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Mailed: October 17, 2011

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Frangeli Consulting, Inc.

Serial No. 77684564

Michael F. Morano of F. Chau & Associates, LLC for Frangeli Consulting, Inc.

Linda E. Blohm, Trademark Examining Attorney, Law Office 110 (Chris A.F. Pedersen, Managing Attorney).

Before Mermelstein, Wolfson, and Kuczma, Administrative Trademark Judges.

Opinion by Wolfson, Administrative Trademark Judge:

Frangeli Consulting, Inc. ("applicant") has filed an application for the design mark shown below:



for the following services in Classes 35, 37, and 42.

Class 35: Providing cost estimations to legal professionals and life care planners for proposed home modifications, namely, accessible home modifications to make homes accessible for persons with special needs;

Class 37: Construction services, namely, completing accessible home construction projects for profit to make existing homes accessible for persons with special needs; remodeling and renovation of homes for profit to make homes accessible for persons with special needs; and

Class 42: Architectural design consultation services, namely, providing accessible home design solutions to architects, builders, insurance companies and trustees of special needs trusts for making homes accessible for persons with special needs; residential building design services, namely providing accessible residential building design solutions to architects, builders, insurance companies and trustees of special needs trusts for making residential buildings accessible for persons with special needs.¹

The examining attorney has refused registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. §1052, having determined that registration would lead to a likelihood of confusion in view of the services recited in the following registrations, which are owned by the same entity:

¹ Filed March 5, 2009, on the basis of applicant's bona fide intent to use the mark in commerce.

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Registration No. 3342604² for the mark



for "building construction and repair;
building restoration; charitable services, namely,
renovating and constructing homes for low income families;"
and Registration No. 3511753³ for the mark



for "building construction and repair."

We affirm.

I. Applicable Law

Our determination under Trademark Act § 2(d) is based on an analysis of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); *see also Palm Bay*

² Registered November 27, 2007; first use and first use in commerce claimed as of March 1, 1987. The colors red and white are claimed as features of the mark.

³ Registered October 7, 2007; first use and first use in commerce claimed as of January 14, 2005. Color is not claimed as a feature of the mark.

Imp., Inc. v. Veuve Clicquot Ponsardin Maison Fondée 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); and *In re Dixie Rests. 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 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); *see also In re Azteca Rest. Enters., Inc.*, 50 USPQ2d 1209 (TTAB 1999).

II. Discussion

A. Similarity or Dissimilarity of the Marks in Their Entireties

In a likelihood of confusion analysis, we compare the marks for similarities and dissimilarities in appearance, sound, connotation and commercial impression. *Palm Bay*, 73 USPQ2d at 1692. When comparing design marks, the key factor is visual appearance. *See Diamond Alkali Co. v. Dundee Cement Co.*, 343 F.2d 781, 145 USPQ 211, 213 (CCPA 1965) (“When symbol marks such as these are being considered, appearance is most significant. ‘Symbols of

this kind do not sound,'" citing *Columbian Steel Tank Co. v. Union Tank & Supply Co.*, 277 F.2d 192, 196, 125 USPQ 406, 409 (CCPA 1960)); see also *General Foods Corp. v. Ito Yokado Co. Inc.*, 219 USPQ 822, 828 (TTAB 1983) (the comparison of design marks comes down to a "subjective 'eye ball' reaction," citing *Long John Silver's Inc., v. Lou Scharf Inc.*, 213 USPQ 263, 267 (TTAB 1982) (visual comparison of pirate design marks)). To the extent the marks may be verbalized, no evidence of a settled pronunciation for any of the marks has been presented.

The marks at issue are arbitrary designs. They share several identical design features: a white cross with arms of equal length, superimposed against a dark background; placement of the cross inside a house design; and the house design being that of a simple iconic house with a peaked roof and a chimney on the right side.⁴ Applicant argues that the stylized house designs of each mark are "not subtle and create different commercial impressions in the mind of a consumer." *Applicant's Brief* at 10. We disagree. The cross in each party's mark, which

⁴ We note that Reg. No. 3342604 contains a color claim, but Reg. No. 3511753 does not. The designs are otherwise identical. Moreover, applicant has not claimed color in its application. Both parties are thus entitled to use any color scheme in representing their marks; and applicant is not precluded from using a red-and-white color scheme in its mark.

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prominently appears as the central design element, is proportionally the same. The outline shapes of the house designs, which form the immediately recognizable, overall design of each party's mark, are virtually identical. Although the cross in applicant's mark is set on a contrasting circular background that is situated inside the house design, the circular design merely creates a different background for the prominent cross inside the house. Overall, the marks create the same commercial impressions. Moreover, although the differences in the patterns of each mark may be seen when the marks are compared side-by-side, the test under the first *du Pont* factor 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 terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. Under actual marketing conditions, consumers do not necessarily have the luxury of making side-by-side comparisons between marks, and must rely upon their imperfect recollections. See *Dassler KG v. Roller Derby Skate Corp.*, 206 USPQ 255, 259 (TTAB 1980). The average purchaser normally retains a general rather than a specific impression of trademarks.

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See *H.D. Lee Co. v. Maidenform Inc.*, 87 USPQ2d 1715, 1727 (TTAB 2008); and *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Here, consumers are likely to remember a white cross set against a dark background being situated inside a house; they are less likely to recall whether the cross is contained within a circle or not.

Applicant's reliance on *Red Carpet Corp. v. Johnstown American Enterprises Inc.*, 7 USPQ2d 1404 (TTAB 1988), is misplaced. There, the Board compared two designs whose overall commercial impressions were substantially different, despite the fact that both designs were representations of pentagonal "house designs." The Board recognized that such five-sided figures were commonly described as "house designs," but nonetheless held that "although the designs in question may both be characterized as stylized houses, they are so different visually it is not even accurate to describe them as [having] 'common elements.'" The suggestive connotation of the two different designs may be common, but this is quite different from concluding that they share a common design element." *Red Carpet*, 7 USPQ2d at 1406.

In contrast, the marks in this case share common design elements, and these elements are the prominent features of both parties' marks. Accordingly, the marks

are similar in appearance and overall commercial impression.

B. Similarity of the Services

Applicant intends to use its mark in association with the following services:

Class 35: Providing cost estimations to legal professionals and life care planners for proposed home modifications, namely, accessible home modifications to make homes accessible for persons with special needs;

Class 37: Construction services, namely, completing accessible home construction projects for profit to make existing homes accessible for persons with special needs; remodeling and renovation of homes for profit to make homes accessible for persons with special needs; and

Class 42: Architectural design consultation services, namely, providing accessible home design solutions to architects, builders, insurance companies and trustees of special needs trusts for making homes accessible for persons with special needs; residential building design services, namely providing accessible residential building design solutions to architects, builders, insurance companies and trustees of special needs trusts for making residential buildings accessible for persons with special needs.

The recitation of services in registration No. 3342604 is "building construction and repair, building restoration; charitable services, namely, renovating and constructing homes for low income families." The recitation of services in registration No. 3342604 reads: "building construction and repair." It is well settled that the

question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods identified in the cited registration(s). See *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n. 4 (Fed. Cir. 1993); *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *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.").

We compare the recitation of services in the three international classes in applicant's application with those of the cited registrant's registrations. "Likelihood of confusion may be found based on any item that comes within the identification of goods [or services] in the involved application and registration. ... An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence." *In re La Peregrina Ltd.*, 80 USPQ2d 1645, 1646-7 (TTAB 2008).

We first note that both parties offer "construction services" in Class 37. While applicant has narrowed the scope of its construction services to "completing accessible home construction projects for profit to make

existing homes accessible for persons with special needs," these services are encompassed by registrant's broadly worded recitation of "building construction services." We therefore must construe the services as being legally identical.

Applicant's services also include Class 42 services, namely, "architectural design consultation services, namely, providing accessible home design solutions to architects, builders, insurance companies and trustees of special needs trusts for making homes accessible for persons with special needs." The examining attorney has made of record seven third-party registrations, based on actual use in commerce, that list "architectural design services" and "building construction services" as part of their recitations of services. This evidence is probative to show that consumers would likely perceive both architectural design and building construction services as being services performed by a single company, and that a company such as registrant, offering building construction services, would be likely to provide architectural design services as well. See *In re Infinity Broad. Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); and *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Thus, these services are construed as being closely related.

Likewise, several of the third-party registrations, in addition to architectural design and construction services, also recite business services in Class 35, such as "project management services," "start-up support," "business management" and "business consulting." This suggests that consumers have come to expect that building construction companies may also provide business services. The business services identified in the third-party registrations are sufficiently related to applicant's cost estimation services to further suggest that consumers are likely to believe that cost estimation services are also available from a building construction company. The fact that applicant has limited its cost estimation services to "legal professionals and life care planners for proposed home modifications, namely, accessible home modifications to make homes accessible for persons with special needs" is unavailing. Applicant has not shown that building construction companies do not provide cost estimation services, or that the market for accessible home modifications excludes companies providing, as does registrant, "building construction and repair; building

restoration; charitable services, namely, renovating and constructing homes for low income families.”

Accordingly, based on the recitations in the cited registrations and the evidence of record suggesting that services provided by both registrant and applicant may emanate from a single source, we find that applicant’s services are identical or related to the services recited in both of the cited registrations.

C. Channels of Trade and Classes of Purchasers

It is settled that in making our determination regarding the channels of trade, we must look to the services as identified in the involved application and cited registrations. *See Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); and *Paula Payne*, 177 USPQ at 77. Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased

by all potential buyers thereof. *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *see also In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Because applicant's construction services have been found to be legally identical to registrant's building construction services, and there are no limitations or restrictions as to trade channels or class of consumers in the cited registrations with respect to registrant's building construction services, such services are presumed to move in the same channels of trade and be encountered by the same classes of purchasers as are applicant's more narrowly defined construction services. Moreover, inasmuch as registrant's building construction services are not limited as to trade channels or purchaser classes, they may be offered to the more narrow class of consumer mentioned as the target customers for applicant's architectural design and cost estimation services, namely, "legal professionals and life care planners" and "architects, builders, insurance companies and trustees of special needs trusts."

D. Buyer Sophistication

Applicant contends that purchasers of the services recited in its application are sophisticated, and that "[i]t is well understood that services such as building construction and remodeling and renovation of homes comes

with a high price tag, and consumers will often research and take many estimates prior to engaging a contractor." *Applicant's Appeal Brief* at 13. Even assuming *arguendo* that purchasers of such services would carefully deliberate before making a purchasing decision, this does not mean that they are immune from confusion as to the origin of the respective services. See *HRL Assoc., Inc. v. Weiss Assoc., Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks can outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). See also *In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986), citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970) ("Human memories even of discriminating purchasers ... are not infallible.").

Moreover, given that some of the services, as identified, are identical, and others are closely related in that they are competitive or complementary, "the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines." *Hunt Control Sys. Inc. v. Koninklijke Philips Elec. N.V.*, 98 USPQ2d 1558, 1566 (TTAB 2011), citing *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed.

Cir. 1992). Even sophisticated consumers may view the marks as variations on a theme intended to differentiate related services having a common source or sponsorship.

III. Conclusion

We have carefully considered the entire record, all arguments, and the evidence submitted by the examining attorney. We conclude, in light of the similarity of the marks at issue, the related services, classes of customers, and channels of trade, that use of applicant's mark in association with the identified services is likely to cause confusion with the marks in the cited registrations.

Decision: The refusal to register under Trademark Act § 2(d) is accordingly affirmed both as to the mark in Registration No. 3342604 and as to the mark in Registration No. 3511753.