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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Wilbur Packing Company**

Serial No. 74/**567,447**

Michael J. Hughes of Law Offices of Michael J. Hughes for
Wilbur Packing Company
Zhaleh S. Delaney, Trademark Examining Attorney, Law Office
101 (**Christopher Wells**, Managing Attorney)

Before **Sams**, **Simms** and **Seeherman**, Administrative Trademark
Judges.

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

Wilbur Packing Company (applicant), a California joint venture, has appealed from the final refusal of the Trademark Examining Attorney to register the mark WILBUR for dried fruits.¹ The Examining Attorney has refused registration under 2(d) of the Act, 15 USC Section 1052(d), on the basis of three registrations held by Wilbur Chocolate Company, Inc. The first of these registrations (Registration No. 334,404, issued May 5, 1936) has now expired as the result of registrant's failure to renew in

¹Application Serial Number 74/567,447, filed August 29, 1994, claiming use since October 1, 1992.

1996, and the arguments of the attorneys concerning the similarities or lack thereof between the goods in this registration and applicant's dried fruit are therefore disregarded. The remaining two registrations cover the marks WILBUR BUDS (stylized) and WILBUR. These registrations, respectively, issued for the following goods: candy and chocolate (Registration No. 419,097, issued February 5, 1946, second renewal); and chocolate coatings, chocolate liquors, chocolate candy and chocolate-flavored syrup for food beverages and other food purposes (Registration No. 811,794, issued July 26, 1966, renewed).

It is the Examining Attorney's position that the marks of applicant and registrant are very similar and that the goods are closely related. The Examining Attorney argues that the dominant origin-indicating feature of each mark is the word "WILBUR." The Examining Attorney argues that applicant's dried fruit and registrant's candy and chocolate candy are related products in that they are all processed snack food items traveling in the same channels of trade. The Examining Attorney contends that dried fruits and a variety of candies are often offered side-by-side in retail stores and often eaten between meals as snacks. Further, the Examining Attorney maintains that dried fruits and chocolate candies may even be used together in making "trail mix" or "gorp." (The Examining Attorney has attached definitions of those terms to her appeal brief.) Finally, the Examining Attorney has made of record numerous third-

party registrations showing that the companies have registered certain marks both for candy, including chocolate candy, and dried fruit. For example, the mark "THE NUTTY BAVARIAN" is registered for both dried fruit, candy and chocolate raisins (Registration No. 1,830,450, issued April 12, 1994); the mark GROWERS' STORE is registered for dried fruit and chocolate-covered raisins (Registration No. 1,755,569, issued March 2, 1993); while another mark has been registered (Registration No. 1,551,148, issued August 8, 1989) for such goods as candy, chocolate and chocolate candy, cocoa preparations for food beverages, snack bars containing nuts, and dried fruit. An additional factor creating a likelihood of confusion, according to the Examining Attorney, is the fact that the respective goods are purchased on impulse. Finally, the Examining Attorney contends that, if there is any doubt, it should be resolved in favor of the prior user and registrant.

It is applicant's position, on the other hand, that there is no per se rule that all foods products are related. Here, applicant contends, registrant's chocolate products are a "far cry" from applicant's dried fruit, and that these goods are classified in different classes.² Further, applicant argues that the respective goods are sold in

²In this regard, the Examining Attorney correctly points out that determinations concerning classification of goods and services are purely administrative in nature and unrelated to any determination of likelihood of confusion. National Football League vs. Jasper Alliance Corp., 16 USPQ2d 1212, 1216 n.5 (TTAB 1990).

different sections of stores, dried fruit being sold near the fresh produce section whereas chocolate products would be sold in the candy section. While applicant concedes that some entities may offer both candies and dried fruit, it is applicant's contention that the third parties reflected in the registrations of record are general candy and snack companies and not manufacturers that specialize in chocolate like registrant. According to applicant, any association by consumers with the registered marks is with chocolate products and not candies in general and the public will not expect that the registrant is now offering dried fruit. Applicant relies upon *In re Mars, Inc.*, 222 USPQ 938 (Fed. Cir. 1984), wherein the court found no likelihood of confusion between CANYON for fresh citrus fruit and CANYON for candy bars. In this regard, applicant maintains that its product is fresh fruit which has been dried while registrant's goods are highly processed food with a mixture of ingredients. Finally, applicant maintains that, because the registered marks allegedly include the surname WILBUR, the scope of protection accorded the registrations should be limited so as not to be "an unjustified and unnecessary barrier to others sharing the surname." Applicant's brief, 8.

After careful consideration of this record and the arguments of the attorneys, we believe that applicant's mark WILBUR for dried fruit so resembles the registered marks for candy and chocolate candy as to be likely to cause

confusion. Applicant has not seriously disputed the similarities of the marks in their entirety and we believe that they are substantially similar in sound, appearance and commercial impression. With respect to the goods, we agree with the Examining Attorney that they are commercially related and may be sold very near each other in the same stores. Given these facts and the inexpensive nature of the respective goods and the impulse nature of their purchase, we believe that purchasers familiar with registrant's marks WILBUR and WILBUR BUDS for various chocolate products who then encounter applicant's WILBUR dried fruit are likely to believe that all these products come from the same source. Contrary to applicant's argument, we do not believe that the average consumer will be so familiar with registrant and its business that he or she will believe that registrant would not have "expanded" into dried fruit. There is nothing in this record to show that ordinary purchasers of these inexpensive items often purchased on impulse would have that knowledge. Finally, not only are the goods here--dried fruit and candy--more closely related than the goods in the *Mars* case (fresh citrus fruit and candy bars), but also here there is evidence that producers offer both dried fruit and candy under the same mark, making it more likely that purchasers will believe that applicant's goods come from the same source that sells candy and chocolate candy under the same mark.

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Decision: The refusal to register is affirmed.

J. D. Sams

R. L. Simms

E. J. Seeherman
Administrative Trademark Judges
Trademark Trial and Appeal Board

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