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Mailed:
October 14, 2009
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Formax, Inc.

Serial Nos. 77298497 and 77298501¹

Sean Fifield and Christine E. Obrochta of Locke Lord
Bissell & Liddell LLC for Formax, Inc.

Christina Brightmire King, Trademark Examining Attorney,
Law Office 109 (Dan Vavonese, Managing Attorney).

Before Hairston, Walsh and Ritchie, Administrative
Trademark Judges.

Opinion by Walsh, Administrative Trademark Judge:

Formax, Inc. (applicant) has applied to register both
POWERMAX and POWERMAX4000 in standard characters on the
Principal Register for goods identified as "industrial
electric food processing machines, namely, machines for

¹ We are deciding both referenced appeals in a single opinion because the applications involve the same applicant and related marks, POWERMAX (Serial No. 77298497) and POWERMAX4000 (Serial No. 77298501), and because the appeals present the same issue. The records in the two applications and the appeals are virtually identical; for convenience we will refer to the record in Serial No. 77298501 in this opinion.

Serial Nos. 77298497 and 77298501

slicing food products for packing and packaging in commercial quantities, and parts therefor" in International Class 7. Both applications are based on applicant's statement of its bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

In both applications, the Examining Attorney has issued a final refusal under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion between applicant's marks and the mark in Registration No. 2817553, POWERMAX in standard characters, registered on the Principal Register for goods identified as "electric food blenders" in International Class 7. The registration issued on February 24, 2004, and it is active.

Applicant has appealed. Applicant and the Examining Attorney have filed briefs. We reverse as to both applications.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "... which so resembles a mark registered in the Patent and Trademark Office... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion..." 15 U.S.C. § 1052(d). The opinion in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977), sets forth the

Serial Nos. 77298497 and 77298501

factors to consider in determining likelihood of confusion. In that opinion, the Court also recognized that one factor may be dominant in a particular case. *Id.*

In this case, the dominant factors are: Factor 2 - the similarity or dissimilarity and nature of the respective goods; Factor 3 - the similarity or dissimilarity of the trade channels for the respective goods; and Factor 4 - the conditions under which and the buyers to whom sales are made, that is, a purchase based on impulse versus a purchase undertaken with care by a sophisticated purchaser. *Id.* In this case, these three factors are not only closely related but essentially inseparable. Accordingly, we will discuss these factors together.

In general, the goods of the applicant and the registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). We may find the goods to be related if the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods originate from or are associated with the same source. *See In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

Furthermore, in comparing the goods we must consider the goods as identified in the application and cited

registration. *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

The Examining Attorney argues, "Identical marks are being used in food processing." Examining Attorney's Brief at 5. The Examining Attorney argues further that we should rely on the third-party registrations she has provided which "... demonstrate that it is common practice to use the same mark for electric food blenders and electric food processing machines and/or electric food slicers." *Id.*

The Examining Attorney also argues that applicant's identification of goods "... could encompass food slicers used in other commercial facilities such as delis and stores that utilize the packaging function." *Id.* at 6.

In addition, the Examining Attorney argues that applicant construes the identification of goods in the cited registration too narrowly, and that the registrant's goods could include industrial food blenders. The Examining Attorney argues still further that industrial food blenders are related to applicant's goods. The Examining Attorney also relies on evidence from various websites and other sources to support her position.

Serial Nos. 77298497 and 77298501

On the other hand, applicant argues that there are vast differences between its goods and the goods identified in the cited registration: "The Applicant's Mark and the Cited Mark attach to entirely distinct goods used by two entirely different consuming groups. Applicant has identified, and applies its mark to, a massive industrial packing and packaging machine for use in a food packing and packaging plant, whereas Braun [owner of the cited registration] has identified an ordinary appliance (i.e., an 'electric food blender') in the Cited Registration." Applicant's Brief at 8.

To support its position, among other evidence, applicant has provided two affidavits from its Business Development Manager to explain the nature of the goods identified in its application, the channels of trade for those goods, and the conditions related to the purchase. See Affidavits of Brian Sandberg, dated July 15, 2007, and February 20, 2009, attached to Responses of July 17, 2008, and February 22, 2009 respectively.

Applicant markets its goods through a dedicated sales force to meat-packaging companies, food product manufacturers, and their suppliers and subcontractors. The particular machine to which the mark is applied lists for \$500,000.00. It weighs in excess of five tons, and its

Serial Nos. 77298497 and 77298501

dimensions are just over 177 ins. x 116 ins. x 74 ins. The machine can process up to 3.6 tons of meat products per hour and produce up to 120 stacks of sliced meat per minute. *Id.*

Applicant delivers the machines by truck to a manufacturing plant. The installation takes two days and requires hookups to the plant's electrical, water and air systems. Applicant typically provides to the purchaser five days of on-site training in the operation of the machine. *Id.*

We find applicant's arguments and evidence highly persuasive. We recognize that the particular machine applicant describes in detail is the largest such machine it offers and that the identification of goods in the application may include machines of smaller capacity and machines which differ in other respects from the one described. Nonetheless, the record indicates that the machine is representative of the essential characteristics of "industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefor." *See, e.g.,* Attachments to Applicant's Response of February 23, 2009, from meatpoultry.com and wattpoultry.com. Moreover, we likewise conclude that the Examining

Serial Nos. 77298497 and 77298501

Attorney's construction of the applicant's identification of goods is overly broad and not supported by the evidence.

Applicant identifies its goods as "*industrial* electric food processing machines, namely, machines for slicing food products for packing and packaging *in commercial quantities*, and parts therefor." (emphasis added) In presenting her arguments the Examining Attorney consistently disregards or discounts the importance of the terms "*industrial*" and "*in commercial quantities*." The Examining Attorney also tends to discount the fact that the identification specifies that the machines both slice and package the products. We construe the stated limitations in applicant's identification as effectively limiting the goods to industrial machines performing both a slicing and packaging function used in a food processing plant, as applicant argues.

We base this construction on applicant's affidavits and the other evidence of record. In doing so we reject the Examining Attorney's contention that applicant has used this evidence to limit its identification improperly beyond the limitations stated in the identification. We conclude that the evidence applicant provided sheds necessary light on the significance of the identifications of goods at issue here. *In re Trackmobile Inc.*, 15 USPQ2d 1152 (TTAB

1990) (“... when the description of goods for a cited registration is somewhat unclear, as is the case herein, it is improper to simply consider that description in a vacuum and attach all possible interpretations to it when the applicant has presented extrinsic evidence showing that the description of goods has a specific meaning to members of the trade.” (internal citations omitted)). *See also In re W.W. Henry Co.*, 82 USPQ2d 1213, 1215 (TTAB 2007). We have considered applicant’s evidence in that light and not as an improper attempt to restrict its goods as identified in the application.

Likewise, the evidence of record fails to substantiate the Examining Attorney’s contention that the goods identified in the cited Braun registration, “electric food blenders,” could include industrial equipment used in a food processing plant. While goods identified in the cited registration may not be as narrow as applicant contends, neither is it reasonable to conclude that these goods could include industrial food blending equipment.

When we view the record as a whole, it demonstrates that “industrial” food blenders are distinct from “electric food blenders.” Furthermore, even if we construed the identification in the cited registration to include industrial equipment, the record does not establish that

the industrial slicing and packaging machines identified in the application would necessarily be related to industrial electric food blenders.

In fact, the full record shows that there is a category of appliances, including food slicers and electric food blenders, which are suitable for home use, and a category of appliances, also including food slicers and electric food blenders, which are suitable for use in retail and commercial establishments, such as, delis, restaurants and food markets. Both categories are distinct from the "industrial" category to which applicant's goods belong. The retail and commercial appliances are generally for use on a counter top, small in size, and relatively inexpensive, at least relative to applicant's goods.²

The evidence suggests that these two categories of products may be related or even overlap, but that is not the question before us. The goods identified in the cited registration are certainly in the former of these two categories and likely also in the latter. Thus, we conclude that both of these two categories could include

² Based on a review of the prices of electric food blenders used in households and light commercial settings shown in the record, applicant asserts that they range in cost from \$39.95 to \$1049.00. In like fashion, applicant asserts that the food slicers of record range in cost from \$179.00 to \$6,191.00. *Id.* at 5. Applicant's Brief at 4. The Examining Attorney does not dispute this analysis.

Serial Nos. 77298497 and 77298501

the goods identified in the cited registration, "electric food blenders." These goods are sold through conventional retail and perhaps wholesale channels to a broad consumer group including the general public and operators of retail and commercial establishments.

The full record also shows that there is yet another category of industrial equipment for use in slicing and packaging food products, as well as for use in other processing functions. This equipment is used in food processing plants to produce packaged food on a commercial scale. The finished packaged food ultimately may very well be sold through retail delis and food markets. We conclude that the goods identified in the application are in this category, and further that this category is totally distinct from the two categories of goods we discussed above. This industrial equipment is generally sold directly to the operators of food processing plants, a distinct and sophisticated class of purchasers. *In re Shipp*, 4 USPQ2d 1174, 1176 (TTAB 1987). It is also evident that a high degree of care would attend the decision to purchase the goods identified in the application and that the potential purchasers, operators of food processing plants, are sophisticated.

Serial Nos. 77298497 and 77298501

With regard to the Examining Attorney's evidence, we find the Examining Attorney's reliance on the third-party registrations misplaced. Not one of the registrations covers the two specific types of goods identified in the application and the cited registration. Accordingly, we find the third-party registrations lacking in significant probative value in this case.

We also concur with applicant in concluding that none of the industrial equipment which the Examining Attorney alleges to be within the scope of "electric food blenders" is ever identified as such in the evidence of record. Rather, this equipment is identified as "ribbon blenders," as "industrial food mixers" or in a similar manner which effectively distinguishes this equipment from the goods identified in the registration. See, e.g., Attachments to Office Action of March 21, 2009, from ribbonblenders.com and marionmixers.com. Again, in this analysis, we are not imposing limitations on the identification in the cited registration through extrinsic evidence, but merely construing the identification in light of relevant evidence and reason. Cf. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764-765 (TTAB 1986).

We also reject the Examining Attorney's reliance on the text from the aptkitchen.com website. *Id.* The pages

from this site discuss the selection of "kitchen equipment" primarily for homes. The discussion includes headings for "The Medium Duty of the Economy Slicers" and "The Heavy Duty Industrial Slicers." The Examining Attorney argues that this use of "Industrial" shows that applicant's identification of goods could include slicers for use in a home or light commercial setting. Again, reliance on this isolated, confusing use of "industrial" is misplaced. It stands in stark contrast to the rest of the record. Also, this use in no way corresponds to the totality of the identification of goods in the application, "industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefor."

Overall, we find the Examining Attorney's evidence insufficient to support the broad construction of the identifications of goods in the application and the cited registration the Examining Attorney urges us to adopt. In fact, on balance, the Examining Attorney's evidence supports the construction applicant urges, and the construction we adopt as most reasonable in this case.

Accordingly, we conclude that the goods identified in the application and the cited registration are unrelated, that the goods travel through distinct trade channels to

Serial Nos. 77298497 and 77298501

different classes of potential purchasers, and that the potential purchasers of applicant's goods are sophisticated.

Applicant has also submitted copies of third-party registrations - registrations for other POWERMAX marks - to show that POWERMAX is a weak mark. We agree with the Examining Attorney's criticism of these registrations on the grounds that they do not cover relevant goods. Accordingly, we do not find this evidence probative and have not relied on this evidence in reaching our decision here. *Cf. Knight Textile Corp. v. Jones Investment Co.*, 75 USPQ2d 1313, 1316-1317 (TTAB 2005).

As to the marks more generally, we conclude that applicant's POWERMAX mark is identical to the cited mark and that applicant's POWERMAX4000 mark is highly similar to the cited mark. Nonetheless, we find that confusion is not likely here, even in the case of identical marks, due to the overriding, substantial differences between the respective goods and channels of trade and the sophistication of the purchasers of applicant's goods.

Finally, after considering all evidence and arguments bearing on the *du Pont* factors, including any we have not specifically discussed here, we conclude that there is not a likelihood of confusion between applicant's POWERMAX and

Serial Nos. 77298497 and 77298501

POWERMAX4000 marks when used in connection with "industrial electric food processing machines, namely, machines for slicing food products for packing and packaging in commercial quantities, and parts therefor" and the registered POWERMAX mark when used in connection with "electric food blenders."

Decision: We reverse the refusals to register applicant's marks under Trademark Act Section 2(d) in both applications.