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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Exotimex S.A. de C.V.

Application No. 76660787

Myron Amer of Myron Amer, PC, for applicant.

Ronald L. Fairbanks, Examining Attorney, Law Office 117 (Loretta C. Beck, Managing Attorney).

Before Zervas, Mermelstein, and Ritchie de Larena, Administrative Trademark Judges.

Opinion by Mermelstein, Administrative Trademark Judge:

Exotimex S.A. de C.V. filed an application to register the following mark on the Principal Register? for "boxed fresh limes" in International Class 31:[1]

The examining attorney issued a final refusal to register under Trademark Act § 2(d), 15 U.S.C. § 1052(d), on

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[1] Filed May 30, 2006, based upon an allegation of first use and use in commerce of January 1, 2006. Applicant has disclaimed the exclusive right to use "produce" apart from the mark as shown.

the ground that applicant's mark so resembles the mark JADE (in standard characters) previously registered[2] for

> fresh fruits and vegetables, not including alfalfa, chewings fescue, common vetch, field corn, rape, soybean, St; [sic] Augustinegrass, sugar beet, sunflower, wheat, broadbean, chicory, cornsalad, garden bean, lettuce okra, parsley, pea, pepper, spinach, squash, and watermelon,

that it would, if used on or in connection with the identified goods, be likely to cause confusion, to cause mistake, or to deceive.

Applicant appealed the final refusal to register. Both applicant and the examining attorney have filed briefs. We affirm.

I. Applicable Law

We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005); *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003); *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

[2] Registration No. 3053337, issued January 31, 2006.

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); *In re Azteca Rest. Enter., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Record on Appeal

Relevant to the refusal to register,[3] the examining attorney submitted nine trademark registrations to show a relationship between the applicant's goods and the goods in the cited registration. One of these is owned by applicant,[4] and the remainder by third parties. In addition, the examining attorney requests in his brief that we take judicial notice of the definition of "lime" as "the small globose yellowish green fruit of a widely cultivated spiny tropical Asian citrus tree (Citrus aurantifolia) with a usually acid juicy pulp used as a flavoring agent and as a source of vitamin C." MERRIAM-WEBSTER DICTIONARY (online version) http://www.m-w.com/dictionary.

In support of registration, applicant submitted two declarations of its Chief Executive Officer, Laurent Chabres, dated January 8, 2007, and May 21, 2007, as well as pictures of a box bearing the applied-for mark. In its

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[3] The examining attorney had also refused registration on the ground that "jade" is a varietal name for the identified goods. That ground for refusal was withdrawn following amendment to applicant's identification of goods.

[4] Registration No. 3226536, issued April 10, 2007, for the mark

reply brief, applicant cited a definition of "fresh vegetables" in its reply brief as "...not artificially preserved ... fresh vegetables ...." Applicant cites "The World Book Dictionary, a THORNDIKE-BARNHART DICTIONARY" for this definition. While not explicitly requested, we construe this citation as a request for judicial notice.

The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006). Nonetheless, judicial notice is not appropriate in all situations. As a general matter,

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). "A court shall take judicial notice if requested by a party <u>and supplied with the necessary information</u>." Fed. R. Civ. P. 201(d)(emphasis added).

Because the examining attorney's request was appropriate, we grant his request for judicial notice of the definition of "lime." On the other hand, applicant

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NATURY for "fresh fruits and vegetables, including limes."

furnished neither a copy of the definition nor an indication of where it can be found electronically, and the excerpt quoted in applicant's reply brief provides virtually no context for the statement. Applicant's request for judicial notice is accordingly denied. Nonetheless, we accept the general proposition that a fresh vegetable is one that is "not artificially preserved."

III. Discussion

A. Similarity of the Marks

Applicant states the issue to be decided on appeal as

> whether the goods of Registration No. 3,053,337 and the goods of the application, alleged by the Examining Attorney to be related, and, based on such allegation of being related, travel through the same channels of trade to the ultimate consumer....

App. Br. at 1.

Applicant makes no mention of the similarities or differences of the marks in either its main brief or its reply, apparently conceding the issue. In any event, we find the marks highly similar for purposes of our analysis.

Applicant's mark is JADE PRODUCE and design. While we must consider the marks in their entireties, we agree with the examining attorney that JADE is the dominant portion of applicant's mark. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985)("there is nothing improper in stating that, for rational reasons, more or less

weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties"). The disclaimed term "produce" carries little source-identifying significance, as it is descriptive or generic for the identified goods. *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997). Moreover, when a mark consists of words and a design, it has often been said that the literal portion of the mark is more significant, because it is the words which will be used in calling for the goods or otherwise referring to them. *E.g., In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553, 1554 (TTAB 1987). In addition, the word JADE in applicant's mark is visually the largest portion of the mark, and therefore most likely to create an impression in the mind of the consumer.

The mark in the cited registration is JADE, which is identical to the dominant element in applicant's mark. The cited mark is in standard character form, and could thus be used in any form, including one similar to the word "jade" in applicant's mark. Given these similarities, purchasers of these goods may well believe that applicant's words and design mark are merely a different version of the prior registrant's mark.

Considered as a whole, we find applicant's mark substantially similar to that of the prior registrant, a factor which supports the refusal to register.

b. Similarity of the Goods

Applicant's goods are identified as "boxed fresh limes," while the cited mark is registered for "fresh fruits and vegetables," excluding a number of items. The examining attorney's definition of "lime" makes clear the obvious, namely, that a lime is a fruit. Because a fresh lime is a fruit, it is necessarily included in the prior registrant's "fresh fruits and vegetables." Accordingly, we find applicant's goods to be included within the scope of the cited registration, and to that extent, legally identical.[5]

Nonetheless, applicant argues that we should find these goods unrelated, citing statements from the declaration of applicant's CEO:

> 2. I participated in the selection of the packaging of the firm's boxed fresh limes and, being an imported product, recognized the need for proper handling in transit that the selected packaging be able to withstand the abuse of the handling that would be involved;

[5] The third party registrations submitted by the examining attorney were unnecessary to show that "boxed fresh limes" and "fresh fruits and vegetables" are *related*, because, as noted, the goods are in part *identical*. Nonetheless, to the extent applicant argues that "fresh fruits and vegetables" does <u>not</u> include fresh limes, the third-party registrations clearly demonstrate that this is incorrect. *See, e.g.,* Registration Nos. 1360907, 2533840, 2969375, 3190784 ("fresh fruits and vegetables namely, ... limes"). Indeed, Registration No. 3226536, owned by applicant, identifies its goods as "fresh fruits and vegetables, including limes."

> 3. what was selected was cardboard construction material made of cellulose wood pulp fibers held together with adhesive binder which manifests itself in a gray color;
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> 4. I was made aware of the goods of Reg. No. 3,053,337 generally for "fresh fruits and vegetables" but not including a large list of exceptions and asked to provide my comments;
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> 5. it is my experience that based on the exceptions and also taking into account our firm's packaging, that boxed fresh limes would be included in the exceptions and not in the "fresh fruits and vegetables," and thus I earnestly believe that applicant's imported boxed limes and registrant's domestically grown fruits, which stated to include limes, in my experience would not include fresh limes and do not travel through the same channel of trade to the ultimate consumer, nor are they displayed on the same shelves in the same section of a retail store so as to be likely to be encountered by a purchaser shopping for imported, on the one hand, and domestically grown, on the other hand, citrus products....

Chabres Decl. (May 21, 2007).

Mr. Chabres' declaration is not persuasive, because it is apparently based on a number of misunderstandings. First, Mr. Chabres' comments about the type and color of applicant's packaging (also made in the January 8, 2007, declaration) are irrelevant. Applicant has not applied to register a particular configuration or color of a box; the only mark at issue is that in the drawing, and we may not base our decision on any other mark or trade dress.

Next, Mr. Chabres opines – based on the <u>exclusions</u> from the "fresh fruits and vegetables" identified in the prior

registration – that applicant's "boxed fresh limes" would not be included within the scope of the prior registrant's goods. Mr. Chabres does not explain how he arrives at this conclusion, but it is logically incorrect. None of the exclusions in the registration includes limes, so the exclusions cannot provide a basis for this argument.

Further, Mr. Chabres compares "applicant's imported boxed limes and registrant's domestically grown fruits." (emphasis added). But neither applicant's nor registrant's goods are so limited. Even if Mr. Chabres' statement were supported by the evidence – and it is not – we must construe applicant's and registrant's goods as including both domestic and imported goods. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986)(registrant's goods may not be limited by evidence or argument).

Mr. Chabres also asserts that applicant's goods and those of the prior registrant would travel in different channels of trade. Again, there is no evidence to support this fact, and even if there were, we may not read such restrictions into an application.

Lastly, we note the argument made in applicant's reply brief. Seizing on a rhetorical flourish in the examining attorney's brief,[6] applicant argues that

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[6] Examining Atty. Br. at 6:

> The registrant's identification makes no mention of whether its fresh fruits and vegetables are

> [w]hat should have been made of record was the dictionary definition of FRESH VEGETABLES (Fruits)(underlining added) which is the full description of Registrant's goods.
>
> Such full definition as provided in The World Book Dictionary, a THORNDIKE-BARNHART DICTIONARY is "...not artificially preserved ... fresh vegetables...."
>
> A lime is neither a vegetable nor a fruit that would be perceived by a purchaser as an article for purchase at a roadside produce stand because "the acid juicy pulp" thereof is not artificially preserved.

Applicant's point is unclear, but whether a lime would be sold at a roadside stand seems to us to have minimal relevance, at best.

We conclude that applicant's goods, channels of trade, and classes of consumers, are legally identical to those of the cited registrant, and that these *du Pont* factors strongly support the refusal to register.

IV. Conclusion

After careful consideration of the evidence and argument of record, we conclude that in view of the similar marks and the identical goods at issue, applicant's use of its mark in connection with "boxed fresh limes" is likely to cause confusion as to the source or sponsorship of such goods.

> domestically grown, imported, boxed or bagged. A lime, whether boxed or sold at a roadside produce stand, is a fruit and would be found in the same channels of trade as the registrant's goods.

Decision: The refusal to register under Trademark Act § 2(d) is AFFIRMED.