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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Trademark Management Company

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Serial No. 78076460

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Bert A. Collison of Duane Morris LLP for Trademark Management Company.

Amy E. Hella, Trademark Examining Attorney, Law Office 110 (Chris Pedersen, Managing Attorney).

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Before Hanak, Hairston and Walters, Administrative Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge:

Trademark Management Company (applicant) seeks to register in typed drawing form BREAKFAST BITES for "frozen, packaged or prepared Mexican foods, namely, corn tortillas with chicken, beef, egg, fruit or cheese fillings, flour tortillas with chicken, beef, egg, fruit or cheese fillings." The intent-to-use application was filed on July 30, 2001. At the request of the Examining Attorney, applicant disclaimed the exclusive right to use BREAKFAST apart from the mark in its entirety.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis

that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark BREAKFAST BITE, previously registered in typed drawing form for "sandwiches; namely, sausages and buns for consumption on or off the premises." Registration No. 1,688,000.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). Indeed, applicant acknowledges this very proposition at page 4 of its appeal brief.

Considering first the marks, we find that they are virtually identical. Obviously, applicant's mark BREAKFAST BITES is simply the plural form of registrant's mark BREAKFAST BITE. Indeed, at page 5 of its brief, applicant

acknowledges the obvious, namely, that the difference in the marks "is slight."

Thus, the first Dupont "factor weighs heavily against applicant" because applicant's mark is virtually identical to the registered mark. In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984).

Turning to a consideration of applicant's goods and the goods of the cited registration, we note that because the marks are virtually identical, their contemporaneous use can lead to the assumption that there is a common source "even when [the] goods or services are not competitive or intrinsically related." In re Shell Oil Co., 922 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). However, in this case we find that applicant's goods and registrant's goods are, at a minimum, very closely related. As their virtually identical names imply, both are food items for consumption at breakfast, as well as other times, a point conceded by applicant at page 3 of its brief. Moreover, both sandwiches consisting of sausages and buns (registrant's goods) and corn and flour tortillas filled with, among other things, meat (applicant's goods) can be eaten by hand without the need for utensils.

In sum, given the fact that the marks are virtually identical and that the goods are very closely related, we find that there exists a likelihood of confusion, and accordingly affirm the refusal to register.

One final comment is in order. At page 2 of its brief applicant argues that the trade channels for its tortillas and registrant's sandwiches are different because registrant is the Southland Corporation and hence registrant's sandwiches would only be sold in registrant's 7-Eleven convenience stores. Not only has applicant failed to offer any proof to support the latter contention, but more importantly, even if this contention were proven to be true, it would have no bearing on the issue of likelihood of confusion in this Board proceeding. Put quite simply, the cited registration contains no language in any way restricting where registrant's sandwiches will be sold, much less restricting the sale of such sandwiches solely in registrant's 7-Eleven convenience stores. It is well settled that in Board proceedings, "the question of likelihood of confusion must be determined based on analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited [in the cited] registration rather than what the evidence shows the goods and/or

Ser. No. 78076460

services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

Decision: The refusal to register is affirmed.