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May 21, 2007  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Trinidad Benham Corp.

Serial No. 78446099

James L. Brown and Thomas D. Bratschun of Swanson & Bratschun,  
L.L.C. for Trinidad Benham Corp.

Renee D. McCray, Trademark Examining Attorney, Law Office 115  
(Craig D. Taylor, Managing Attorney).

Before Seeherman, Hohein and Drost, Administrative Trademark  
Judges.

Opinion by Hohein, Administrative Trademark Judge:

Trinidad Benham Corp. has filed an application to register the mark "SOLFRESCO" in standard character form on the Principal Register for "dry beans, peas and lentils" in International Class 29.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that, under the doctrine of foreign equivalents, applicant's mark, when used in connection with its goods, so resembles the

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<sup>1</sup> Ser. No. 78446099, filed on July 6, 2004, which is based on an allegation of a bona fide intention to use the mark in commerce. The mark translates into English as "sun cool" or "sun fresh."

mark "SUNFRESH," which is registered in standard character form on the Principal Register by the same registrant for both "chilled or processed foods sold in sealed containers, namely fruit or fruit mixtures as slices, sections, chunks or tidbits" in International Class 29<sup>2</sup> and "chilled or processed foods, namely fruit or fruit mixtures as slices, sections, chunks or tidbits sold in containers" in International Class 29,<sup>3</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We reverse the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.<sup>4</sup>

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<sup>2</sup> Reg. No. 1,990,676, issued on August 6, 1996, which sets forth a date of first use of the mark anywhere and in commerce of July 1988; renewed.

<sup>3</sup> Reg. No. 2,009,258, issued on October 22, 1996, which sets forth a date of first use of the mark anywhere and in commerce of July 25, 1988; renewed.

<sup>4</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

Applicant contends in its initial brief that confusion is not likely, arguing that the marks at issue are dissimilar and the respective goods are not related. In particular, as to the marks, applicant argues that the doctrine of foreign equivalents is inapplicable because the Examining Attorney has offered no evidence that customers for applicant's goods would be likely to stop and translate its "SOLFRESCO" mark into an English equivalent and would, instead, simply take the mark as it is. In support of its position, applicant notes that "[t]he doctrine of foreign equivalents was recently revisited by the Federal Circuit" in *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005), and submits that:

[As t]he Federal Circuit confirmed, "The doctrine of foreign equivalents is not an absolute rule and it should be viewed merely as a guideline." The Federal Circuit does make it quite clear that, "when it is unlikely that an American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied." *Id[.]* at p. 1377. ....

Here, applicant asserts, the "Examining Attorney's application of the doctrine of foreign equivalents begins and ends with the conclusion that SOLFRESCO would be translated as "sun fresh," with the basis for such conclusion resting solely upon her statement in the final refusal that the "large number of Americans who speak Spanish make it very likely that the Spanish terms comprising the mark would be translated." In addition, applicant insists that:

Applicant's mark, SOLFRESCO, is a fanciful combination of two Spanish roots - sol and fresco. It is important to note that the combination SOLFRESCO has no Spanish meaning. More importantly, "sol fresco" is not a grammatically proper construction which would ever be used in Spanish.

In view thereof, and inasmuch as the term "SOLFRESCO," as noted later in this opinion, "could possibly be translated as either 'sun cool' or 'sun fresh,' applicant urges that "a Spanish speaking American would be confused as to how to translate this mark." Applicant thus "submits that it is unlikely that the mark would be translated by an American buyer at all."

Furthermore, applicant maintains that, even if its mark were to be translated by purchasers and prospective customers, confusion with registrant's mark would not be likely. While, in this regard, there is no dispute that the Spanish term "sol" means "sun" in English, applicant points out that two of three sources for translations which it made of record list "cool" as the meaning of the Spanish term "fresco" before setting forth its other meaning of "fresh" (with, we note, it being the converse which is true with respect to the third source). Applicant argues, in consequence thereof, that under the doctrine of foreign equivalents, its mark would most likely be translated into English as "sun cool" rather than "sun fresh," stating that:

The first element of Applicant's fanciful combination, sol, indisputably translates as "sun." Fresco, however, does not have a single meaning. Applicants [sic] have previously made of record ... three separate Spanish to English translations of the word "fresco." Two of the references are internet based translation dictionaries. The third is a published Spanish to English Dictionary. According to Word Reference.com,

the primary translation of "fresco" is "cool." "Cool" is the second definition listed according to the Larouse Spanish to English Pocket Dictionary [with "fresh" being the first definition listed]. "Cool" is the first definition listed according to the Houghton-Mifflin Spanish to English Dictionary as reported by Yahoo.

Admittedly, the secondary definition of fresco is "fresh." However, a Spanish speaking American confronted with Applicant's mark SOLFRESCO would be as likely to translate that mark as "sun cool" as they would be to translate the mark as "sun fresh." Applicant contends that "sun cool" is a more likely translation since "fresco" as an adjective means "cool" when describing a temperature. The sun is obviously hot and thus, SOLFRESCO results in the fanciful contradiction "sun cool." Thus, a Spanish speaking American would be confused as to how to translate this mark, and at a minimum would require a mental pause. ....

Relying, also, on *In re Sarkli, Ltd.*, 721 F.2d 353, 220 USPQ 111 (Fed. Cir. 1983), in which the Federal Circuit reversed the Board's holding that the term "REPECHAGE" was the French equivalent of the English words "second chance," contends that:

The Federal Circuit concluded that in certain instances REPECHAGE has the same meaning as "second chance" but that REPECHAGE was not a strict equivalent of "second chance." The Federal Circuit's ruling is supported by the fact that REPECHAGE has multiple translated meanings, none of which is an unambiguous equivalent to "second chance." The *Sarkli* court's analysis can be extended to the present matter where the potential translation of SOLFRESCO to "sun fresh" is ambiguous.

In view thereof, and in light of the aural and visual differences which are readily apparent between the marks "SOLFRESCO" and "SUNFRESH," applicant maintains that "the differences in the marks as a whole in appearance, sound, connotation and commercial

impression leads to the inescapable conclusion that there is no likelihood of confusion between the respective marks."<sup>5</sup>

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<sup>5</sup> Applicant, referring to the *du Pont* factor of the number and nature of similar marks in use on similar goods, additionally points to several "currently coexisting third-party registrations ... for marks including the elements SUN and FRESH or SOL and FRESCO ... for foods or beverages." Applicant argues that such registrations, which cover the marks "SUNFRESH" for "coffee," "SUNFRESH" for "fruit juices sold exclusively to manufacturers," "DRINK SUN-FRESH BEVERAGES" for "non-alcoholic maltless soft drinks" and "SUNSWEET FRESH" for "fresh vegetables, fresh fruit, [and] raw and unprocessed nuts," as well as its own subsisting registration for the mark "SOLFRESCO" for "rice and husked barley," are evidence that such marks "are weak marks entitled to only a narrow scope of trademark protection" because "consumers are capable of differentiating between the various marks." Interestingly, applicant never mentions three other third-party registrations, two of which are owned by the same entity, for the marks "SUNFRESH," with and without a design, for "fresh potatoes and onions" and "SUN FRESH" and design for "retail grocery store and supermarket services," which had additionally been cited by the Examining Attorney as a Section 2(d) bar to registration but which were withdrawn as references in the final refusal even though still subsisting and coexisting with the two cited registrations which are the basis for the final refusal.

It is well settled, however, that third-party registrations are not evidence of what happens in the marketplace or that the purchasing public is familiar with the use of the marks which are the subjects thereof and has therefore learned to distinguish those marks by the differences therein. See, e.g., *National Aeronautics & Space Admin. v. Record Chemical Co.*, 185 USPQ 563, 567 (TTAB 1975). Such registrations therefore do not show that the subject marks are actually being used, much less that the extent of their use is so great that customers are accustomed to encountering the marks in the marketplace and will differentiate among them. See, e.g., *Smith Brothers Manufacturing Co. v. Stone Manufacturing Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973), in which the court indicated that:

[L]ittle weight is to be given such registrations in evaluating whether there is likelihood of confusion. The existence of these registrations is not evidence of what happens in the market place or that customers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.

See also *Olde Tyme Foods, Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542, 1545 (Fed. Cir. 1992) [third-party registrations "may not be given any weight" (emphasis in original) as to the strength of a mark]; and *In re Hub Distributing, Inc.*, 218 USPQ 284, 285-86 (TTAB 1983). Accordingly, the *du Pont* factor which concerns the number and nature of similar marks in use on similar goods is considered to be neutral rather than in applicant's favor.

The Examining Attorney, on the other hand, argues that the marks at issue are "strikingly similar" in sound, appearance, connotation and commercial impression." In particular, with respect to sound and appearance, she contends that "SOLFRESCO is strikingly similar to SUNFRESH, with both marks comprising the same letters, i.e., 'S' and 'F,' and the same overall construction." As to connotation and commercial impression, she maintains that "the mark SOLFRESCO comprises Spanish terms that directly translate into English as SUNFRESH" and that "[t]he doctrine of foreign equivalents is applicable in this case because it is likely that, given the appreciable number of purchasers in the United States who speak or understand Spanish, the ordinary American purchaser, upon encountering applicant's mark, would stop and translate it into its English equivalent." This is so, according to the Examining Attorney, because "the relevant goods in this case all comprise closely related processed fruits and vegetables" and the "slight suggestive significance" of applicant's mark in relation to its goods in that the mark SOLFRESCO "conveys that the goods are SUN-ripened and FRESH." In addition, she essentially notes that applicant's mark is a cognate in that "SOLFRESCO comprises Spanish terms that directly translate into English as SUNFRESH," pointing out that "as conceded by applicant and supported by the [dictionary] evidence of record, the term SOL means SUN in English, and the term FRESCO means FRESH."

As to applicant's contention that its mark would instead primarily translate as "SUNCOOL," she asserts that "there

is no evidence to support the argument that, with respect to a purchaser of these goods, the term FRESH is only a secondary meaning while the primary meaning is COOL" and that, "given that the relevant goods comprise produce, it is more likely that the term would be translated as FRESH." In fact, we note in this regard that, in response to an Office action, applicant tellingly admitted that "'fresco' when used as a Spanish adjective to modify a food item would be generally translated as 'fresh,'" even though it further argued that, because its mark incorporates the term "sol" rather than the name of a food item, purchasers would view such mark as meaning "sun cool" if translated or, at the least, would be confused as to the English meaning of the mark and thus would not regard it as the foreign equivalent of registrant's SUNFRESH mark. Nonetheless, because the Examining Attorney finds that "the mark SOLFRESCO is the Spanish-language equivalent of the literal portions of the cited registered mark, SUNFRESH," she maintains that it is the "equivalent in terms of connotation and commercial impression" of the registrant's mark. Contemporaneous use of such marks, she insists, in connection with related goods would therefore be likely to cause confusion as to source or sponsorship.

While concededly a close question, we agree with the Examining Attorney that, in light of the goods at issue, the doctrine of foreign equivalents is applicable and that applicant's mark "SOLFRESCO" would be regarded as the foreign equivalent of registrant's mark "SUNFRESH." As recently set forth by our primary reviewing court in *Palm Bay Imports Inc. v.*

Veuve Clicquot Ponsardin Maison Fondée En 1772, supra at 73 USPQ2d 1696, in reversing the finding by this Board of a likelihood of confusion between the marks "VEUVE ROYALE" and "THE WIDOW":<sup>6</sup>

Under the doctrine of foreign equivalents, foreign words from common languages are translated into English to determine genericness, descriptiveness, as well as similarity of connotation in order to ascertain confusing similarity with English word marks. See *In re Sarkli, Ltd.*, 721 F.2d 353 [220 USPQ 111] (Fed. Cir. 1983); *In re Am. Safety Razor Co.*, 2 U.S.P.Q.2d 1459, 1460 (T.T.A.B. 1987) (finding BUENOS DIAS for soap confusingly similar to GOOD MORNING for shaving cream). When it is unlikely that an

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<sup>6</sup> Specifically, the Federal Circuit noted that:

The Board held that Palm Bay's VEUVE ROYALE was confusingly similar to VCP's mark THE WIDOW, in part because under the doctrine of foreign equivalents, an appreciable number of purchasers in the U.S. speak and/or understand French, and they "will translate" applicant's mark into English as "Royal Widow." *Veuve Clicquot Ponsardin*, slip op. at 36. The Board erred in so finding.

*Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, supra at 73 USPQ2d 1695-96. Although nonetheless also affirming this Board's finding of a likelihood of confusion in such case between the mark "VEUVE ROYALE" and the marks "VEUVE CLICQUOT PONSARDIN" and "VEUVE CLICQUOT," the Federal Circuit observed that the Board had been inconsistent in its application of the doctrine of foreign equivalents, stating that:

In comparing VEUVE ROYALE with VEUVE CLICQUOT PONSARDIN and VEUVE CLICQUOT, the Board found that "an appreciable number of purchasers are unlikely to be aware that VEUVE means 'widow' and are *unlikely to translate* the marks into English." *Veuve Clicquot Ponsardin*, slip op. at 11 (emphasis added). In comparing VEUVE ROYALE with THE WIDOW, however, the Board found that "[A]n appreciable number of purchasers in the United States speak and/or understand French, and they *will translate* applicant's mark into English as ROYAL WIDOW." *Id.*, slip op. at 14 (emphasis added). An appreciable number of U.S. consumers either will or will not translate VEUVE into "widow," and the Board was inconsistent in its application of the doctrine of foreign equivalents.

Id. at 73 USPQ2d 1696.

American buyer will translate the foreign mark and will take it as it is, then the doctrine of foreign equivalents will not be applied. *In re Tia Maria, Inc.*, 188 U.S.P.Q. 524 (T.T.A.B. 1975) (no likelihood of confusion between TIA MARIA for a Mexican restaurant and AUNT MARY'S for canned vegetables).

....

Although words from modern languages are generally translated into English, the doctrine of foreign equivalents is not an absolute rule and should be viewed merely as a guideline. *In re N. Paper Mills*, 64 F.2d 998, 999 (C.C.P.A. 1933); *McCarthy on Trademarks*, at §11:34. The doctrine should be applied only when it is likely that the ordinary American purchaser would "stop and translate [the word] into its English equivalent." *In re Pan Tex Hotel Corp.*, 190 U.S.P.Q. 109, 110 (T.T.A.B. 1976). This court agrees with the T.T.A.B. that it is improbable that the average American purchaser would stop and translate "VEUVE" into "widow." Substantial evidence does not support the Board's finding regarding the doctrine of foreign equivalents. This court, therefore, reverses the Board's finding of likelihood of confusion for THE WIDOW.

While neither the Federal Circuit in *Palm Bay Imports* nor applicant in either of its briefs have provided any indication as to what evidence would suffice to support the application of the doctrine of foreign equivalents in a particular case, it would appear from the court's decision in *Palm Bay Imports* that applicant is correct that the mere fact that an appreciable number of purchasers in the United States speak and/or understand the particular modern foreign language of which an applicant's mark is allegedly the equivalent of the registrant's English language mark (or vice versa) is not necessarily sufficient to constitute substantial evidence showing

that such purchasers will stop and translate the foreign language mark into English. Nevertheless, there is no question that Spanish, like French, is a common or modern foreign language which is spoken or understood by an appreciable segment of purchasers of applicant's and registrant's goods in the United States and applicant does not argue to the contrary. See, e.g., In re Thomas, 79 USQP2d 1021, 1024-25 (TTAB 2006) [in finding that "the marks BLACK MARKET MINERALS and MARCHE NOIR, while decidedly different in sound and appearance, have the same connotations" inasmuch as the record showed that "MARCHE NOIR is the exact French equivalent of the English idiom BLACK MARKET," the Board also noted that French not only "is a common foreign language spoken by an appreciable segment of the population," but that the evidence revealed that, "of the foreign languages with the greatest number of speakers in the United States, French is ranked second only to Spanish"].

Also present in this case, however, is the fact that applicant's mark "SOLFRESCO" and registrant's mark "SUNFRESH" are cognates in that, in sound and appearance, each mark readily suggests the meaning or connotation of the other. While it appears to be true that, as argued by applicant, there is no Spanish word "solfresco" *per se*, that fact no more slows or precludes recognition of its constituent terms "sol" and "fresco" and their respective connotations than the compound term "sunfresh" hampers or prevents understanding of the component words "sun" and "fresh" and their associated meanings. Moreover, it is clear, as applicant has conceded in the translation set

forth in the application, that "sun fresh" is not only one probable meaning for the mark "SOLFRESCO," but such meaning, unlike "sun cool," is the connotation which the mark would unambiguously and most likely have due to the fact, as applicant has also admitted, that "'fresco' when used as a Spanish adjective to modify a food item would be generally translated as 'fresh.'"<sup>7</sup> Simply put, it strains credibility to believe that customers for and potential purchasers of applicant's "dry beans, peas and lentils" would ascribe a meaning of "sun cool" to the mark "SOLFRESCO" when used in connection therewith. Produce items are not typically described as being "cool"; rather, such goods are more often commonly described favorably as being "fresh." While applicant's contention that "'sun cool' is a more likely translation since 'fresco' as an adjective means 'cool' when describing a temperature" might have some plausibility if, for instance, its goods were air conditioners or fans or perhaps even soft drinks, we fail to see why the mark "SOLFRESCO" results

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<sup>7</sup> Such situation is analogous to the circumstances in *In re Perez*, 21 USPQ2d 1075, 1076-77 (TTAB 1991), in which the mark "GALLO," despite having several meanings in Spanish, was found by the majority to be the foreign equivalent of the word "ROOSTER" due to the picture of a rooster on the packaging for the associated goods. Specifically, the Board majority observed that:

Undercutting applicant's argument that the Spanish word "gallo" has meanings other than "rooster", and, thus, is not the foreign equivalent of registrant's mark, is the usage of applicant's mark[s] in the commercial marketplace, as evidenced by the specimens of record. The specimens depict applicant's marks with a prominent representation of a rooster. While the rooster design is not a feature of the marks sought to be registered and, of course, cannot be considered when comparing the marks, the design would certainly reinforce to consumers in the marketplace the "rooster" translation of "gallo" as opposed to the other English meanings of "gallo."

in the fanciful contradiction 'sun cool'" when used for applicant's dried beans, peas and lentils.

Accordingly, instead of it being the case that "a Spanish speaking American would be confused as to how to translate" applicant's mark, as argued by applicant, we concur with the Examining Attorney that because, in essence, the marks at issue are cognates, even persons with a minimum exposure to Spanish, much less those who are also fluent therein, would immediately understand that, when used in connection with applicant's dried beans, peas and lentils, the mark "SOLFRESCO" means "sun fresh" and thus, when translated, is the foreign equivalent of registrant's mark "SUNFRESH" in connotation. Furthermore, while such marks are not substantially similar in overall sound or appearance, they nonetheless share some aural and visual similarities and are structured the same in that both are compound terms which consist of words which, in each instance, start with the letters "S" and "F," as pointed out by the Examining Attorney. Such similarities add to the likelihood that customers for applicant's goods would stop and translate its "SOLFRESCO" mark as "SUNFRESH" rather than taking the mark as it is. Overall, the respective marks engender substantially similar commercial impressions. Consequently, in light of the doctrine of foreign equivalents, the *du Pont* factor of the similarity or dissimilarity of the marks at issue in their entireties as to appearance, sound, connotation and commercial impression favors a finding that confusion is likely if the marks "SOLFRESCO" and "SUNFRESH" were to be used in connection with the same or related

goods. Nonetheless, it is obvious that such marks, when used in connection with the particular goods at issue herein, are highly suggestive and therefore would generally be entitled to protection only if the respective goods would be considered to be commercially related by purchasers and prospective customers for those products.

Turning, therefore, to consideration of whether applicant's dried beans, peas and lentils are indeed commercially related to registrant's chilled or processed fruit or fruit mixtures sold in sealed containers as slices, sections, chunks or tidbits, applicant contends that such products are dissimilar, arguing that registrant's goods "are packaged and sold in ready-to-eat condition" and thus are "not likely to be used as the ingredients of more complex preparations." Such goods, applicant points out, "are also most likely to be presented to the buying public in the refrigerated or canned fruits section of a supermarket." Applicant maintains that, by contrast, its products "are staple goods" which "are virtually inedible as delivered to the consumer and have undergone minimal processing." Applicant stresses that its goods "are specifically sold to be incorporated as an ingredient into more complex preparations, and a good deal of effort must be undertaken to prepare the goods for consumption." In particular, applicant points out that, unlike registrant's goods, "dried beans, peas and lentils must be re-hydrated by soaking, boiling or other methods" before they are ready for consumption. "Typically," applicant further notes, its "dried beans, peas and lentils will be sold in plastic bags and

located in a section of the supermarket separate from canned fruits or [a] refrigerated section." Specifically, applicant asserts that its goods "would be displayed along with other staple goods such as bagged rice." In light of such differences, applicant contends that the goods at issue are not commercially related and thus "no mistaken belief that the goods come from a common source is likely to arise in the mind of a consumer."

The Examining Attorney, however, insists that the goods at issue are related in a commercial sense because they "are all similar food products, specifically, produce in the nature of processed fruits and vegetables that, as shown in the copies of third-party registrations provided by the Examining Attorney, are typically offered by the same source" under the same mark. She argues that while applicant "contends that the goods are processed in different ways and may be sold in different sections of the supermarket, it has offered no evidence to show that the goods are not in fact sold through the same trade channels or otherwise marketed in such a way that purchasers would not be lead [sic] to believe that the goods emanate from the same source." According to the Examining Attorney, "the evidence of record amply demonstrates that processed produce in the nature of packaged fruits and vegetables, irrespective of the type or degree of processing, typically emanate from the same source and are marketed and sold through the same trade channels to the same class of purchasers." In particular, she asserts that she "has ... previously made of record multiple excerpts of articles obtained from the Internet and Lexis-Nexis which overwhelmingly

demonstrate the overlapping nature of the respective trade channels and the sale and marketing of the relevant goods to the same class of purchasers." Lastly, she urges that the goods at issue are inexpensive items and thus would be selected with less care: "In this case, the parties' goods may all be considered low-price 'impulse goods'." She consequently maintains that applicant's and registrant's goods are commercially related products and thus a likelihood of confusion as to source or sponsorship would exist if such goods were marketed under their respective marks.

As to the several use-based third-party registrations relied upon by the Examining Attorney, seven specifically appear to pertain to marks which are registered for, *inter alia*, the goods at issue herein in that they respectively include the following pairs of items: (i) "canned fruits, bottled fruits, ... [and] fruit salads" and "dried beans"; (ii) "fruits in jars ... [and] fruit salad" and "processed beans, ... and dried beans"; (iii) "canned ... fruits ..., namely, ... apricots, ... baby apples, ... grapefruit, kiwifruit, kumquats, ... mandarin oranges, mango, pineapple, mixed tropical fruits, fruit cocktail, tropical fruit salad, ... papaya, ... [and] pears" and "dried ... vegetables, namely, ... dried beans, ... [and] peas"; (iv) "bottled, [and] canned ... fruits ... [and] fruit salads" and "dried beans, peas and lentils"; (v) "canned fruits ... [and] canned fruit cocktail" and "dried beans"; (vi) "bottled, [and] canned ... fruits" and "dried beans, peas and lentils"; and (vii) "bottled, [and] canned ... fruits" and "dried beans, peas and

lentils." However, of those seven third-party registrations, on their face only two or three appear to be owned by grocery or supermarket stores while the rest seem to be owned by food distributors or processors (including the three owned by the same company).

Moreover, with respect to what the Examining Attorney has characterized as "multiple excerpts of articles obtained from the Internet and Lexis-Nexis which overwhelmingly demonstrate the overlapping nature of the respective trade channels and the sale and marketing of the relevant goods to the same class of purchasers," there are pages from only two supermarket or grocery store circulars and one on-line grocery shopping service. None of the excerpts, however, shows both applicant's and registrant's goods advertised together or otherwise therein and only the excerpts from the on-line grocery shopping service even list such "Dry Grocery" items as "Lentils Dry" and various "Beans Dry."

While, once again, we are faced with an admittedly close question, we cannot agree with the Examining Attorney that applicant's dry beans, peas and lentils have been shown to be related in a commercial sense to registrant's chilled or processed fruit or fruit mixtures sold in sealed containers as slices, sections, chunks or tidbits. To be sure, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion, it being sufficient, instead, that the goods simply are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by

the same persons in situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., *Monsanto Co. v. Enviro-Chem Corp.*, 199 USPQ 590, 595-96 (TTAB 1978); and *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978). While there are a variety of ways in which such may be demonstrated, including excerpts from the "LEXIS-NEXIS" database or from the Internet, another method which is often used is to submit copies of use-based third-party registrations for marks which, in each instance, are registered for the applicant's goods, on the one hand, and the registrant's products, on the other. Although such registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nonetheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds 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 (TTAB 1988) at n. 6.

In this case, while the seven use-based third-party registrations which the Examining Attorney has made of record are indeed some evidence which tends to suggest that applicant's and registrant's goods could be regarded by ordinary, retail level customers or consumers for such products as commercially related

goods,<sup>8</sup> by contrast their probative value is lessened by the telling fact that, in this case, none of the "multiple excerpts of articles obtained from the Internet and Lexis-Nexis" database serves to "overwhelmingly" or even otherwise demonstrate the assertedly "overlapping nature of the respective trade channels and the sale and marketing of the relevant goods to the same class of purchasers" as contended by the Examining Attorney. To be sure, excerpts from food store flyers and similar advertising materials, as well as excerpts from on-line supermarket or grocery store shopping services, may be used to show that various food items are sold in the same channels of trade to the same classes of purchasers. Here, however, such evidence is not only insufficient to show that applicant's and registrant's goods are commercially related, but it tends to undercut whatever probative value the third-party registrations may otherwise have.

Specifically, the excerpts made of record by the Examining Attorney, as previously pointed out, are from only two supermarket or grocery store circulars and one on-line grocery

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<sup>8</sup> The Examining Attorney variously refers to such customers in her brief as "the ordinary American purchaser" and "an American consumer," making it clear that the focus of her theory of a likelihood of confusion is on the retail grocery store and supermarket level rather than the food wholesaler and distributor level. Given the obvious sophistication of purchasers at the latter level, coupled with the high degree of suggestiveness of the marks at issue herein and the specific differences in the respective goods, confusion by buyers of such products as inventory items for grocery stores and supermarkets would not appear to be likely to occur. See, e.g., *Federated Foods, Inc. v. Fort Howard Paper Co.*, supra at 192 USPQ 29 at n. 11 [court noted that even though "all of the goods might also be carried by distributors, ... in our opinion, confusion between the marketed goods would be even less likely at the distributor level than in the supermarket where the goods might actually be displayed in proximity"].

shopping service, and none of the excerpts shows conjoint advertising of applicant's and registrant's goods. In fact, only the excerpts from the on-line grocery shopping service even list such dry grocery items such as lentils and various beans and there is no mention of respondent's goods. If it were the case that the goods at issue herein were commercially related, we would expect to see at least some examples where such goods were advertised or otherwise promoted together. Here there are none.

Furthermore, as cogently argued by applicant, the respective goods are specifically different in that, among other things, registrant's chilled or processed fruit or fruit mixtures sold in sealed containers as slices, sections, chunks or tidbits "are packaged and sold in ready-to-eat condition." Consequently, as applicant notes, registrant's goods are generally "not likely to be used as the ingredients of more complex preparations" and "are also most likely to be presented to the buying public in the refrigerated or canned fruits section of a supermarket." By contrast, applicant's dry beans, peas and lentils are considered "staple goods" which, as applicant observes, "are virtually inedible as delivered to the consumer and have undergone minimal processing." Applicant, moreover, notes that its goods "are specifically sold to be incorporated as an ingredient into more complex preparations, and a good deal of effort must be undertaken to prepare the goods for consumption," pointing out that, unlike registrant's goods, "dried beans, peas and lentils must be re-hydrated by soaking, boiling or other methods" before they are ready to be eaten.

Accordingly, while it is nonetheless undisputed that the goods at issue in this appeal are sold to ordinary consumers through such identical channels of trade as grocery stores and supermarkets, it is well established that there is no *per se* rule that all food products are related goods simply by their nature or virtue of capability of being sold in the same food markets. See, e.g., *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151, 152-53 (CCPA 1978); and *Federated Foods, Inc. v. Fort Howard Paper Co.*, supra at 192 USPQ 29. Thus, even assuming, as contended by the Examining Attorney, that both applicant's and registrant's goods are "inexpensive items and ... would be selected with less care,"<sup>9</sup> common experience reveals that, as asserted by applicant, its "dried beans, peas and lentils will be sold in plastic bags and located in a section of the supermarket separate from canned fruits or [a] refrigerated section." Specifically, applicant's goods, as previously noted, "would be displayed along with other staple goods such as bagged rice." In light of such differences, we are not persuaded by the limited evidence presented by the Examining Attorney that customers for the goods at issue herein would consider such goods to be commercially related.

We therefore conclude that, on this record, confusion has not been demonstrated to be likely, based on the doctrine of

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<sup>9</sup> Although there is no information of record to indicate the retail price of registrant's goods and like products sold by third parties, the record shows that goods like the dried beans, peas and lentils which applicant intends to market are offered for sale in 16 oz. bags at prices of \$0.95 for dry baby lima beans, \$0.69 for dry black beans, \$0.79 for dry light red kidney beans, \$0.69 for dry navy beans and \$0.55 for dry lentils.

foreign equivalents. In particular, while we find that the mark "SOLFRESCO," when used in connection with applicant's dried beans, peas and lentils, is the foreign equivalent of the mark "SUNFRESH," as used for registrant's chilled or processed fruit or fruit mixtures sold in sealed containers as slices, sections, chunks or tidbits, we further find that in view of the highly suggestive nature of such marks and the specific differences in the respective goods, confusion as to source or sponsorship is not likely to occur.

**Decision:** The refusal under Section 2(d) is reversed.