

**THIS OPINION  
IS NOT A PRECEDENT OF  
THE TTAB**

Mailed: August 26, 2008

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Focus Property Group, LLC Ltd.

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Serial No. 76567881

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Lauri S. Thompson and Peter H. Ajemian of Greenberg Traurig  
for Focus Property Group, LLC Ltd.

Vivian Micznik First, Trademark Examining Attorney, Law  
Office 114 (K. Margaret Le, Managing Attorney).

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Before Seeherman, Walters and Kuhlke, Administrative  
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Focus Property Group, LLC Ltd. has filed an application  
to register the standard character mark FOCUS PROPERTY GROUP  
on the Principal Register for "land development and  
construction services; namely planning, development and  
construction of residential communities, custom lot  
programs, and commercial projects," in International Class

37.<sup>1</sup> The application includes a disclaimer of PROPERTY GROUP apart from the mark as a whole.

The examining attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark FOCUS DEVELOPMENT, previously registered for the services listed below, that, if used on or in connection with applicant's services, it would be likely to cause confusion or mistake or to deceive.

Registration No. 2359956 [registered June 20, 2000; Sections 8 and 15 affidavits accepted and acknowledged, respectively]:

- "real estate management and real estate brokerage," in International Class 36.
- "real estate development, construction, residential and commercial building and general contracting," in International Class 37
- The registration includes a disclaimer of DEVELOPMENT apart from the mark as a whole.

Applicant has appealed. Both applicant and the examining attorney have filed briefs.<sup>2</sup> We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are

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<sup>1</sup> Serial No. 76567881, filed December 31, 2003, based on use of the mark in commerce, alleging first use and use in commerce as of June 10, 2002.

<sup>2</sup> In its supplemental appeal brief, applicant requested leave to amend its application to seek concurrent use with the cited registrant. After remand to, and communication with, the examining attorney, applicant withdrew this request. The examining attorney filed her brief and applicant filed a reply brief. All briefs have been considered.

relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

In considering the evidence of record on these factors, we keep in mind that “[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

Considering, first, the services, we note that both the application and the cited registration include, in International Class 37, identical residential and commercial land/real estate development and construction services. Therefore, there is no need to further consider the services in registrant’s identification of goods in International

Class 36.<sup>3</sup> This *du Pont* factor weighs strongly against applicant.

Moreover, inasmuch as the International Class 37 identifications of services in both the involved application and the cited registration are not limited to any specific channels of trade, we presume that the services would be offered in all ordinary trade channels for these services and to all normal classes of purchasers, i.e., the trade channels and classes of purchasers for these identical services are the same. See *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992).

Applicant describes itself as "a real estate development company working with a variety of builders to create master planned residential communities and commercial properties in the retail, business and gaming industries"; and argues that its services are "expensive" (brief, p. 2) and purchased by discriminating purchasers exercising a high degree of care. Applicant argues that its services are offered to builders as well as home buyers; that home buyers exercise a high degree of care in purchasing real estate; and that builders are sophisticated purchasers of expensive parcels of land who will, therefore, also exercise a high

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<sup>3</sup> Applicant also appealed the refusal in its Application Serial No. 76567880, involving the same mark for real estate brokerage services, which was refused registration under Section 2(d) of the Trademark Act based on the same registration cited herein. The Board issued a decision on March 17, 2008 affirming the refusal in that case.

degree of care. However, because of the close similarity in the marks, as discussed below, even purchasers who exercise a high degree of care are likely to mistakenly believe that these identical services emanate from the same source.

Further, sophisticated purchasers may also be susceptible to source confusion, particularly under circumstances where, as here, the services are the same and the marks are similar.

*See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chemical Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible."). *See also Wincharger Corp. v. Rinco, Inc.*, 297 F.2d 261, 132 USPQ 289 (CCPA 1962); and *In re Pellerin Milnor Corp.*, 221 USPQ 588 (TTAB 1983).

Considering the marks, we note, first, that when the goods and/or services of the respective parties are "similar in kind and/or closely related," the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods and/or services. *See Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); and *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987). Moreover, the test is not whether the marks can be distinguished when subjected to a side-by-

side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Further, although the marks at issue must be considered in their entireties, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

The examining attorney contends that FOCUS is the dominant portion of both marks because it is the first term in each mark, it is an arbitrary term in connection with the identified services, and the remaining terms in each mark are merely descriptive.

Applicant contends that, "even accepting that the dominant portion of each mark is the term FOCUS" (reply brief, p. 6), the marks are multi-word marks that, considered in their entireties, are sufficiently different in sight, sound, meaning and commercial impression.

Applicant notes that "property group" and "development" have different meanings and are not "indicative of services somehow associated with real estate" (brief, p. 4).

Again, applicant's arguments are not well taken. First, we agree with the examining attorney that FOCUS is the dominant portion of each mark. Not only is it the first term in each mark, but it appears to be arbitrary in connection with the identified services, and the additional wording in each mark, while different from each other, is clearly merely descriptive. The term DEVELOPMENT in the mark in the cited registration precisely describes the nature of the services involved in both the application and the registration. The fact that DEVELOPMENT may have multiple meanings, such as in connection with the processing of film, is irrelevant herein where we consider the marks in connection with the identified services. When we consider the marks in their entireties, we consider them to be more similar than dissimilar; in fact, they are substantially similar. Therefore, this factor also weighs against applicant.

Applicant contends that applicant and registrant have coexisted for more than five years without actual confusion. However, the absence of actual confusion is of little probative value where we have little evidence pertaining to the nature and extent of the use by applicant and

registrant. Moreover, the test under Section 2(d) is not actual confusion but likelihood of confusion. See *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value.”). See also, *In re Kangaroos U.S.A.*, 223 USPQ 1025 (TTAB 1984); and *In re General Motors Corp.*, 23 USPQ2d 1465 (TTAB 1992).

Applicant also refers to a third-party registration (no. 2372203) for the mark FOCUS 2000 for the same services as those of applicant and the registrant and argues that, in view of the coexistence of this registration and the cited registration, its mark should also be permitted to register. This argument is not well taken. The Board has noted that “[n]either the Board, nor the Courts, are bound by prior decisions of Trademark Examining Attorneys, and each case must be decided on its own merits on the basis of the record therein. See *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). See also, *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).”

When we consider the record and the relevant likelihood of confusion factors, and all of applicant's arguments relating thereto, including those arguments not specifically addressed herein, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark, FOCUS PROPERTY GROUP, and registrant's

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mark, FOCUS DEVELOPMENT, their contemporaneous use on the same services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

*Decision:* The refusal under Section 2(d) of the Act is affirmed.