

**THIS DECISION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Mailed: 2/14/2006

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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Wholesome Harvest, LLC
v.
Foxy Foods, LLC
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Opposition No. 91155512
to application Serial No. 78139829
filed on June 28, 2002
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Daniel A. Rosenberg of Davis, Brown, Koehn, Shors &
Roberts, P.C. for Wholesome Harvest, LLC.

Thomas A. Dirksen for Foxy Foods, LLC.
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Before Quinn, Walters and Kuhlke, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

Applicant, Foxy Foods, LLC, seeks registration of the
standard character mark WHOLESOME HARVEST ("WHOLESOME"
disclaimed) for "precut, ready to serve vegetables" in
International Class 29.¹

Opposer, Wholesome Harvest, LLC, opposed registration
pursuant to Section 2(d) of the Trademark Act, 15 U.S.C.

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¹ Application Serial No. 78139829, filed on June 28, 2002, based on an
allegation of a bona fide intention to use the mark in commerce.

§1052(d), on the ground that applicant's mark, if used in connection with applicant's goods, would so resemble opposer's previously used mark WHOLESOME HARVEST for meat, poultry and "other products" as to be likely to cause confusion, or to cause mistake, or to deceive. Opposer claims first use of its mark in connection with its goods at least as early as January 15, 2000 and first use in commerce at least as early as June 16, 2001. Opposer also alleges that it owns application serial no. 78157127, filed on August 23, 2002, for the mark WHOLESOME HARVEST and design for "frozen meat and poultry."²

Applicant filed an answer wherein it denied the salient allegations of the notice of opposition.³

² Opposer's use-based application serial no. 78157127, as originally filed, also listed "vegetables" in the identification of goods. Opposer subsequently filed a request to divide, requesting that "vegetables" be listed in a separate intent-to-use application. "Child" application serial no. 78975424 was created. Application serial no. 78975424 has been suspended pending a final disposition of applicant's application involved herein.

A check of Office records shows that opposer's "parent" application serial no. 78157127 matured into Registration No. 2969732 on July 19, 2005. Inasmuch as the registration issued subsequent to trial and after briefs were filed, the registration, of course, was not introduced herein. In view thereof, opposer's registration does not form part of the record of this case.

³ Applicant's answer also contained several allegations captioned as "affirmative defenses," some of which merely amplify the denial of likelihood of confusion. Applicant additionally made allegations that opposer fraudulently claimed use in commerce for "vegetables" and fraudulently asserted incorrect dates of use for its goods in application serial no. 78157127. Suffice it to say, although applicant's allegations may have a bearing on the validity of opposer's application, the allegations are irrelevant insofar as opposer's common law rights for organic meats are concerned, that is, the basis upon which opposer claims priority and likelihood of confusion in this case.

The record consists of the pleadings; the file of the involved application; and trial testimony, together with attached exhibits, taken by opposer.⁴ The testimony comprises the deposition of opposer's founder and president, Wende Elliott, together with several exhibits, including the file contents of opposer's pleaded "parent" application serial no. 78157127 and "child" application serial no. 78975424.

Applicant neither took testimony nor offered any other evidence at trial. Both parties filed briefs on the case, and an oral hearing was not requested.

Opposer is in the business of providing organically grown and farmed products, including meat and poultry, and has done so under the name "Wholesome Harvest, LLC" since organizing as a limited liability company on May 10, 2002. Prior to that time, opposer operated as a sole proprietorship under the same name.

Ms. Elliott testified that opposer sells precooked convenience meals such as bratwurst and frankfurters, packaged poultry and raw meat in retail-ready packages to

⁴ As last set, opposer's testimony period was to close on October 10, 2004. On October 8, 2004, opposer timely filed a motion to extend the testimony period until November 10, 2004. Opposer then deposed Wende Elliott on November 3, 2004. The Board has not previously considered opposer's motion to extend. However, inasmuch as the motion is uncontested, it is granted as conceded. TBMP § 502.04 (2d ed. rev. 2004).

grocery and food service distributors; that the Wholesome Harvest logo shown below



was created in 1999 and that organic meat labeled with the mark was shipped interstate in 2001; and that opposer has promoted its goods through interviews in media outlets such as The Christian Science Monitor, USA Today and public television, through sponsorships on public radio, as well as through appearances at trade shows. Ms. Elliott, while being very non-committal, estimated that opposer's annual sales of its meat products in 2001, 2002 and 2003 were less than \$5 million. Ms. Elliott admitted that opposer has not used its mark on vegetables.

The record is devoid of any evidence relating to applicant's business activities.

We turn first to the issue of standing. Ms. Elliott testified about opposer's use of the mark WHOLESOME HARVEST and design in connection with organic meat products.⁵ In

⁵ Although superfluous to the testimony establishing opposer's standing, the record also establishes that opposer owns application serial nos. 78157127 and 78975424. See *Hartwell Co. v. Shane*, 17 USPQ2d 1569, 1570 (TTAB 1990). Opposer also points out, as evidenced by the examining

view thereof, there is no issue regarding opposer's standing.

We turn next to the question of priority of use - that is, whether opposer has shown by competent evidence use of its mark prior to the earliest date upon which applicant can rely; in this case, that date is June 28, 2002, the filing date of the involved application. See *David Crystal, Inc. v. Estee Lauder, Inc.*, 167 USPQ 411 (TTAB 1970), aff'd, 476 F.2d 1373, 177 USPQ 461 (CCPA 1973); and *Levi Strauss & Co. v. R. Josephs Sportswear, Inc.*, 36 USPQ2d 1328 (TTAB 1994). Opposer bears the burden of establishing its priority. Section 2(d) of the Trademark Act bars registration if a conflicting mark has been "previously used in the United States by another and not abandoned."

As noted above, opposer claims first use anywhere and first use in commerce prior to the filing date of applicant's intent-to-use application. Ms. Elliott testified that the WHOLESOME HARVEST and design mark was first developed "over the winter of 1999," and that sales of organic meat products under the mark to a multi-state grocery chain (Hy-Vee with locations in seven Midwestern

attorney's Office action, that registration in application serial no. 78975424 will be refused under Section 2(d) in the event applicant's application serial no. 78139829 ultimately matures into a registration.

states) followed in 2001. (Elliott dep., pp. 11 and 20-21). An invoice dated June 29, 2001 involving a sale of chicken to a restaurant in Iowa accompanies Ms. Elliott's testimony. Ms. Elliott also testified that promotion and advertising of the mark occurred contemporaneously with the 2001 sales. (Elliott dep., pp. 25-26). Ms. Elliott went on to say that opposer's food products have now been sold throughout the continental United States.

Oral testimony, even of a single witness, if "sufficiently probative," can suffice to prove priority. *Powermatics, Inc. v. Global Roofing Products Co., Inc.*, 341 F.2d 127, 144 USPQ 430 (CCPA 1965). In the present case, Ms. Elliott's testimony regarding opposer's first uses was not characterized by contradictions, inconsistencies or indefiniteness. Rather, Ms. Elliott testified with conviction about the first uses of opposer's mark, including during cross-examination. See *B.R. Baker Co. v. Lebow Brothers*, 150 F.2d 580, 66 USPQ 232 (CCPA 1945). Further, Ms. Elliott's pertinent testimony was accompanied by documentary evidence. Although not overwhelming by any stretch, the minimal evidence nonetheless is consistent with the testimony. See *Elder Manufacturing Co. v. International Shoe Co.*, 194 F.2d 114, 92 USPQ 330 (CCPA 1952).

Applicant challenges opposer's claim of priority, arguing that opposer's 2001 use was only intrastate in nature. Firstly, as indicated above, the record establishes opposer's prior use in both intrastate and interstate commerce. Secondly, even assuming arguendo that opposer's 2001 use occurred solely within the state of Iowa, as applicant contends, such intrastate use is sufficient to demonstrate priority. Contrary to the gist of applicant's challenge, opposer need not prove priority of use in interstate commerce in order to establish priority of use in a mark. Proof of prior and continuous use in intrastate commerce is sufficient to preclude registration. See National Cable Television Association v. American Cinema Editors, Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1429 n.4 (Fed. Cir. 1991) ["Section 14 requires only prior use; 'in commerce' is noticeably absent."]; Bourns, Inc. v. International Resistance Co., 341 F.2d 146, 144 USPQ 424 (CCPA 1965); and Corporate Document Services, Inc. v. I.C.E.D. Management, Inc., 48 USPQ2d 1477 (TTAB 1998) ["It is well established that rights in and to a trademark are created by use of the mark in either intrastate or interstate commerce."]. In this case, Ms. Elliott testified that opposer's organic meat products were sold to regional grocery distributors and to at least one

restaurant in 2001. Such commercial activity, either in intrastate or interstate commerce, is sufficient to show priority of use. Applicant has failed to provide testimony or any other evidence contravening the validity of opposer's prior use.

In view of the above, we find applicant's argument unpersuasive, and conclude that opposer has presented competent and uncontroverted evidence regarding its use of the mark WHOLESOME HARVEST and design prior to the filing date of applicant's intent-to-use application.

We turn next to the ultimate question in this case - that of likelihood of confusion. 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, however, two key considerations are the similarities between the marks and the similarities between the goods. See Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, In re Dixie Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to the similarity or dissimilarity of the marks in their entirety as to appearance, sound,

connotation and commercial impression. *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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 their entireties that confusion as to the source of the goods 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). Furthermore, 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, for rational reasons, 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).

Applicant's mark is set forth as WHOLESOME HARVEST in standard character form. Opposer's mark, as reproduced earlier, is WHOLESOME HARVEST and design. Applying the above principles in the present case, we find that applicant's mark is sufficiently similar to opposer's mark

that, if the marks were used in connection with related goods, confusion would be likely to occur among consumers in the marketplace.

Applicant's argument that the design element is the dominant portion of opposer's mark is not well taken. The word portion of opposer's mark, "WHOLESOME HARVEST," which is identical to the entirety of applicant's mark, is more likely to be remembered by consumers and used when calling for the goods. As such, the literal element of opposer's mark is the dominant element of the mark and is therefore accorded greater weight in determining the likelihood of confusion. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Furthermore, the literal element of opposer's mark is prominently displayed relative to the design.

It is clear that the literal portions of the marks are identical in sound and virtually identical in appearance, as they are comprised of the same terms - "wholesome" and "harvest" set forth in the same order. Inasmuch as applicant's mark is shown in standard character form, applicant is not limited to any particular depiction. Thus, in deciding likelihood of confusion, we "must consider all reasonable manners" in which the standard

character form of the word mark could be depicted. A registration issued to applicant would give applicant rights to WHOLESOME HARVEST in all normal manners of presentation, including typical lower case form, that is, the manner in which the word portion of opposer's mark appears. *Jockey International Inc. v. Mallory & Church Corp.*, 25 USPQ2d 1233 (TTAB 1992), citing *INB National Bank v. Metrohost Inc.*, 22 USPQ2d 1585 (TTAB 1992).

The "WHOLESOME HARVEST" portion of each mark, as applied to food products, also would create the same connotation in the minds of purchasers, namely that the goods are harvested foods with wholesome or healthy attributes.

In sum, the marks, when considered in their entirety, create substantially similar commercial impressions, and the few differences between the marks are insufficient to differentiate them. Clearly, the existence of a design element in opposer's mark does not serve to sufficiently distinguish the marks. The du Pont factor of the similarity between the marks weighs in opposer's favor.

Applicant has argued that the marks are not "strong" as evidenced by the fact that both applicant and registrant disclaimed the word "wholesome" in their respective applications. The mere fact that the word has been

disclaimed does not render the entirety of opposer's mark weak. As noted above, marks must be considered in their entireties when determining whether there is a likelihood of confusion; further, a disclaimer does not remove the disclaimed portion from this analysis. In re National Data Corp., supra. See Giant Food, Inc. v. Nation's Foodservice, Inc., 218 USPQ 390 (Fed. Cir. 1983). In this connection, we further note that the record is devoid of any third-party uses or registrations of marks that are the same as or similar to opposer's mark.

Next we turn to consider the second, third and fourth du Pont factors, namely the similarities between opposer's and applicant's goods and trade channels, as well as the classes of purchasers of these goods.

It is well established that the goods of the parties need not be similar or competitive, or even that they are offered through the same channels of trade, to support a finding of likelihood of confusion. It is sufficient that the respective goods of the parties are related in some manner and/or the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken believe that they originate from a common

source. See *Hilson Research, Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993); and *In re International Telephone and Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Here, applicant's goods are "precut, ready-to-serve vegetables." The evidence of record shows that opposer is an organic food company using its mark on organic meat and poultry, including frozen meats. At the outset, we recognize that there is no per se rule that all food products are related goods by their nature or by virtue of their capability of being sold in the same food markets. See *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171-72 (TTAB 1987). In saying this, however, we also are aware that meats and vegetables have long been held to be related in the context of a likelihood of confusion analysis. See, e.g., *Independent Grocers Alliance Distributing Co. v. Potter-McCune Co.*, 404 F.2d 622, 160 USPQ 46 (CCPA 1968)[fresh meat and canned vegetables related]; and *In re Armour and Co.*, 180 USPQ 351 (TTAB 1973)[frozen vegetables and frozen meats related]. Further, the Board and its primary reviewing court have previously found likelihood of confusion in cases, such as this one, involving substantially similar marks and food products which, though distinctly different, are

nevertheless related in that they are sold to the same classes of purchasers through the same types of stores for conjoint use. See, e.g., *In re Martin's Famous Pastry Shoppe, Inc.*, 221 USPQ 364 (TTAB 1984), *aff'd*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984)[MARTIN'S for cheese v. MARTIN'S for wheat bran and honey bread]; *In re Colonial Stores, Inc.*, 216 USPQ 793 (TTAB 1982), *aff'd in unpublished opinion*, Appeal No. 82-612 (Fed. Cir. March 7, 1983)[COUNTRY PRIDE for prepared meat products, namely, sausage, bacon, smoked meats, ham, and lard v. COUNTRY PRIDE for bread]; and *In re Patrick Cudahy (Wisconsin) Inc.*, 206 USPQ 1030 (TTAB 1979)[ANDERSEN'S for canned soups v. ANDERSEN'S and design for ham].

Applicant's goods and opposer's goods are also complementary and subject to impulse purchase. Ms. Elliott testified that meat and vegetables are often purchased together during the course of a single shopping trip, and consumed together during meals. (Elliott dep., pp. 16-17). Finally, Ms. Elliot testified that both meat and vegetables are inexpensive items often purchased by consumers on impulse. (Id.). Where products are inexpensive and likely to be purchased on impulse, purchasers are held to a lesser standard of purchasing care and, thus, are considered more likely to be confused as to the source of the goods. Recot

Inc. v. M.C. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Applicant's argument that consumers of organic foods are more likely to exercise greater caution and discretion when purchasing organic foods like opposer's is not persuasive. By their inherent nature, the parties' goods are relatively inexpensive and purchasers are therefore likely to exercise nothing more than ordinary care in making their purchasing decisions. In any event, applicant's argument is not supported by any evidence.

The goods of applicant and opposer also move in the same channels of trade. Ms. Elliott has testified that opposer sells its products to grocery distributors, organic food distributors and food service distributors, as well as directly to large retail chain stores and on the Internet. (Elliott dep., pp. 6-7). Opposer's products have been sold in grocery stores, independent health food stores, and health food co-ops.

Applicant's goods are set forth in its application without restriction. Where the application describes the goods broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, it is presumed that the application encompasses all goods of the type described, that they move in all normal

channels of trade, and that they are available to all potential customers. See *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991). Thus, applicant's goods are presumed to encompass organically grown vegetables. Here, customary trade channels for pre-cut, ready-to-serve vegetables would include grocery distributors and retail grocery stores, as well as organic food stores. These trade channels are the same channels through which opposer's goods move.

Furthermore, according to Ms. Elliott, consumers may encounter both vegetables and frozen meat and poultry in physical proximity in the same retail store. As shown by the evidence of record, opposer's goods are organic in nature and such goods, as in the case of opposer's meats, may be marketed in physical proximity to vegetables. As Ms. Elliott testified:

In a grocery store you typically have an organic section to the grocery store that may be half of one aisle, and you have meats and vegetables and canned products all in one aisle. Our [products] would be in a freezer section, and, depending on whether there was a frozen vegetable or fresh vegetable, it would either be next to our product as a frozen vegetable in the organic freezer door, or it would be in the fresh section right next to the organic frozen section.

(Elliott dep., p. 16). Applicant has offered no testimony to the contrary.

Here, it is clear from the evidence of record that applicant's goods and opposer's goods are staple food products, which may be sold through the same trade channels to the same consumers, and they may be used together in the preparation of meals. These findings under the second, third and fourth du Pont factors all weigh heavily in opposer's favor in our likelihood of confusion analysis. Given these findings, we see no need to consider opposer's arguments involving its intention to expand its product line into vegetables, and whether this expansion is natural.

Two other du Pont factors mentioned by applicant require quick comment. The absence of actual confusion is irrelevant to our analysis. There is no evidence that applicant's mark has ever been used; thus, the opportunity for confusion to have occurred in the marketplace may be nonexistent. Further, applicant's argument that it adopted its mark in good faith is unavailing. Good faith adoption does not necessarily mean that confusion is not likely. See *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Hydra Mac, Inc. v. Mack Trucks, Inc.*, 507 F.2d 1399, 184 USPQ 351 (CCPA 1975); and *Greyhound Corp. v. Both Worlds Inc.*, 6 USPQ2d 1635 (TTAB 1988).

We conclude that the evidence of record as it pertains to the relevant du Pont factors supports a finding of likelihood of confusion between the involved marks, and registration of applicant's mark is therefore barred under Section 2(d) of the Trademark Act.

To the extent that any of applicant's points raise a doubt about our conclusion on likelihood of confusion, doubt on the issue of likelihood of confusion is resolved in favor of the prior user and against the newcomer. *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992).

Decision: The opposition is sustained and registration to applicant is refused.