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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77298497
Applicant	Formax, Inc.
Applied for Mark	POWERMAX
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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In re : Trademark Application of :
: Formax, Inc. :
: :
For : POWERMAX : Examining Attorney
: : Chrisie Brightmire King
Serial No : 77298497 :
: :
Filed : October 8, 2007 : Attorney Docket No. 5142800-0002

APPLICANT'S REPLY BRIEF

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The Applicant, Formax, Inc. (“Applicant”), appeals to the Trademark Trial and Appeal Board from the Examining Trademark Attorney’s (“Examining Attorney”) August 24, 2008 issuance of a final refusal to register the trademark POWERMAX (“Final Action”), and submits this Reply Brief in response to the Examining Attorney’s July 23, 2009 Appeal Brief (“EA Brief”).

I. APPLICANT HAS NOT ASKED THE TTAB TO LOOK BEYOND THE IDENTIFICATION OF GOODS IN ITS APPLICATION.

Applicant has not asked the Board to look beyond the identification of goods provided in its application to find no likelihood of confusion with the mark registered by Braun for “electric food blenders.” The goods to which Applicant seeks to apply its POWERMAX mark are “*industrial* electric food processing machines, namely, machines for slicing food products *for packing and packaging* in commercial quantities, and parts therefore.” (emphasis added). As described, these are industrial machines for food packing and packaging applications, not mere commercial slicers, nor electric food blenders.

While the Examining Attorney attempts to group Applicant’s industrial machines for packing and packaging applications with slicers used in a store or deli, she has presented no evidence that delis or stores do any sort of commercial packaging and packing of food products (let alone in quantities requiring the production of thousands of slices per minute), or that such commercial outlets would be capable of housing or have any use for such a machine. While the Examining Attorney has cited evidence that some deli slicers describe themselves as “industrial” or “heavy duty” slicers, there is no evidence that such slicers are used in the packing and packaging of commercial quantities of food – rather, as noted in the EA Brief, these slicers are expressly intended to be used in stores and delis. The plain terms and ordinary usage of Applicant’s identification describe a machine used for “packing and packaging” food “in commercial quantities” (i.e., a machine ordinarily used in a food processing plant).

Consequently, Applicant's identification could not encompass food slicers used in "commercial facilities such as delis and stores that utilize the packaging function" as argued by the Examining Attorney. *See* EA Brief.

II. APPLICANT HAS NOT ASKED THE TTAB TO UNDULY RESTRICT THE GOODS LISTED IN BRAUN'S REGISTRATION.

As explained in Applicant's Appeal Brief, electric food blenders are commonly understood to be countertop appliances – whether used in the home or in a commercial setting. All of the electric food blenders identified in the Examining Attorney's print-outs (even those identified as "commercial" or "industrial" devices) are relatively small appliances that can fit on a countertop. *See* Final Action, Exhibit #s 23-31; 61-62; 67-68. While the Examining Attorney has identified some industrial mixers that might be used in a food processing plant, the materials submitted by the Examining Attorney do not identify such equipment as "electric food blenders" (or even as "food blenders"). Instead, they are identified as "ribbon blenders" or "industrial food mixers" and the materials submitted indicate that ribbon blenders (many of which are hydraulically powered) are suitable for mixing a wide range of products such as pharmaceuticals, foods, chemicals, fertilizers and plastics. *See* 3/21/09 Reconsideration Letter, Exhibits 41 & 42. In instances in which the equipment is specific to food, the equipment is identified as an "industrial food mixer" to clearly distinguish it to the potential purchaser from an ordinary electric blender. *See Id.* at Exhibit 42. Thus, Applicant is not arguing that the scope of the registration should be limited to only "electric food blenders" which are countertop appliances. Instead, Applicant is noting that all evidence in the record demonstrates that the plain meaning of "electric food blenders" is understood to refer to such an appliance and that larger industrial mixers are not commonly understood to fall within the scope of the identification "electric food blenders," as such industrial mixers are identified differently in the trade as mixers. It is the

Examining Attorney that appears to be expanding the scope of the identification of goods in Braun's registration to include "ribbon blenders" and "industrial food mixers," in addition to the specified "electric food blenders."

The Examining Attorney argues that electric food blenders are sold with slicers, and by extension, that Applicant's and Registrant's goods are related. While the Examining Attorney has introduced evidence that electric food blenders are sometimes sold with deli slicers (i.e., similar appliances), the Examining Attorney has presented no evidence that electric food blenders are remotely related to other types of slicers, in particular industrial machines for food packing and packaging. The evidence in the record demonstrates that only a very limited class of slicers (which are unrelated to Applicant's identified goods) are even arguably related in nature to the electric food blenders identified in Braun's registration.

III. CONCLUSION

Applicant has not asked the TTAB to look beyond the goods listed in its application, nor has it asked the TTAB to restrict the goods listed in Braun's registration. By the plain terms contained in the identification of goods in their respective application and registration, the goods upon which Applicant and Braun use their respective marks are not "highly related" as proffered by the Examining Attorney. *See* EA Brief. Moreover, the mere fact that certain slicers (entirely different from Applicant's goods) are sometimes sold with electric blenders does not cause Applicant's and Registrant's goods capable of being deemed related. The evidence shows that the goods at issue are distinct and unrelated, and entirely unlikely to cause a likelihood of confusion or cause consumers to believe that the goods emanate from the same source.

Applicant believes all other arguments raised by the Examining Attorney in the Examining Attorney's Appeal Brief are addressed in the Applicant's June 1, 2009 Appeal Brief. Accordingly, Applicant respectfully requests that this Board reverse the Examining Attorney's final refusal of

registration and enable its application to proceed to publication on the Principal Register.

Date: August 11, 2009

Respectfully submitted,

By: Christine E. Obrochta

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