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February 1, 2005  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Mama Sita's Holding Company, Inc.

Serial No. 76238639

Stephen J. Quigley and Lawrence E. Abelman of Abelman Frayne & Schwab for Mama Sita's Holding Company, Inc.

Susan Leslie DuBois, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Quinn, Walters and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Mama Sita's Holding Company, Inc. seeks registration on the Principal Register of the mark shown below:



for goods identified in the application, as amended:

"Fruit preserves [and] coconut milk," in International Class 29; and

"Frozen confections, ice cream, frozen fruit, frozen vegetables, frozen yogurt, frozen meats, frozen poultry, [and] frozen seafood," in International Class 30.<sup>1</sup>

<sup>1</sup> Application Serial No. 76238639 was filed on April 9, 2001 by Marigold Commodities Corporation, a corporation of the Philippines, based upon applicant's allegation of a *bona fide* intention to use

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register this mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods, so resembles the mark MAMACITA registered for goods identified as "vegetable-based seasonings, namely, recaito and sofrito"<sup>2</sup> also in International Class 30, as to be likely to cause confusion, to cause mistake or to deceive.<sup>3</sup>

The Trademark Examining Attorney and applicant have fully briefed the case. Applicant did not request an oral hearing before the Board. We affirm the refusal to register.

In arguing for registrability, applicant contends that the marks create totally different commercial impressions;

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the mark in commerce. The application was subsequently assigned to Mama Sita's Holding Company, Inc., also a corporation of the Philippines. This assignment was recorded with the Assignment Branch of the United States Patent and Trademark Office at Reel 2582, Frame 328.

<sup>2</sup> Reg. No. 2201115 issued to Mamacita Inc. on November 3, 1998, Section 8 affidavit accepted; Section 15 affidavit acknowledged. The registration notes that the English language translation of the Spanish language word "mamacita" is "mommy."

<sup>3</sup> The initial refusal to register was based on two additional registrations (Reg. Nos. 1829935 and 2258873, both for MAMACITA'S registered in connection with "fajitas" and "tortillas" respectively, and both owned by ConAgra, Inc.). Applicant's predecessor in interest, Marigold Commodities Corporation, was the plaintiff in Canc. Nos. 92042183 and 92042181, filed against ConAgra, Inc.'s two registrations, respectively. The '183 proceeding against '935 ended in May 2004 with the petition for cancellation being granted under Fed. R. Civ. P. 55 when ConAgra, Inc. failed to file an answer, and the '181 proceeding against '873 ended with a consent agreement between the parties.

that applicant's identified items are different in character from registrant's goods and would not normally be sold in the same section of retail food stores as would registrant's seasonings; that the MAMACITA mark is weak as applied to food products; that applicant had an earlier, now-cancelled registration at the time when a third party got a registration for MAMACITA for "fajitas"<sup>4</sup>; and that at this point, given the registrations and applications made a part of this record, no one party can claim an exclusive use extending beyond rights to a specific mark for specifically enumerated goods.

By contrast, the Trademark Examining Attorney contends that the marks create highly similar overall commercial impressions; that these goods are definitely related and arguably complementary; that the goods would move through the same channels of trade to the same classes of ordinary consumers; and finally, that third-party registrations are accorded little probative value on the question of likelihood of confusion, even when, in case cited by applicant, the third-party registrations had been registered for goods that

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<sup>4</sup> Applicant's earlier Reg. No. 1658369 was for MAMA SITA'S used in connections with "spices and sauces" issued to Marigold Commodities Corporation on September 24, 1991; cancelled Sec. 8. However, it was still extant on April 5, 1994, when ConAgra's Reg. No. 1829935, (see footnote 3, *supra*) issued (as noted earlier, also now cancelled by applicant's predecessor-in-interest).

were more closely related to those registrant's and applicant's goods than is the case herein.

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 issue of likelihood of confusion. 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 similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

We turn first to the du Pont factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound and connotation. The proper test for determining the issue of likelihood of confusion is the similarity of the general commercial impression engendered by the marks. Due to the consuming public's fallibility of memory, the emphasis is on the likely recollection of the average customer, who normally retains a general rather than a specific impression of trademarks or service marks. Spoons Restaurants, Inc. v. Morrison, Inc., 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992); and In re Steury Corporation, 189 USPQ 353 (TTAB 1975). Both applicant and the Trademark Examining Attorney recognize the well-

established principle that, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, while the marks are compared in their entireties, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." In re National Data Corp., 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). If both words and a design comprise the mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them in asking for the goods and/or services. In re Appetito Provisions Co., 3 USPQ2d 1553, 1554 (TTAB 1987); and Kabushiki Kaisha Hattori Tokeiten v. Scutto, 228 USPQ 461, 462 (TTAB 1985). See also Giant Food, Inc. v. Nation's Food Service, Inc., 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

Applicant argues that its mark is distinguished from the cited mark (the word mark MAMACITA in a typed drawing format) because it incorporates the unique component SITA'S; in its mark, MAMA and SITA'S are separate components; while the cited mark is a Spanish language word, its mark suggests the Italian language; applicant's mark is presented in the possessive

form; and applicant's mark has stylized letters with the addition of a design component - the portrait of Mama Sita.



**Mama Sita's**

MAMACITA

In turn, the Trademark Examining Attorney contends that in this case, it is most significant that the marks are phonetic equivalents, despite the fact that there are slight differences in the exact formatting of the two marks. For example, the Trademark Examining Attorney agrees that the applicant has two words while registrant has only one; that applicant spells the second to last syllable of its mark with a letter "s" rather than the letter "c"; and that applicant has adopted the possessive form of the word, "Sita." Nonetheless, the Trademark Examining Attorney disagrees with applicant by contending that the words MAMA SITA'S in applicant's mark merit much greater weight in determining likelihood of confusion than does the design feature. Although we agree with applicant that the design element is not insignificant, we find this element insufficient to distinguish applicant's mark from registrant's mark. Applicant's design element by itself cannot be used in calling for the goods. On the other hand, this design does serve to reinforce the "mommy" or "mamacita" connotation of the mark. We find nothing in the record to support applicant's arguments

that its mark creates an Italian connotation. Rather, the name of applicant's principal, from whom the word "Sita" was taken, actually suggests someone of Filipino origin, which historically would suggest a Spanish language connection.

In any case, inasmuch as consumers will call for the goods in the marketplace by the word portion of the marks, we find that there is nothing improper in stating that the audio-literal element has more significance than the design feature in articulating our reasons for reaching a conclusion on the issue of likelihood of confusion. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987), and In re National Data Corporation, supra at 752.

Therefore, we conclude that applicant's mark, MAMA SITA'S (and design) creates the same overall commercial impression as does registrant's mark, MAMACITA. These two marks are sufficiently similar that their contemporaneous use on closely-related goods would be likely to cause confusion as to the source or sponsorship of such goods.

We turn next to the du Pont factor focusing on the relatedness of the goods as described in the application and the cited registration. Applicant argues correctly that there is no *per se* rule that all food products must be considered related. On the other hand, applicant argues that its identified items are different in character from registrant's

goods, and then argues, without any supporting evidence in the record, that its goods would not normally be sold in the same section of retail food stores as would registrant's seasonings.

By contrast, in support of his contention that these goods are related, the Trademark Examining Attorney submitted copies of fifty-four current registrations owned by a variety of third parties who offer under the same mark the kind of food items (in both classes of identified goods) to be marketed by applicant as well as seasonings such as those sold by registrant.<sup>5</sup>

Considering the goods, we find the evidence of record sufficient to conclude that applicant's goods in both classes are related to the goods identified in the cited registration (See In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467 (TTAB 1988)). We are not convinced otherwise by applicant's arguments regarding the specific nature of its goods or registrant's goods in the absence of any evidence to the contrary. We certainly find no evidence in the record to suggest that processed food items intended for Philippine cuisine would not be on the same ethnic food aisle in a bodega

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<sup>5</sup> In fact, as noted in footnote 4, *supra*, applicant has shown from its own Reg. No. 1658369 that its MAMA SITA'S mark was registered in connections with its prepared mixes, spices and sauces.

or supermarket in the United States as would Latino or Caribbean seasonings. Specifically, the Trademark Examining Attorney argues as follows:

"... [T]hese goods are more than related. They are also complementary in that they can be used together in the same dish or recipe... The registrant has identified seasonings, and applicant has identified a wide variety of food products. By simple definition, the goods are complementary as the registrant's seasonings could easily be used in preparing the vegetables, meats and seafood identified by the applicant. Further, the applicant has provided examples of how sofrito and recaito are sold (in jars) as Exhibit 3 to the brief. The labels on the jars indicate that the seasonings can be used in stews and soups. The applicant's vegetables, meat, poultry and seafood are all common soup and stew ingredients. As such, it is submitted that the goods are complementary.

Trademark Examining Attorney's appeal brief, p. 7.

Accordingly, it seems likely, from the evidence of record, that registrant's seasonings would be appropriate in recipes using applicant's fruit preserves, coconut milk, vegetables, meat, seafood and/or poultry.

Consequently, if the respective goods were to be sold under the same or similar marks, confusion as to source or sponsorship would be likely to occur. We note that both applicant's goods and registrant's goods are broadly identified and, thus, we must presume that applicant's goods and registrant's goods will be sold in all of the normal

channels of trade to all of the ordinary purchasers for such goods. See Canadian Imperial Bank v. Wells Fargo, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).

We turn next to the du Pont factor focusing on the number and nature of similar marks in use on similar goods. Applicant argues that these third-party registrations "demonstrate the commercial attractiveness and popularity of MAMACITA in connection with a variety of goods and services (especially food products) and are relevant to show that a mark is weak."

However, when one excludes pending applications, expired registrations and extant registrations for marks having additional matter and seemingly used in connection with unrelated goods or services (three registrations for MAMACITA'S MEXICAN RESTAURANT for restaurant and catering services, drink mixes and items of clothing, all owned by the same third party, for example), we agree with the Trademark Examining Attorney that, except for the cited registration, there are no such registrations.

Moreover, even if there were third-party registrations for related food items incorporating the word MAMACITA within composite marks, they would not establish that the marks shown therein are in use, much less that consumers are so familiar with them that they are able to distinguish among such marks.

AMF Incorporated v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Furthermore, even weak marks are entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods or services. See Hollister Incorporated v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

In conclusion, we find that the marks create quite similar overall commercial impressions, that applicant's goods must be considered to be complementary to registrant's identified seasonings, and that applicant has failed to demonstrate that MAMACITA marks are weak in the field of food products. Accordingly, we find that applicant's mark, when used in connection with the identified goods, so resembles registrant's mark as to be likely to cause confusion, to cause mistake or to deceive.

*Decision:* The refusal to register this mark based upon Section 2(d) of the Lanham Act is hereby affirmed.