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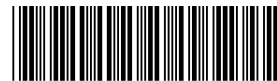
UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/633971

APPLICANT: DEL CAMPO Y ASOCIADOS, S.A. DE C.V.

CORRESPONDENT ADDRESS:

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**BEFORE THE
TRADEMARK TRIAL
AND APPEAL BOARD
ON APPEAL**

MARK: DEL CAMPO ORGANICS

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

EXAMINING ATTORNEY'S APPEAL BRIEF

I. STATEMENT OF THE CASE

Applicant appeals the examining attorney's final refusal to register the proposed mark,

"DEL CAMPO ORGANICS" (and flower design) for:

ORGANIC FRESH ROUND TOMATOES, (in International Class 31)

The examining attorney refused registration on the Principal Register under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), on the ground that the mark when used

in connection with the applicant's goods is likely to be confused with U.S. Registration No. 1,960,775, for the mark "**DEL CAMPO**," in typed form for goods identified as:

Canned goods, namely vegetables, hearts of palm, and tropical fruits, (in International Class 29)

Tropical fruit nectars, (in International Class 32)

II. FACTS

The applicant, Del Campo Asociados, SA, applied for registration on the Principal Register of the proposed mark, **DEL CAMPO ORGANICS** (and design) on March 11, 2005.

Registration was refused in an Office action dated October 7, 2005, under Section 2(d) of the Trademark Act, 15 U.S. C. 1052(d), because the proposed mark when used with the relevant goods is likely to cause confusion with the registered mark, **DEL CAMPO** for goods as indicated.

In a response dated March 24, 2006, the applicant responded to the Section 2(d) refusal, amended the recitation of goods to its present description and entered the translation of the mark as required.

The examining attorney issued a Final Refusal as to the issue of the likelihood of confusion under Section 2(d) of the Trademark Act, 15 U.S. C. 1052(d), on May

15, 2006. The applicant filed a Reconsideration request on November 13, 2006, which was denied on January 9, 2007. The applicant has thus filed a Notice of Appeal and Appeal.

II. ISSUE

The issue to be decided on appeal therefore, is whether the proposed mark, **DEL CAMPO ORGANICS** (and design) for organic tomatoes, is confusingly similar to the registered mark **DEL CAMPO** for a variety of fruits and vegetables.

III. ARGUMENT

THE APPLICANT'S PROPOSED MARK IS NOT ENTITLED TO REGISTRATION BECAUSE IT SO RESEMBLES THE REGISTERED MARK AS TO BE LIKELY TO CAUSE CONFUSION, MISTAKE, OR DECEPTION.

The examining attorney must analyze each case in two steps to determine whether there is a likelihood of confusion. First, the examining attorney must look at the marks themselves for similarities in appearance, sound, connotation and commercial impression.

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

Secondly, the examining attorney must compare the goods or services to determine if

they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *In re August Storck KG*, 218 USPQ 823 (TTAB 1983); *In re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB 1978); *Guardian Products Co., v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978).

A. THE SOUND, COMMERCIAL MEANING AND IMPRESSION OF THE MARKS
ARE CLOSELY RELATED.

In considering the two-pronged test set forth by the *Dupont* court, the proposed mark is highly similar to the registered mark. The marks are viewed as follows:

DEL CAMPO ORGANICS (and design)

v.

DEL CAMPO

The applicant argues that the marks are sufficiently dissimilar, but the examining attorney disagrees. In particular, the examining attorney asserts that the dominant term in the proposed mark, **Del Campo**, is identical to the registered mark. Although the examining attorney must look at the marks in their entireties under Section 2(d), one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 224 USPQ 749 (Fed. Cir. 1985);

Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA 1976). *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1988).

The applicant argues the term “Del Campo” in its mark appears in lower case with a special font. Secondly, the applicant maintains that the generic term “Organics” is in larger lower case with a fanciful “O.”¹ The distinctions the applicant makes are not enough to distinguish the marks. Furthermore the applicant’s claim that the points of difference between its mark and the applicant’s are greater than the points of similarity, is exactly *opposite of* how the Board has determined the marks should be view in a likelihood of confusion analysis. In fact the Board has determined, that when applicant’s mark is compared to a registered mark, “the *points of similarity are of greater importance than the points of difference.*” *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37, 108 USPQ 161 (D.C. Cir.), *cert. denied*, 351 U.S. 973, 109 USPQ 517 (1956); TMEP §1207.01(b). The court has mandated that the registrant’s mark be given priority in a likelihood of confusion analysis.

The Board Must Consider the Overall Commercial Impression of the Marks

In considering the likelihood of confusion between marks, the examining attorney must consider the overall commercial impression of the marks. See *Long John Distilleries, Ltd. V. Sazerac*, 426 F.2d 1406 (CCPA 1970). In the instant case, the overall commercial impression of the marks is the same. The translation of the common term of the marks “**Del Campo**” is “from the fields.” Both marks give the impression then that their fruits

¹ Appellant’s Brief at page 2

and/or vegetables are fresh and right from the field. The applicant has added the generic term “organics,” which merely certifies what is implied in the nature of the term “Del Campo.”

It is well established that the addition of generic wording to a registered mark is not enough to distinguish the marks. *In Re Denise*, 225 USPQ 624 (TTAB 1985) (PERRY’S found to be confusingly similar to PERRY’S PIZZA); *Saab-Scania AG v. Sparkomatic Corp.*, 26 USPQ 2d 1709 (TTAB 1993) (9000 found to be confusingly similar to 9000 SERIES). As indicated the term “organics,” is a generic designation as to foods, and adds little to its meaning. The examining attorney herein attaches a dictionary definition of the term “Organic.”²

ORGANIC

Agriculture avoiding synthetic chemicals: relating to or employing agricultural practices that avoid the use of synthetic chemicals in favor of naturally occurring pesticides, fertilizers, and other growing aids

Food produced without synthetic chemicals: grown or reared without the use of synthetic chemicals a wide range of organic products

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² The TTAB has determined that dictionary definitions constitute proper subject matter for judicial notice. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594 (TTAB 1982).

Thus the term “organics,” despite the fact that it is in lower case or fanciful lettering, does not distinguish the marks.

Secondly, the flower design element is not enough to distinguish the marks. When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

The applicant claims the examining attorney improperly dissects the mark in determining the likelihood of confusion; however, the Board permits dissection of a mark in order to determine the overall commercial meaning and impression of a mark. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b). *In re Hester*, a case dealing with the issue of descriptiveness, the Board concluded:

It is perfectly acceptable to separate a compound mark and discuss the implications of each part thereof with respect to the question of descriptiveness provided that the ultimate determination is made on the basis of the mark in its entirety...” *In re Hester Industries, Inc.*, 230 USPQ 797 (TTAB 1996). See also *McCarthy’s on Trademarks and Unfair Competition; Section 11:29*

The examining attorney asserts that it is the applicant who overly dissects the mark. The applicant separates the lower case lettering, slight design element and generic wording and concludes the marks are distinctive. The applicant's argument is not persuasive. Consumers typically do not totally dissect a mark, but merely retain the impression formed by the marks. *See Johnson & Johnson v. Colgate Palmolive Co.*, 345 F. Supp. 1216, 175 U.S.P.Q. 287 (D.N.J. 1972), where the court concluded that consumers typically do not totally dissect a mark as a means of purchasing goods or services. Both the Board and the courts have determined that consumers will not remember nebulous distinctions between. *See for example Floss Aid Corp. v. John O. Butler Co.*, 205 USPQ 274 (TTAB 1979), where the Trademark Trial and Appeal Board concluded that the average consumer will not likely consider the distinction between a floss aid, a floss mate, and a floss helper. *See also Hancock v. American Steel & Wire Co.*, 203 F.2d 737, 97 USPQ 330 (CCPA 1953). Likewise, in the present instance, the consumer is not likely to make minute distinctions between the marks "Del Campo Organic" and "Del Campo." Thus, while dissection is useful in determining the overall commercial impression of a mark, minute distinctions such as "lower case" lettering do not impact how consumers view a mark.

Applicant's Third Party Registrations are Not Persuasive

The applicant attaches third party registrations to support its claim. The applicant concludes that the third party registrations are evidence that the registered mark is

entitled to a “narrow scope of protection.” Neither the applicant’s argument nor the registrations are persuasive. Third-party registrations, by themselves, are entitled to little weight on the question of likelihood of confusion. *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Hub Distributing, Inc.*, 218 USPQ 284 (TTAB 1983). Third-party registrations are not evidence of what happens in the marketplace or that the public is familiar with the use of those marks. *In re Comexa Ltda*, 60 USPQ2d 1118 (TTAB 2001); *National Aeronautics and Space Admin. v. Record Chem. Co.*, 185 USPQ 563 (TTAB 1975); TMEP §1207.01(d)(iii). Further, existence on the register of other confusingly similar marks would not assist applicant in registering yet another mark, which so resembles the cited registered mark, that confusion is likely. *In re Total Quality Group Inc.*, 51 USPQ2d 1474 (TTAB 1999).

In addition, the applicant has submitted evidence of the marks such as “De Campo” which are not the same as the marks of the parties’ herein; to wit; Del Campo, and contain unrelated goods. As to the mark “De Campo,” for instance, the terms may have different meanings as translated. The term “Del Campo,” may be a translation of “de +le” which is combined in Spanish may mean “Of the” or “of the fields,”³ whereas the term “De Campo” could be translated as “Of Camp,” which has a totally different meaning. Thus the marks the applicant submits as evidence do not have the same overall commercial meaning and impression as the marks herein. The applicant attempts to draw an analogy between its case and *General Mills, Inc. v. Health Valley Foods*, 14 USQP2d 1270 (TTAB 1992), wherein the terms “Fiber One” and “Fiber 7” for food products were

³de belonging to or connected with something or someone.
campo: a piece of open grassland **Spanish: Spanish:** campo www.onelook.com

compared as to a likelihood of confusion between the marks. In that case the court noted that the term “fiber” is commonly used for food products. This is indeed so, but bears no relationship to the term “Del Campo,” which is not commonly used for any products.

The *General Mills* case then has no bearing on the present case. Other examples of the unrelated marks the applicant submits are below:

U.S. Registration No. 2, 829,791 **De Mi Campo**- translated From My Fields or Of May Camp- for the goods “herbs.”

U.S. Registration No. 2,783,952 **Camp de Montalban**- Field of Montalban- for the goods “cheese.”

U.S. Registration No. 3,211,598 **Campo Del Drago**- Field of the Dragon- for the goods “wine.”

U.S. Registration No. 2,828,551 **Casa De Campo**- House of the Village- for the goods “wine.”

U.S. Registration No. 2,978,939 **Sabor Del Campo**-Taste of the Field- for the goods “dry beans, peas, and lentils.”

Thus, as noted, many of the marks are unrelated and the goods and products of the parties are unrelated and as such the evidence has little or no probative value to the instant case.

B. THE SERVICES OF THE PARTIES ARE CLOSELY RELATED

In part two of the analysis, the goods or services of the parties must be compared. The applicant’s goods are organic tomatoes. The registrant offers canned vegetables, as well as fruits. The appellant alleges, “canned products and nectars are quite different from fresh goods.”⁴ Initially, the goods of the registrant include vegetables and fruits, both of which could include tomatoes. Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-*

⁴ Appellant’s Brief at page 5.

Packard Co. v. Packard Press Inc., 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the registrant's goods is broad, it is presumed that the registration encompasses all goods and/or services of the type described, including those in the applicant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); *In re Optica International*, 196 USPQ 775 (TTAB 1977); TMEP §1207.01(a)(iii). These include fresh as well as processed vegetables and fruits.

The applicant, while it admits that the goods of the parties will likely be sold in supermarkets and grocery stores, states that the goods will likely be sold in different departments in a store. The *Elbaum* decision set forth the principle that the applicant cannot restrict the trade channels or expansion of the registrant. *Id.* Moreover, the applicant presents no evidence, nor states any reason why this would be so; processed vegetables and or fruits can be sold near organic tomatoes in the same department in a store. In *In re Wilson*, 57 USPQ 2d 1863 (TTAB 2001), the Board found fresh fruits to be related to canned fruits. In that case the Board opined:

"We are not persuaded by applicant's argument that we should accord significant or dispositive weight to the fact that registrant's food products are "processed" while applicant's are not."

See also MidwestBiscuit Co. v. John Livacich Produce, Inc., 203 USPQ 628 (TTAB 1979) (fresh strawberries, avocados and vegetables vs. cookies, crackers, macaroni, spaghetti, cakes and candy), *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re The Vim Corporation*, 161 USPQ 58 (TTAB 1969); *Gentry Canning Company v. Blue Ribbon Growers, Inc.*, 138 USPQ 536 (TTAB 1963); and *Francis H. Leggett & Co. v. Cowin and Ryan*, 69 USPQ 174 (Comm'r Pats. 1946).

Even if the products are sold in separate parts of a grocery chain this not determinative of the issue of the likelihood of confusion. The goods are relatively inexpensive grocery items. When products are inexpensive and subject to impulse purchase, purchasers are held to a lesser standard of purchasing care and thus are considered more likely to be confused as to the source of the goods. *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc., v. Coffee Bean Distributors, Inc.*, 748 F.2d 669, 223 USPQ 1281 (Fed. Cir. 1984).

Therefore, it cannot be concluded that consumers purchasing fruits and vegetables may not walk around one aisle in the supermarket and purchase processed fruits and vegetables and purchase organic tomatoes from another aisle, from what it thinks is the same origin of the goods. If the consumer has often purchased Del Campo processed products for example, he or she is likely to believe Del Campo has become health conscious like the rest of the world, and now sells organic tomatoes, and since the consumer has relied on this product, and thought it to be a good product, he or she will

purchase the related goods without much thought that the goods may be from a different source of origin. There is a likelihood of confusion then, if consumers believe the vegetables and fruits of the registrant originate from the same source as the applicant's organic tomatoes.

Any goods or services in the registrant's normal fields of expansion must also be considered in order to determine whether the registrant's goods or services are related to the applicant's identified goods or services for purposes of analysis under Section 2(d). *In re General Motors Corp.*, 196 USPQ 574 (TTAB 1977). The test is whether purchasers would believe the product or service is within the registrant's logical zone of expansion. *CPG Prods. Corp. v. Perceptual Play, Inc.*, 221 USPQ 88 (TTAB 1983); TMEP §1207.01(a)(v). The applicant maintains that the applicant's goods are not within the registrant's zone of expansion. Specifically, the applicant states that while it is possible for a "huge processor" to have a farm, it would be unusual for a normal processing plant to expand and sell fresh foods from a farm.⁵ The applicant states no foundation for this argument. Even if the applicant's argument was true, the Trademark Act not only guards against the misimpression that the senior user is the source of the junior user's goods or services, but it also protects against "reverse confusion," that is, that the junior user is the source of the senior user's goods or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *Banff Ltd., v. Federated Department Stores*, 6 USPQ2d 1187 (2d Cir. 1988); *Fisons Horticulture v. Vigoror Industries*, 31 USPQ2d 1592 (3d Cir. 1994). The consumers are likely to believe

⁵ Appellant's Brief at page 7.

the goods of the parties, fresh and non-fresh, are likely to originate from the same source.

IV. CONCLUSION

An analysis of the proposed mark under the *Dupont* case, *In re I.E. Dupont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), indicates that there is a likelihood of confusion in the minds of consumers as to the source of the applicant's goods and those of the registrant. The applicant has met the two pronged test enumerated above.

Accordingly, the refusal to register under the Trademark Act Section 2(d), should be affirmed.

Respectfully submitted,

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