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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Shah Trading Corporation

Serial No. 75/439,223

Dillis V. Allen, Esq. for applicant.

Linda M. King, Trademark Examining Attorney, Law Office 101
(Jerry Price, Managing Attorney).

Before Quinn, Hohein and Chapman, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Shah Trading Corporation to register the mark SUGAM for "Indian lentils" (in International Class 29) and "Indian pastes, namely, garlic paste, ginger paste, ginger and garlic pastes, green chili paste; Indian chutneys, namely, coriander chutney, mint chutney, coconut chutney, tamarind chutney, garlic chutney and red pepper chutney; Indian flours, namely, rice flour,

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corn flour; Indian spices, namely, mustard seeds, fenugreek seeds, nutmeg powder, cloves" (in International Class 30).¹

The Trademark Examining Attorney refused registration in both classes under Section 2(d) on the ground that applicant's mark, when used in connection with applicant's goods, so resembles the previously registered mark SAGAM and the mark shown below



both registered to the same entity, and both for "pepper-based hot sauce, vinegar, honey and salt" (in International Class 30).²

¹ Application Serial No. 75/439,223, filed February 23, 1998, alleging first use anywhere and first use in commerce on February 1, 1998 for both classes. The application includes a statement that the term "sugam" is an Indian term that, when translated into English, means "simple, easy, or light." In its appeal brief, applicant proposed an amendment to the identification of goods. More specifically, applicant amended the identification to more narrowly define the products listed as "Indian" as indicated above. The Examining Attorney, in her brief, accepted the amendment. Accordingly, we have analyzed the likelihood of confusion issue on the basis of the amended identification of goods.

² Registration Nos. 1,242,258 and 1,242,261, issued June 14, 1983, combined Sections 8 and 15 affidavits accepted and acknowledged, respectively. Registration No. 1,242,261 includes the following statement: "The device on the left includes four S's and the fanciful Arabic design on the right translates as 'Sagam.'"

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney submitted briefs. An oral hearing was not requested.

Applicant argues, in urging that the refusal be reversed, that its Indian food items are sold only in Indian retail stores, whereas registrant's Arabic food items would be sold only in Arabic retail stores. Thus, according to applicant, the goods would not be sold in the same stores and the same customers would not encounter the respective marks. Applicant also argues that the marks are pronounced differently; that although its mark has a meaning in the Indian (Gujarati) language, the term in registrant's marks has no meaning; and that the goods listed in the involved application are uniquely Indian. Applicant points to the absence of any instance of actual confusion, and states that registrant has been out of business since 1984, (that is, shortly after issuance of the cited registrations).

In support of its position, applicant submitted the affidavit of its president, Kaushik Shah. Mr. Shah states, in part, that applicant's goods are sold exclusively to stores that cater to Indian origin customers in the United States; and that due to diverse cultures and differences in cooking methodology and tastes, Indian consumers do not

patronize Arabic food markets, and Arabic consumers do not shop at Indian food markets. Applicant also submitted a document from the secretary of state for the state of Texas.

The Examining Attorney maintains that the similarities between applicant's mark and the cited marks outweigh the differences. As to the goods, the Examining Attorney contends that they are related, pointing out that the limited trade channels relied upon by applicant are not reflected in the identifications of goods in the application and the cited registrations. In response to applicant's claim that registrant is no longer in business, the Examining Attorney states that the cited registrations are still subsisting and, thus, are valid Section 2(d) cites. In support of the refusal, the Examining Attorney submitted third-party registrations in an effort to show that goods of the type involved herein may emanate from a common source under one mark.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

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similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods.

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

Turning first to compare the goods, we start with the premise that they need not be identical or even competitive to support a holding of likelihood of confusion. It is sufficient that the goods are related or that conditions surrounding their marketing are such that they are encountered by the same persons who, because of the relatedness of the goods and the similarities between the marks, would believe mistakenly that the goods originate from or are in some way associated with the same producer. In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978).

Applicant's Indian lentils, pastes, chutneys, flours and spices are similar and/or related to registrant's pepper-based hot sauce, vinegar, honey and salt. The goods are all food items, and the relatedness of such specific items as pastes, spices, hot sauce, vinegar, honey and salt is undeniable. All are used to flavor foods, and any combination of the items may be used in any one recipe. We find that the requisite relationship between applicant's and registrant's goods exists in this case, and that this

du Pont factor weighs in favor of a finding of likelihood of confusion.

In comparing the goods, applicant places great significance on its assertion that its goods are sold only in Indian stores, whereas registrant's goods are likely sold only in Arabic stores, and that there will be no crossover in clientele between the two different types of stores. The perceived differences in trade channels are largely irrelevant for purposes of the likelihood of confusion issue before us. Although applicant's identification of goods indicates that the food items are "Indian," there is no limitation to the effect that the items are sold only in Indian grocery stores. See: Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987) [the goods must be compared as recited in the involved application and registration]. As identified, applicant's goods are presumed to be sold in ordinary grocery stores as well. Moreover, nothing in the involved registrations limits the trade channels in which registrant's food items are sold. We must assume that applicant's and registrant's goods move through all normal and usual channels of trade and methods of distribution. Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1788 (Fed.

Cir. 1990); and *Squirtco v. Tomy Corporation*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). As identified, applicant's and registrant's goods must be presumed to travel in the very same trade channels, such as ordinary grocery stores and food markets that cater to consumers of all nationalities. Further, we must presume that the same classes of purchasers purchase the goods. In *re Elbaum*, 211 USPQ 639 (TTAB 1981).

The goods listed in the involved application and registrations are everyday items used in food preparation. All of the items are relatively inexpensive, subject to frequent replacement, and often are bought on impulse. Ordinary consumers are not likely to exercise any great care in purchasing these goods. *Specialty Brands, Inc. v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). These facts weigh in favor of a finding of likelihood of confusion.

In reaching our decision, we have taken into account the use-based third-party registrations submitted by the Examining Attorney.³ The third-party registrations show the same marks registered by the same entity for both types of goods listed in the involved application and the cited

³ The registrations based under Section 44 of the Act are of no probative value.

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registrations. Although the third-party registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods identified therein are of a kind that may emanate from a single source. *Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Insofar as the marks are concerned, the test is not whether applicant's mark SUGAM and registrant's marks SAGAM and SAGAM and design can be distinguished when subjected to side-by side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to cause confusion. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks encountered in the marketplace. *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, *aff'd*, Appeal No. 92-1086, (Fed. Cir. June 5, 1992); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

With respect to the typed marks, applicant's mark SUGAM differs from registrant's mark SAGAM by only one letter. With only the minor second letter difference, the marks are certainly similar in appearance. Although we note applicant's argument that the marks sound very different when spoken, it has often been stated that there is no correct pronunciation of a trademark. In re Great Lakes Canning, Inc., 227 USPQ 483 (TTAB 1985). Thus, while applicant has carefully explained the correct pronunciation of the respective marks, consumers may very well pronounce the marks in a variety of ways, making the marks' sound more alike than when "correctly" pronounced. As to connotation, Mr. Shah asserts that applicant's mark means "easy going" in the Indian (Gujarati) language, whereas registrant's mark has no meaning. Although applicant may be correct, we suspect that most consumers in this country are not familiar with the Gujarati language, and any difference in meaning will be completely lost on them. In sum, we find that the terms SUGAM and SAGAM are similar in overall commercial impressions.

The similarities between SUGAM and SAGAM just discussed obviously apply as well when we compare applicant's mark with registrant's logo mark, SAGAM and design. Further, although the marks must be considered in

their entireties, including the design features of registrant's logo mark, 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. In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). In the present case, SAGAM is the dominant feature of registrant's logo mark. When a mark consists of a word and a design, the word portion is more likely to be impressed upon a purchaser's memory. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987). That would be the case here. The SAGAM portion of registrant's mark will be most likely impressed upon purchasers' memories and used by purchasers in calling for registrant's goods.

The term SAGAM in registrant's mark, according to Mr. Shah, has no meaning. Based on the record before us, therefore, the term would appear to be arbitrary as applied to the relevant goods. There is no evidence of any third-party uses or registrations of the same or similar marks in the food industry. This favors a finding of likelihood of confusion.

In sum, we find that applicant's mark is sufficiently similar to both of registrant's marks that, when applied to

their respective goods, consumers are likely to be confused.

The absence of evidence of actual confusion is not determinative. Given the ex parte nature of this proceeding, registrant does not have an opportunity to be heard on this point. Further, it is not necessary to show actual confusion in establishing likelihood of confusion. *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983); and *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991).

Lastly, with respect to applicant's claim that registrant is no longer in business, it has submitted a document from the secretary of state of the state of Texas. The document indicates that registrant, incorporated under the laws of Texas, was deemed to have forfeited its corporate charter by the secretary of state on February 20, 1984 pursuant to the franchise taxation provisions of the Texas statutes. The document also indicates that registrant has filed no application for reinstatement. Mr. Shah, in his affidavit, further states that his investigation, revealing the absence of any SAGAM brand products in the marketplace, leads to the reasonable conclusion that registrant is no longer in business.

Notwithstanding applicant's remarks and the Texas document, the certificate of registration is prima facie evidence, pursuant to Section 7(b) of the Act, of the validity of the registration and registrant's exclusive right to use the mark in connection with the goods specified. Applicant's argument that the registered mark is essentially abandoned is a collateral attack on the validity of the registration that cannot be entertained in the context of an ex parte proceeding. Rather, the appropriate forum for such a challenge is a cancellation proceeding. In re Dixie Restaurants, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997); TMEP §1207.01(d)(iv) (3rd ed. 2002).

We conclude that consumers familiar with registrant's pepper-based hot sauce, vinegar, honey and salt sold under the SAGAM marks would be likely to mistakenly believe, upon encountering applicant's mark SUGAM for Indian lentils, pastes, chutneys, flours and spices, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusals to register are affirmed.