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**THIS DISPOSITION
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Paper No. 11
JQ

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Cross Country Paper Products, Inc.**

Serial No. 75/508,058

Myron Amer for **applicant.**

Tarah K. Hardy, Trademark Examining Attorney, Law Office
110 (Chris A.F. Pedersen, Managing Attorney).

Before Quinn, Bucher and Bottorff, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Cross Country Paper
Products, Inc. to register the mark EXCEL for "plastic
gloves to be used once by and thereafter disposed of by
dentists."¹

The Trademark Examining Attorney has refused
registration under Section 2(d) of the Trademark Act on the

¹ Application Serial No. 75/508,058, filed June 24, 1998, based
on a bona fide intention to use the mark in commerce.

ground that applicant's mark, if applied to applicant's goods, would so resemble the previously registered marks EXCEL for "surgical instruments, namely, forceps, graspers, scissors, dissectors, clamps, needles, needle holders, probes, suction and irrigation instruments, trocars, cannulae, [brushes] and cutting instruments"² and EXCEL DR for "surgical instruments, namely, needles, [and] needles holders"³ as to be likely to cause confusion. Both registrations are owned by the same entity.

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

Applicant contends that the cited marks are suggestive, and that the surgical instruments listed in the cited registrations are not used in dental procedures. Applicant also asserts that "surgical instruments would typically be purchased by a discriminating purchaser, such as a hospital employee, whereas disposable plastic gloves by a dentist's assistant, the former being concerned with quality of the purchased product and the latter by the cost." (brief, pp. 3-4) Applicant also is critical of the third-party registration evidence, submitted by the

² Registration No. 1,960,642, issued March 5, 1996.

³ Registration No. 2,011,191, issued October 22, 1996.

Examining Attorney, bearing on the relatedness of the goods.

The Examining Attorney maintains that the marks are identical or nearly so and that the goods are related. Further, the Examining Attorney contends that the goods would be encountered by the same groups of purchasers, namely those in the medical and dental fields. The Examining Attorney points to the third-party registrations of record showing that the same entity has adopted a single mark to identify both medical gloves and surgical instruments.

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

We first turn to compare the marks. Applicant's mark EXCEL is identical to registrant's EXCEL mark, and is substantially identical to registrant's EXCEL DR mark. The presence of the abbreviation for "doctor" in registrant's

second mark does not serve to distinguish it from applicant's mark in any meaningful way. Simply put, the marks are identical or substantially identical in terms of sound and appearance. With regard to meaning, we take judicial notice of the fact that the term "excel" means "to surpass or outshine (as in some quality possessed)."

Webster's Third New International Dictionary (unabridged ed. 1993). Thus, we recognize that the cited marks, as well as applicant's mark, are laudatorily suggestive. Nevertheless, the marks convey the same meaning, namely, that the goods sold thereunder are superior in quality.

Because the marks are, in one instance, identical, and in the other case, nearly identical, applicant's goods need not be closely related to registrant's goods in order for there to be a likelihood of confusion. In *re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Indeed, "even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption that there is a common source." In *re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993). In the present case, due to the identity or near identity between the marks, if there is a viable relationship between

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applicant's goods and registrant's goods, a likelihood of confusion exists.

We find that there is a sufficient relationship between, on the one hand, registrant's surgical instruments and, on the other hand, applicant's plastic gloves, that, when sold under identical or substantially identical marks, purchasers are likely to be confused. Although applicant would urge us to confine registrant's goods to the medical field, the goods are not so restricted. *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]. Thus, some of registrant's surgical instruments, as identified in the cited registrations, might also be used in the dental field by oral surgeons. Registrant's goods, therefore, would be encountered by the same class of purchasers/users of applicant's goods. Although we find it reasonable for applicant to assert that medical professionals are likely to be somewhat sophisticated purchasers of medical supplies, that sophistication would not ensure against confusion here given the closeness between the involved marks.

In finding that applicant's plastic gloves to be used once by and thereafter disposed of by dentists are related

to registrant's surgical instruments, we have considered the several third-party registrations based on use which the Examining Attorney has submitted. The registrations show marks which are registered for both types of goods. Although these registrations are not evidence that the marks shown therein are in use or that the relevant purchasers are familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein, including medical gloves and surgical instruments, are of a kind which may emanate from a single source. See, e.g., *In re 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). Although we have taken into account applicant's critique of this evidence, the registrations remain probative to the extent just indicated. To the extent that applicant asserts that some of the registered marks are house marks or trade names, we would point out that the range of products listed thereunder are, nevertheless, all confined to the medical/dental field.

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. *In re Hyper*

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Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., supra.

We conclude that purchasers familiar with registrant's surgical instruments sold under the marks EXCEL and EXCEL DR would be likely to believe, upon encountering applicant's mark EXCEL for plastic gloves to be used once by and thereafter disposed of by dentists, that the goods originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusals to register are affirmed.