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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re AIT, Inc.

Serial Nos. 75/323,782; 75/323,783; 75/323,785; 75/323,786; and 75/323,787

Request for Reconsideration

Ira S. Dorman, Esq. for AIT, Inc.

Shanna Blaustein, Trademark Examining Attorney, Law Office 108 (David Shallant, Managing Attorney).

Before Simms, Quinn and Rogers, Administrative Trademark Judges.

Opinion by Rogers, Administrative Trademark Judge:

The Board, in a decision dated October 4, 2000, affirmed the Examining Attorney's refusal of applicant's applications no. 75/323,782, 75/323,783, 75/323,785, 75/323,786, and 75/323,787, for registration, respectively, of the marks KEY LARGO LIMES, KEY WEST WAHOOS, MARCO ISLAND MANATEES, SANIBEL STINGRAYS, and SIESTA KEY SNOOKS. Each

application is based on applicant's allegation of a bona fide intention to use the mark for goods identified as "men's, women's and children's clothing, namely, shirts, sweatshirts, T-shirts, jackets, coats, robes, sweaters, hats, caps, skirts, dresses, sweatpants, trousers, slacks, shorts, sleepwear and neckwear."

The marks were refused registration under Section 2(e)(3) of the Trademark act on the ground that they are primarily geographically deceptively misdescriptive of the goods on or in connection with which applicant claims to have an intent to use its marks. In addition, two of the marks were refused registration on the additional ground that, under Section 2(d) of the Trademark Act, they are unregistrable because of a likelihood of confusion with previously registered marks.

Applicant has filed a request for reconsideration. Applicant does not dispute the Board's finding that each of its marks have a primarily geographic connotation. Nor does applicant retreat from its prior admission that its goods will not come from the places named in its marks. Applicant's only complaint is with that portion of the Board's decision which found a goods/place association, i.e., that members of the public would believe the origins of the goods are the places named in the marks.

First, applicant argues that its goods include more than just t-shirts and that there is no evidence that its marks will be "emblazoned" on its goods in a manner that would prominently display the marks. This point is mystifying, as applicant analogized the nature of its goods to "T-shirts, sweatshirts, and other articles of clothing bearing the names of sports teams," stated that its t-shirts are "representative of the entire line of goods" and asserted (as the Board acknowledged in its order) that each of its marks "is or will be" applied to the goods "by printing it prominently thereon."

Applicant's second complaint is that the Board did not define the term "tourist destination" when it held that the evidence established that the places named in applicant's marks are aptly characterized as such, and that the Examining Attorney had not so characterized the involved places. The term "tourist destination" hardly seems in need of definition. Applicant cites no authority for its apparent proposition that the Board cannot employ common lexicon in its evaluation of evidence without citation to dictionaries. Likewise, applicant cites no authority for the proposition that the Board cannot consider evidence for what it shows on its face. Moreover, applicant appears to have similarly assessed some of the evidence, for it stated

"the evidence presented by the Trademark Attorney establishes that, if Key Largo is famous for anything, it is as 'The dive capital of the world.'" It requires no leap of faith to conclude that a place acknowledged as the "dive capital of the world" would be a "tourist destination."

The request for reconsideration is denied in regard to the refusals of registration under Section 2(e)(3) of the Act.

Turning to the Section 2(d) refusals, applicant essentially argues that the Board found the connotations of applicant's marks to be primarily geographic; that the Board found applicant's marks and the marks in the two cited registrations to be "indistinguishable" as designations of source; and that these findings are irreconcilable insofar as the cited registrations contain no geographic terms.

The Board did not find applicant's marks and the cited marks "indistinguishable." Such a characterization of the marks would be equivalent to finding the marks virtually identical. The Board only found that there exists a likelihood of confusion. Similarity of marks, including their connotations, is only one *duPont* factor. A likelihood of confusion can be found even where, as in

these cases, the marks are not virtually identical. They need only be similar enough that, when other *duPont* factors are considered, e.g., the legally identical nature of at least some of the goods, channels of trade and classes of consumers, a finding of likelihood of confusion is warranted.

Equally infirm is applicant's argument that it is irreconcilable for the Board to find the connotations of applicant's marks primarily geographic, in the context of assessing the Section 2(e)(3) refusal, yet to also find that they are similar enough to marks with no geographic connotations that a likelihood of confusion exists. The assessment of applicant's marks under Section 2(e)(3) is done from the perspective of the average consumer and required consideration of the marks, the goods, and the proposed nature of display of the marks on the goods. The assessment of whether confusion might result from contemporaneous use of applicant's marks and the cited marks, for legally identical goods marketed in the same channels of trade to the same classes of consumers, required consideration of, inter alia, whether those familiar with the cited marks would, when confronted with applicant's marks, assume some relation. Consumers could reach such a conclusion, and thereby be confused, mistaken

or deceived, even if they attributed somewhat different connotations to the marks. For example, consumers could assume the different marks are variations reflecting different product lines from the same producer, or that applicant's marks are updated or modified versions of the cited marks.

The request for reconsideration is denied in regard to the refusals of registration under Section 2(d) of the Act.