opposition is dismissed with prejudice on the ground of dilution.