

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB                      JULY 30, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Lombardo

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Serial No. 74/468,937

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Elizabeth F. Janda of Brooks & Kushman P.C. for Frank J.  
Lombardo.

Janice L. McMorrow, Trademark Examining Attorney, Law Office 104  
(Sidney I. Moskowitz, Managing Attorney).

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Before Cissel, Quinn and Hohein, Administrative Trademark Judges.  
Opinion by Hohein, Administrative Trademark Judge:

Frank J. Lombardo has filed an application to register  
the mark "MR. PITA ROLLED SANDWICHES & SALADS" and design, which  
is reproduced below,

as service mark for "restaurant services".<sup>1</sup>

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<sup>1</sup> Ser. No. 74/468,937, filed on December 13, 1993, which alleges dates  
of first use of December 1, 1993. The words "PITA ROLLED SANDWICHES &  
SALADS" are disclaimed and the mark includes "a stylized design of a  
person comprising a rolled pita, lettuce and tomato."

Ser. No. 74/468,937

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to his services, so resembles the mark "MR. PITA NO CHOLESTEROL! LOW IN CALORIES! NO OILS, FATS OR SUGARS ADDED!" and design, as illustrated below,

for "pocket breads and bread chips,"<sup>2</sup> as to be likely to cause confusion, mistake or deception.<sup>3</sup>

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<sup>2</sup> Reg. No. 1,655,673, issued on September 3, 1991, which sets forth dates of first use of October 9, 1989; combined affidavit §§8 and 15. The words "PITA" and "NO CHOLESTEROL! LOW IN CALORIES! NO OILS, FATS OR SUGARS ADDED!" are disclaimed.

<sup>3</sup> Although registration was also finally refused in light of Reg. No. 1,628,518, issued on December 18, 1990, for the mark "MR. PITA" and design, as illustrated below,

for "pocket breads and bread chips," such registration was subsequently cancelled under Section 8 of the Trademark Act, 15 U.S.C. §1058, and thus will not be given further consideration.

Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Turning first to consideration of the respective goods and services, it is plain that, as noted by applicant in his brief, "the goods and services are different." However, as the Examining Attorney properly observes, it is well settled that goods and services need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. Instead, it is sufficient that the goods and services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). Nevertheless, applicant is correct that there is no *per se* rule that "confusion must be found to be likely wherever food items and restaurant services are provided under marks containing similar components" since, as pointed out in Jacobs v. International Multifoods Corp., 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982), "[t]o establish likelihood of confusion a party must show something more than that similar or even identical marks are used for food products and for restaurant services."

The Examining Attorney, in light thereof, supports her contention that applicant's restaurant services are closely

related to registrant's pocket breads and bread chips by relying upon the fact that the record contains over a dozen use-based third-party registrations for marks which, in each instance, are registered for restaurant and/or carry-out services, on the one hand, and bread and/or bread products, on the other. Although such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they still have some probative value to the extent that they serve to suggest that the services and goods listed therein are of the kinds which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993) and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6. Moreover, as the Examining Attorney notes in her supplemental brief, "[i]t has often been held that food products and [fast] food services are closely related." See, e.g., *Southern Enterprises, Inc., v. Burger King of Florida, Inc.*, 419 F.2d 460, 164 USPQ 204, 205 (CCPA 1970); *In re Mucky Duck Mustard Co. Inc.*, supra at 1469-70; *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1556 (TTAB 1987); *In re Best Western Family Steak House, Inc.*, 222 USPQ 827, 829 (TTAB 1984); *Roush Bakery Products Co., Inc. v. Ridlen*, 190 USPQ 445, 448 (TTAB 1976); *In re Three Chefs Corporation*, 175 USPQ 177, 178 (TTAB 1972); and *Marriott Corporation v. Top Boy International, Inc.*, 165 USPQ 642, 643 (TTAB 1970).

We concur with the Examining Attorney's conclusion that the respective services and goods are closely related. The use-based third-party registrations plainly demonstrate the requisite

"something more" in that they suggest that the services and goods listed therein are of the kinds which may emanate from a single source. Such registrations confirm that prepared or ready-to-eat foods as breads, including pocket breads, are often items featured in connection with the sandwiches or other entrées served by restaurants and carry-outs. Pita bread or rolled sandwiches, moreover, are not only increasingly popular items at restaurants and carry-outs in general, but some fast-food businesses, like applicant's restaurants, specialize in such sandwiches.<sup>4</sup> The average consumer, therefore, would view pocket breads, such as pita breads, as emanating from or sponsored by the same source as restaurant services which feature rolled or pita sandwiches, if such goods and services were to be sold under the same or substantially similar marks.

Turning, therefore, to consideration of the marks at issue, applicant argues that, as shown by the numerous third-party registrations and telephone directory excerpts which he has made of record, marks containing the terms "MR." or "MISTER" have been so commonly registered and/or used by others that "the purchasing public is used to making distinctions between a multitude of 'Mr.' and 'MISTER' marks." Applicant asserts, in

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<sup>4</sup> We judicially notice, in this regard, that Webster's New World College Dictionary (3d ed. 1997) at 1029 defines "pita" as meaning "a round, hollow, relatively flat bread of the Middle East that can be split into two layers or cut crosswise to form a pocket for a filling[.] Also pita bread". It is settled that the Board may properly take judicial notice of dictionary definitions. See, e.g., *Hancock v. American Steel & Wire Co. of New Jersey*, 203 F.2d 737, 97 USPQ 330, 332 (CCPA 1953) and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

view thereof, that registrant's mark is weak and therefore "is not entitled to broad protection."

The Examining Attorney, while admitting in her supplemental brief that "the term MR./MISTER is a common designation," contends therein that such fact does not mean that marks incorporating the terms "MR." or "MISTER" are inherently weak. To the contrary, the Examining Attorney insists that "the addition of descriptive or generic matter to courtesy titles such as MR./MISTER creates the very disparity in language that keeps these marks strong." Furthermore, in her initial brief, the Examining Attorney maintains that:

[T]he marks are not "MR." alone. They are [basically] "MR. PITA." In calling for the registrant's goods [or the applicant's services], the public does not request just any "MR." mark; they request the "MR. PITA" mark. The term "PITA" aids the public to distinguish this "MR." mark from other unrelated "MR." marks. The dominant portion of the mark is the term "MR. PITA," taken as a whole. ....

We agree with the Examining Attorney that, when the respective marks are considered in their entirety, the dominant and most distinctive literal elements thereof are, in each case, the words "MR. PITA". None of the third-party registrations furnished by applicant is for a mark which includes such words, nor do the telephone directory excerpts applicant submitted show that anyone--other than apparently applicant--uses those words in connection with restaurant services. Thus, even though there are numerous marks which have been registered, as well as many trade names which are in use, which feature the terms "MR." or "MISTER" for a variety of goods and services, including food items and

restaurants, on this record the term "MR. PITA" must be considered, in the context of pocket breads and restaurants offering rolled or pita sandwiches, as a relatively strong source indicator for registrant's goods and applicant's services.

Applicant further argues, however, "[t]he obvious differences in these design marks preclude a likelihood of confusion" because his mark "consists of the words 'MR. PITA ROLLED SANDWICHES & SALADS' in addition to a distinctive logo incorporating a stylized design of a person comprised of a rolled flat bread with lettuce and tomato peeking out of the top." The logo, applicant urges, "has a distinctive character face on a vertical roll-like shape" and "is an additional distinctive source indicator, as is evidenced by the fact that it is a separately registered trademark of Applicant, U.S. Reg. No. 1,955,050".<sup>5</sup> By contrast, applicant asserts that:

[Registrant's mark] uses a design of a pocket bread cut in half[,] with the open end filled with the words "MR. PITA" and a wheat shaft, as the horizontal body of a face-less figure which wears a hat bearing the word "INTERNATIONAL". This character has no face, is wearing oversized sneakers and is holding a sign stating "NO CHOLESTEROL! [LOW IN CALORIES!] NO OILS, FATS OR SUGARS ADDED!" .... [T]he words "MR. PITA" are in lower case stylized lettering with the dot of the

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<sup>5</sup> Applicant's claim of ownership thereof is belied, however, by the statement made earlier in his brief that applicant "is the president of Pita Franchise Corp., which owns U.S. Registration No. 1,955,050." The Examining Attorney, while acknowledging in her supplemental brief that the character mark which is the subject of such registration "functions as a source indicator," notes that "the Office records at this time indicate that Pita Franchise Corp., and not the applicant, is the owner of this registration," which covers "restaurant services". No explanation has been given, however, as to why such registration was never cited as a possible bar to registration under Section 2(d) of the statute. See TMEP §1201.07(b).

"i" forming the period for "MR.". Applicant's character and mark as a whole is totally different in its appearance, presentation, and commercial impression.

While applicant is correct that differences are apparent from a side-by-side comparison of the respective marks,<sup>6</sup> it is nevertheless the case 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 [that] the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 753 F.3d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ...." 224 USPQ at 751.

Here, in the case of registrant's "MR. PITA" and design mark, the descriptive words appearing on the sign held by an anthropomorphic pita character are essentially informational and devoid of trademark significance. Such words also appear in much smaller size lettering than the more prominently displayed words

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<sup>6</sup> Such a comparison, of course, is not the proper test to be used in determining the issue of likelihood of confusion since it is not the ordinary way that consumers will be exposed to the marks. Rather, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks or service marks. See, e.g., In re United Service Distributors, Inc., 229 USPQ 237, 239 (TTAB 1986); and In re Solar Energy Corp., 217 USPQ 743, 745 (TTAB 1983).

"MR. PITA". Likewise, applicant's "MR. PITA" and design mark not only contains an anthropomorphic pita character, but the words "ROLLED SANDWICHES & SALADS" are merely descriptive, if not generic, terms for the foods featured in applicant's restaurants and consequently are lacking in source indicating significance. Moreover, such words are clearly subordinate elements inasmuch as they appear in a much smaller and thinner style of lettering than the more boldly displayed words "MR. PITA". We therefore agree with the Examining Attorney that, when considered in their entirety, it is the words "MR. PITA" which "are the dominant and most significant features of the marks because consumers will call for the goods or services in the marketplace by that portion." See, e.g., In re Appetito Provisions Co., supra at 1554; and In re Drug Research Reports, Inc., 200 USPQ 554, 556 (TTAB 1978). The anthropomorphic pita characters, while visually not identical, nevertheless are not sufficiently different in their overall appearance, when allowance is made for the fallibility of the average consumer's memory, so as to distinguish marks which are used in connection with products and services that constitute or feature, respectively, pocket breads and rolled sandwiches. As a whole, applicant's "MR. PITA" mark, including its pita character design, is substantially similar in sound, appearance and meaning to registrant's "MR. PITA" mark, with its pita character design, and such marks project essentially the same commercial impression.

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We accordingly conclude that customers, familiar with registrant's "MR. PITA NO CHOLESTEROL! LOW IN CALORIES! NO OILS, FATS OR SUGARS ADDED!" and design mark for, inter alia, pocket breads, would be likely to believe, upon encountering applicant's substantially similar "MR. PITA ROLLED SANDWICHES & SALADS" and design mark for restaurant services, that such closely related goods and services emanate from or are otherwise sponsored by or affiliated with the same source. In particular, even to those consumers who might notice the relatively minor differences in the anthropomorphic pita characters in such marks, it would not be unreasonable for them to assume, for example, that applicant has expanded his operations to include sales of the pocket breads used in the pita sandwiches offered by his restaurants.<sup>7</sup>

**Decision:** The refusal under Section 2(d) is affirmed.

R. F. Cissel

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<sup>7</sup> See, e.g., *Southern Enterprises, Inc., v. Burger King of Florida, Inc.*, supra [confusion is likely between mark "WHOPPABURGER" for sandwiches and mark "HOME OF THE WHOPPER" for drive-in restaurant services]; *In re Mucky Duck Mustard Co. Inc.*, supra at 1469-70 [confusion is likely between mark "MUCKY DUCK" and duck design for mustard and mark "THE MUCKY DUCK" and duck design for restaurant services]; *In re Appetito Provisions Co. Inc.*, supra at 1556 [confusion is likely between mark "APPETITO" and design for Italian sausages and mark "A APPETITO'S INC." and sandwich design for restaurant services]; *In re Best Western Family Steak House, Inc.*, supra [confusion is likely between mark "BEEF MASTER" for frankfurters and bologna and mark "BEEFMASTER" for restaurant services]; *Roush Bakery Products Co., Inc. v. Ridlen*, supra [confusion is likely between mark "HILLBILLY" for bread and "HILLBILLY RESTAURANT" for restaurant services]; *In re Three Chefs Corporation*, supra [confusion is likely between mark "WISHBONE" for frozen poultry and mark "IT'S WISHBONE SWEET" for restaurant services]; and *Marriott Corporation v. Top Boy International, Inc.*, supra [confusion is likely between mark "BIG BOY" for hamburger sandwiches and mark "TOP BOY" for drive-in restaurant services].

**Ser. No.** 74/468,937

T. J. Quinn

G. D. Hohein  
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