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**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Shurfine Foods, Inc.
v.
The Shur-Good Biscuit Co., Inc.

Opposition No. 101,169
to application Serial No. 74/599,288
filed on November 15, 1994

Joseph S. Makuch of Marger Johnson & McCollom, P.C. for
Shurfine Foods, Inc.

Gail L. Morrissey of Standley & Gilcrest for The Shur-Good
Biscuit Co., Inc.

Before Simms, Hairston and Bottorff, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

The Shur-Good Biscuit Co., Inc. has filed an
application to register the mark SHUR-GOOD BRAND and design,
as shown below, for "salted and unsalted snack foods, namely
pretzels and corn-based snacks."¹

¹ Application Serial No. 74/599,288, filed November 15, 1994,
alleging dates of first use of October 31, 1988. Applicant
claims the benefits of Section 2(f) of the Trademark Act.

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Registration has been opposed by Shurfine Foods, Inc. under Section 2(d) of the Trademark Act. As grounds for opposition, opposer asserts that continuously since 1972, it has used the mark SHURFINE on pretzels and corn-based snacks; that opposer owns a number of registrations of marks consisting of the term "SHUR," and that applicant's mark SHUR-GOOD BRAND and design, when used on the identified goods, so resembles opposer's SHUR family of marks, including especially the mark SHURFINE, as to be likely to cause confusion.

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

The record consists of the pleadings; the file of the opposed application, trial testimony, with related exhibits, taken by opposer; status and title copies of opposer's pleaded registrations, introduced into evidence by opposer's notice of reliance; and trial testimony, with related exhibits, taken by applicant. Both parties filed briefs on the case and an oral hearing was held before the Board.

According to the testimony of its witnesses, opposer is a corporation which is organized primarily to own, register, license, maintain, and police the marks SHURFINE, SHURFRESH, SHUR VALUE and SHUR SAVING. These marks are known as "private labels" and are used in connection with over 6,000

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food and non-food products sold through thousands of independent grocery stores and convenience stores in the United States. The marks are also used as service marks for retail store identification and other retail grocery services in central and northeastern Pennsylvania.

The retail stores that sell products under opposer's marks are members of independent wholesale grocery buying cooperatives. Each cooperative wholesaler is owned by its member retailers and operates regional warehouses through which goods bearing opposer's marks are shipped.

The independent wholesalers, in turn, are generally members of one of three procurement and marketing organizations, namely, Shurfine Eastern Corporation, Shurfine International, Inc., and Western Family Foods, Inc. Each of these organizations owns one-third of opposer, Shurfine Foods, Inc. These procurement and marketing organizations contract with vendors throughout the United States to supply thousands of food and nonfood products under opposer's SHUR marks to retail grocery stores and convenience stores. These products cover every major category of goods sold through grocery stores, including bakery, deli, produce, meats, dairy, frozen foods, packaged foods, health and beauty care and general merchandise.

Shurfine International and Western Family advertise opposer's SHUR marks at the institutional level through

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trade journals in an effort to recruit new wholesalers and retailers. They also provide financial support and promotional and advertising materials to wholesalers and retailers to help them sell goods under the SHUR marks. Goods bearing the SHUR marks are advertised in weekly circulars, by point of purchase displays in grocery stores and convenience stores, and by way of television and radio commercials.

Opposer's sales of snack foods, however, amount to several million dollars annually with advertising and promotion expenditures amounting to several hundred thousand dollars.²

According to the testimony of Robert Schmitt, a co-president of applicant, applicant is a family operated company which began business in 1928. Applicant is a distributor of many different brand name cookies, crackers, snacks and specialty products and also distributes its own products under the mark SHUR-GOOD.³ Applicant has a direct delivery system with sales persons calling directly on

² Opposer's specific sales and advertising figures were deemed confidential information and introduced into the record pursuant to a stipulated protective order.

³ We note that applicant's witness, in his testimony, refers to applicant's mark as simply SHUR-GOOD without the term "BRAND." Similarly, applicant, in its brief on the case, refers to the mark as simply SHUR-GOOD. It is clear that the mark sought to be registered SHUR-GOOD BRAND and design and the mark referred to as simply SHUR-GOOD are one and the same.

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grocery stores and delivering products directly to those grocery stores. Applicant has used the SHUR-GOOD mark with crackers and cookies since the inception of the business and with pretzels since 1935. Sometime after 1986 applicant commenced use of the SHUR-GOOD mark in connection with corn-based snacks.

However, we note that there is no issue with respect to priority, the Board having entered summary judgment in opposer's favor on this issue in an order mailed August 18, 1997. In this regard, opposer submitted status and title copies of three of its pleaded registrations for its SHUR marks.

We turn then to the issue of likelihood of confusion and those duPont factors which are relevant in this case.⁴ At the outset, we note that opposer pleaded ownership of a number of registrations of SHUR marks for a variety of food and non-food products. We will focus our attention on the following two most pertinent of opposer's registrations:

Registration No. 1,134,376 (Issued May 6, 1980 under the provisions of Section 2(f); renewed) for, in

⁴ In re E. I. duPont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

pertinent part, pretzels; and

Registration No. 1,152,586 (Issued February 24, 1981 under the provisions of Section 2(f); Sections 8 & 15 affidavit filed) for, in pertinent part, pretzels, pretzel thins, and pretzel sticks.

Insofar as the goods are concerned, applicant does not dispute that the goods on which the parties' marks are used are identical in part (pretzels). Rather, applicant argues that the respective goods move in different channels of trade. In particular, applicant argues that independent stores purchase their goods from warehouses operated by shareholder-licensees of opposer whereas applicant distributes its own goods to grocery stores and supermarkets. First, it is well settled that the issue of likelihood of confusion in a proceeding such as this must be determined on the basis of the identification of goods or services set forth in the plaintiff's registrations vis-a-vis the identification of goods or services set forth in the defendant's involved application, regardless of what the evidence may show as to the specific nature of the parties' respective goods or services. Because there are no

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limitations as to the channels of trade or classes of purchasers in the identification of goods in opposer's registrations and applicant's application, we must presume, for purposes herein, that opposer's and applicant's goods are sold in all of the usual trade channels for pretzels, to all of the normal classes of purchasers for such goods. Accordingly, we can draw no legal distinctions between the parties' trade channels and classes of customers, but rather must consider them to be the same. In point of fact, both parties' pretzels are sold to the same ultimate purchasers, namely, ordinary consumers.

With respect to the marks, when considered in their entirety, we find that applicant's mark SHUR-GOOD BRAND and design is substantially similar to each of opposer's marks, SHURFINE and design and SHURFRESH and design. In each of the marks, the term "SHUR" is obviously a fanciful version of the word "sure." Moreover, the words "fine" and "good," as evidenced by the dictionary definitions made of record by opposer, both connote superior quality. Also, the word "good" connotes that which is not spoiled or ruined, or in other words, that which is fresh.⁵

Although applicant maintains that opposer's marks are weak and thus entitled to a narrow scope of protection, the

⁵ The American Heritage Dictionary of The English Language defines "fine" as, inter alia, "of superior quality"; and "good"

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evidence of record indicates that opposer's use and promotion of these marks has been long and extensive in and around Nebraska and certain parts of Pennsylvania, with the result that opposer's marks have acquired considerable goodwill and strength in these areas. Moreover, the record is devoid of any third-party uses of the same or similar marks for goods of the type involved here.

We recognize that there are specific differences between the marks which cause differences in appearance and pronunciation. In particular, the differing terms FINE, FRESH, and GOOD; the design elements; and the addition of BRAND in applicant's mark. However, consumers are not likely to regard these differences as indicating that the products come from different sources. Rather, when these marks are applied to identical goods, consumers are likely to believe that the products emanate from the same source, and that the marks are merely variants, used by a single source to differentiate its various product lines. This is especially true because both opposer and applicant use the fanciful spelling SHUR.

Another factor which weighs in favor of a likelihood of confusion in this case is the fact that pretzels are relatively inexpensive items that are purchased by ordinary consumers without a great deal of care.

as, inter alia, "superior to average" and "not spoiled or

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Two additional matters raised by applicant require comment. First, the absence of actual confusion evidence is not troubling. Such evidence is difficult to obtain and, in any event, the test is likelihood of confusion. Further, the opportunity for instances of actual confusion to arise has been minimal inasmuch as there is no evidence in this record that the parties' goods are sold in the same market areas.

Second, we recognize that a registration for SHURFINE and design for cookies and crackers was allowed in 1980 to opposer, well after applicant's registration in 1955 of SHUR-GOOD BRAND and design for the identical goods. It is well settled, however, that each case must be decided on its own set of facts and the Board is not bound by determinations made by Examining Attorneys.

Having determined that there is a likelihood of confusion when comparing opposer's individual marks and applicant's mark, we need not reach the issue of whether confusion is likely between applicant's mark and opposer's alleged family of SHUR marks. We should point out, however, that there are questions in this case as to first, whether opposer's evidence is sufficient to establish a family of SHUR marks prior to the filing date of applicant's application, and second, whether applicant's use of its mark

ruined."

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for different goods, i.e., cookies and crackers, in a different geographical area, would defeat opposer's family of marks claim.

In sum, we conclude that consumers familiar with opposer's pretzels sold under the marks SHURFINE and design and SHURFRESH and design would be likely to believe, upon encountering applicant's mark SHUR-GOOD BRAND and design for identical goods, that the respective goods originated with or were somehow associated with the same entity.

Decision: The opposition is sustained and registration to applicant is refused.