

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB MARCH 22, 00

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Michael L. Whalen

Serial No. 75/246,404

G. Brian Pingel of Pingel & Templer, P.C. for Michael L. Whalen.

Raul Cordova, Trademark Examining Attorney, Law Office 114
(Conrad Wong, Managing Attorney).

Before Cissel, Hanak and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Michael L. Whalen filed an application to register the mark THUNDER BAY GRILLE for "restaurant services." The intent-to-use application was filed on February 24, 1997. Prior to the first Office Action, applicant filed on June 4, 1997, an amendment to allege use along with copies of brochures describing its restaurant. Later, at the request of the Examining Attorney, applicant disclaimed the

exclusive right to use GRILLE apart from the mark in its entirety.

The Examining Attorney has issued a final refusal of registration 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 THUNDER BAY, previously registered for "sauces for meat, fish, poultry, pasta, desserts, namely cakes, cookies, pies and ice cream, mixes for making breads, waffle pancakes and cakes,"¹ that, as used on or in connection with applicant's goods, it is likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the Examining Attorney have filed briefs, but a hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See, *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion in this case, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities

¹ Registration No. 1,971,046, issued April 30, 1996, to Loetitia St. James.

between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entireties, are similar in terms of appearance, sound, connotation or commercial impression. Although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. *See, In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

As the Examining Attorney notes, the THUNDER BAY portion of applicant's mark is identical to registrant's mark. Regarding applicant's mark, we find the term THUNDER BAY to be the dominant portion of the mark because, based on the record before us, it is arbitrary in connection with applicant's identified services,² and the additional term in

² Based on the dictionary definition of record indicating that "Thunder Bay" is, variously, a river emptying into, and an inlet of, Lake Huron in Michigan, and a city and region on Lake Superior in Ontario, the Examining Attorney contends that both marks are suggestive in relation to the respective identified goods and services. However, there is no evidence that either of these "Thunder Bay" regions are known, generally, by the public, or whether they are obscure. Nor is there any evidence of a connection between either applicant's services or registrant's goods and any of the geographic regions so named. Applicant's brochure indicates that its restaurant is located in Iowa.

applicant's mark, GRILLE, is admittedly a merely descriptive, if not generic, term in connection with the identified services. Thus, we find that the marks, when considered in their entireties create substantially similar commercial impressions.

We consider, next, the services of applicant and the goods of registrant. It is quite true that these goods and services are different. However, it is well settled that the goods and services of an applicant and registrant need not be similar or even competitive in order to support a holding of likelihood of confusion, it being sufficient for the purpose if such goods and services are related in some manner and/or if the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under conditions that would give rise, because of the marks used thereon, to the mistaken belief that they emanate from or are in some way

The fact that, in the brochure, the terms "Thunder Bay" and "Grille" are separated by a fisherman with a fish on his line does not impart any significance to the "Thunder Bay" portion of applicant's mark. The style of cuisine is referred to in the brochure as "unique northern lodge style dining," and there is no evidence that this is connected in any way to the term "Thunder Bay." Thus, the Examining Attorney's conclusion, echoed by applicant, that "Thunder Bay" is suggestive of applicant's restaurant services is unfounded.

Even if "Thunder Bay" had been considered suggestive in connection with either, or both, applicant's services and registrant's goods, it would remain our opinion that the "Thunder Bay" portion of applicant's mark is the dominant portion of that mark, in view of the admittedly descriptive, perhaps even generic, nature of the additional term, "Grille."

associated with the same source. See, *In re Kangeroos U.S.A.*, 223 USPQ 1025, 1026-1027 (TTAB 1984), and cases cited therein.

In this regard, the Examining Attorney submitted copies of numerous third-party registrations for both restaurant services, as identified in this application, and various food items, including those identified in the cited registration. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467 (TTAB 1988). This does not establish a *per se* rule with respect to restaurant services and food items. However, it is reasonable to conclude that the goods identified in the cited registration, sauces, pastas, desserts and mixes for baked goods, are the types of goods that a restaurant serving popular sauces, pastas and desserts would market separately. Further, a number of the third-party registrations of record include both restaurant services and, variously, the goods identified in this application.

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See In re Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999) (AZTECA MEXICAN RESTAURANT, with MEXICAN RESTAURANT disclaimed, for restaurant services held confusingly similar to AZTECA, in script and with design, for, variously, taco shells, tortillas and chunky salsa).

We note that all of the third-party registrations of record are for *identical* marks for both restaurant services and various food items, whereas the case before us involves substantially similar, but not identical, marks. However, because the term GRILLE in applicant's mark is so highly descriptive, if not generic, in connection with restaurant services, we find that it adds very little to the overall commercial impression of applicant's mark, which is clearly dominated by the term THUNDER BAY. *See In re Dixie Restaurants Inc.*, 41 USPQ2d 1531 (Fed. Cir. 1997) (upholding the Board's refusal to register THE DELTA CAFÉ and design in view of the registration for DELTA, both including restaurant services, the Court stated "neither the design element nor the generic term 'café' offers sufficient distinctiveness to create a different commercial impression"). The proper test is not whether applicant's mark can be distinguished from registrant's mark when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their

overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific, impression of trademarks. See, *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, THUNDER BAY GRILLE, and registrant's mark, THUNDER BAY, their contemporaneous use on the respective goods and services involved in this case is likely to cause confusion as to the source or sponsorship of such goods and services. Consumers familiar with applicant's mark for restaurant services are likely to believe that registrant's goods are a line of food products served in applicant's restaurants, or vice versa.

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Decision: The refusal to register is affirmed.

R. F. Cissel

C. E. Walters
Administrative Trademark
Judges, Trademark Trial and
Appeal Board