

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      MAY 3,00

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Milnot Company  
v.  
Federated Foods Limited

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Opposition No. 94,226 to application Serial No. 74/263,926,  
filed on April 8, 1992

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Andrew B. Mayfield of Armstrong, Teasdale, Schlafly & Davis for  
Milnot Company.

Robert L. Epstein of James & Franklin, LLP, for Federated Foods  
Limited.

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Before Hohein, Rogers and McLeod, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Federated Foods Limited has filed an application to register the mark "SUNSHINE" for "meats, sausage rolls, lobster, scallops, shrimp, vegetable and peanut oil, vegetable and animal shortening, beef fat, soup mixes, and fruit topping, nut topping and whipped topping, pickles, jam, marmalade, jellies, jelly powders, fruit fillings, peanut butter, processed mushroom and walnuts, fish and fowl" in International Class 29, "salt, spices, mustard, relish, ketchup, vinegar, sauces, flavoring syrups, pancake syrup, pies, honey, gravies, gravy mixes and puddings,

salad dressings and mayonnaise" in International Class 30 and "orange juice, syrups for use in making soft drinks, and fruit drinks" in International Class 32.<sup>1</sup>

**Milnot Company**, as set forth in its amended pleading, has opposed registration on the ground that, "since 1978, [it] has been, and is now, using its trademark SUNSHINE in connection with food products distributed to the consuming public through retail grocery chain stores and the like"; that it is the owner of federal registrations for the following marks and goods:

(1) the mark "SUNSHINE" for "evaporated filled milk"<sup>2</sup> and "sweetened condensed milk";<sup>3</sup>

(2) the mark "SUNSHINE BRAND" for "butter";<sup>4</sup> and

(3) the mark "SUNSHINE" and design, as shown below,

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<sup>1</sup> Ser. No. 74/263,926, filed on April 8, 1992, which is based upon Canadian Reg. No. 199,414, issued on May 24, 1974.

<sup>2</sup> Reg. No. 1,140,479, issued on October 14, 1980, which sets forth dates of first use of January 22, 1979; combined affidavit §§8 and 15.

<sup>3</sup> Reg. No. 1,250,587, issued on September 6, 1983, which sets forth dates of first use of October 1981; combined affidavit §§8 and 15.

<sup>4</sup> Reg. No. 1,131,910, issued on March 11, 1980, which sets forth dates of first use of January 31, 1924; combined affidavit §§8 and 15. The word "BRAND" is disclaimed. While, at present, there is no indication as to whether such registration has been renewed, the six-month grace period for effecting a renewal thereof has not yet expired.

for "evaporated milk";<sup>5</sup>

that there is no issue as to opposer's priority; and that applicant's mark, which "is identical to Opposer's SUNSHINE marks," so resembles such marks as to be likely, when applied to applicant's goods, to cause confusion, mistake or deception.

Applicant, in its answer, has denied the allegations of the amended notice of opposition.

The record consists of the pleadings; the file of the involved application; and certified copies of opposer's pleaded registrations showing that, in each instance, the registrations are subsisting and owned by opposer. Neither party took testimony or properly introduced any other evidence. In addition, neither party filed a brief<sup>6</sup> or requested an oral hearing.

Opposer's priority of use of its various "SUNSHINE" marks, with the possible exception of its "SUNSHINE BRAND" mark, is not in issue since, as noted previously, the certified copies of its pleaded registrations demonstrate that the registrations are subsisting and owned by opposer. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 110 (CCPA 1974). The only issue to be determined, therefore, is

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<sup>5</sup> Reg. No. 1,150,549, issued on April 7, 1981, which sets forth dates of first use of July 14, 1978.

<sup>6</sup> Inasmuch as it was apparent, from the motion for reconsideration filed by opposer on February 27, 1998 after the Board entered judgment against opposer under Trademark Rule 2.128(a)(3), that despite its failure to file a brief it has not lost interest in this case, the Board, in an order issued on June 15, 1999, allowed the parties until August 16, 1999 to finalize any settlement in this proceeding. No response thereto, however, has been received.

whether applicant's "SUNSHINE" mark, when used in connection with one or more of the goods identified in its involved application, so resembles opposer's various "SUNSHINE" marks for, inter alia, evaporated filled milk, sweetened condensed milk and evaporated milk as to be likely to cause confusion, mistake or deception as to source or sponsorship.

Upon consideration of the pertinent factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), for determining whether a likelihood of confusion exists, we find that, on this record, opposer has failed to satisfy its burden of demonstrating that confusion as to source or sponsorship is likely to occur. In particular, while applicant's "SUNSHINE" mark is identical, in terms of sound, meaning and commercial impression, to opposer's "SUNSHINE" marks, there is simply no evidence which shows that any of applicant's goods are so closely related to any of opposer's goods that the purchasing public would be likely to attribute a common source thereto when marketed under the respective marks. See, e.g., *In re Mars, Inc.*, 741 F.2d 395, 222 USPQ 938, 938-39 (Fed. Cir. 1984). It is settled, in this regard, that there is no "per se" rule that all food products sold within supermarkets and grocery stores are related merely by virtue of their being sold through the same retail establishments. See, e.g., *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 152 (CCPA 1978); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *Recot Inc. v. Becton*, 50 USPQ2d 1439, 1445 (TTAB 1998); *Hi-*

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Country Foods Corp. v. Hi Country Beef Jerky, 4 USPQ 1169, 1171-72 (TTAB 1987); and In re August Storck KG, 218 UPSQ 823, 825 (TTAB 1983). Here, the respective goods of the parties, which on their face are distinctly different in nature, have not been shown to be of the kinds that, for instance, would normally be sold in the same sections of food stores or would typically be expected to originate from the same entity. Moreover, there has been no demonstration by opposer that its "SUNSHINE" marks are famous and, consequently, would be entitled to a broad ambit of protection. See, e.g., Kenner Parker Toys Inc. v. Rose Art Industries Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 862, 113 S.Ct. 181 (1992). Accordingly, the opposition must fail.

**Decision:** The opposition is dismissed.

G. D. Hohein

G. F. Rogers

L. K. McLeod  
Administrative Trademark Judges,  
Trademark Trial and Appeal Board