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THIS DECISION IS NOT
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OF THE TTAB

Paper No. 14
JQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Von Verde Citrus Packing House, Inc.

Serial No. 75/558,859

Anna M. Calderón for applicant.

Dawn J. Feldman, Trademark Examining Attorney, Law Office
111 (Kevin Peska, Managing Attorney).

Before Quinn, Walters and Rogers, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Von Verde Citrus
Packing House, Inc. to register the mark CACTUS ROSE for
"fresh citrus fruit, namely, tangerines, oranges and
lemons, sold exclusively through a non-profit agricultural
cooperative."¹

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

¹ Application Serial No. 75/558,859, filed September 28, 1998,
alleging a bona fide intention to use the mark in commerce.

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ground that applicant's mark, when applied to applicant's goods, will so resemble the previously registered mark shown below



for "processed nuts and fruit based snacks"² as to be likely to cause confusion.

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

Applicant states that it is an affiliated packinghouse of the non-profit agricultural cooperative of citrus growers known as Sunkist Growers, Inc. Applicant further states that although the goods are marketed with the SUNKIST brand, each individual packinghouse owns its own brand name used in connection with fruit packed by it. The fruit, according to applicant, is marketed through the non-profit agricultural cooperative to produce distributors who are sophisticated. Applicant argues that given the restricted nature of applicant's channels of trade (as

² Registration No. 2,054,861, issued April 22, 1997. The word "Snacks" is disclaimed apart from the mark as shown.

specified in the identification of goods), and the differences between the seasonal nature of applicant's fruit items and registrant's goods, there is no overlap in the marketing conditions surrounding the goods. In its attempt to further distinguish the trade channels for the goods, applicant submitted a Dun & Bradstreet report on the registrant indicating that it sells edible nuts at wholesale to food companies, bulk vending suppliers and restaurants.

The Examining Attorney maintains that applicant has conceded that the marks are similar. The Examining Attorney goes on to assert that the identification of goods in the cited registration is not restricted and that, therefore, it is assumed that registrant's goods would be sold in the same ultimate outlets as applicant's goods, namely supermarkets. The Examining Attorney contends that the goods are related and, in this connection, she submitted third-party registrations to show that the goods (fruit and nuts) are of a type which may emanate from a single source under the same mark.

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

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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).

Insofar as the marks are concerned, applicant "acknowledges that similarities in the elements of the registrant's mark and applicant's mark exist." (response, June 16, 1999). Indeed, registrant's mark is dominated by the literal portion at its top, namely CACTUS ROSE, insofar as the disclaimed word SNACKS is set apart at the bottom. Moreover, the design element of registrant's mark, a stylized "cactus rose," reinforces the dominant literal element. Applicant's mark is identical to this dominant element. In *re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) [there is nothing improper in giving more weight to a particular feature of the mark]; and In *re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987) [word is accorded greater weight over a design because it would be used by purchasers to call for the goods].

With respect to the goods, it is not necessary that the goods be identical or even competitive in nature in order to support a finding of likelihood of confusion. It

is sufficient that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that would give rise, because of the marks used in connection therewith, to the mistaken belief that the goods originate from or are in some way associated with the same source.

In re International Telephone and Telegraph Corp., 197 USPQ 910 (TTAB 1978). Further, the identifications of goods in the application and the cited registration control the comparison of the goods. See: Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)["[T]he question of likelihood of confusion must be determined based on an 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] registration, rather than what the evidence shows the goods and/or services to be."]; and In re Elbaum, 211 USPQ 639 (TTAB 1981).

In the present case, we recognize that applicant's identification of goods is restricted to fruit "sold exclusively through a non-profit agricultural cooperative." At the same time, we also take note that registrant's nuts and fruit based snacks are not restricted to any particular channel of trade. Thus, for purposes of the legal analysis

of likelihood of confusion herein, it is presumed that the identified goods in the cited registration move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers, including supermarkets, grocery stores and the like. In re Elbaum, supra at 640. Accordingly, the evidence submitted by applicant in its attempt to restrict registrant's channels of trade is to no avail.

Even though applicant's goods are sold through an agricultural cooperative, we must assume that these goods, as identified, can be purchased by, among other outlets, grocery stores. Therefore, applicant's and registrant's goods would be purchased by the same classes of purchasers, namely grocery stores and the like. As stated by the Examining Attorney, "[r]egardless of the fact that the applicant sells its goods through a citrus cooperative, its goods eventually end up in supermarkets and retail outlets." (brief, p. 4) Further, it is quite possible that the class of ultimate consumers, namely ordinary purchasers at retail, will be exposed to both marks. Applicant asserts that it is customary in the trade for the marks of packinghouses to appear on the cartons in which the fruit is shipped. There is nothing in the record that establishes that grocery stores do not display

applicant's fruit in the shipping cartons whereby ordinary consumers would see applicant's mark. In sum, the restriction in applicant's identification of goods does not sufficiently distinguish the goods, especially when they are marketed under such substantially similar marks.

In finding that citrus fruit is related to nuts and fruit-based snacks, we have considered the third-party registrations based on use which the Examining Attorney has submitted. The registrations show particular marks registered by different entities for the types of goods involved herein. Although these registrations are not evidence that the marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods listed therein, including fruit and nuts, 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).

Applicant's argument that the purchasers are sophisticated is not persuasive. We recognize that purchasing agents for grocery stores are likely to be knowledgeable about the market. Although this factor weighs in applicant's favor, it is outweighed by the

similarities between the marks and the goods sold thereunder.

We conclude that purchasers familiar with registrant's nuts and fruit based snacks sold under the mark CACTUS ROSE SNACKS and design would be likely to believe, upon encountering applicant's mark CACTUS ROSE for fresh citrus fruit, namely, tangerines, oranges and lemons, sold exclusively through a non-profit agricultural cooperative, that the goods originate with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points argued by applicant casts 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 Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.