

This Opinion is Not a  
Precedent of the TTAB

Mailed: May 31, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re KIM-C1, LLC*  
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Serial No. 86757650  
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Tracy A. Agrall, Esq.,  
for KIM-C1, LLC.

Joshua S. Toy, Trademark Examining Attorney, Law Office 120,  
David Miller, Managing Attorney.

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Before Ritchie, Kuczma and Pologeorgis,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

KIM-C1, LLC (“Applicant”) seeks registration on the Principal Register of the  
mark SPLENDOR (in standard characters) for:

Plant growth regulators for agricultural use, in  
International Class 1.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark  
under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood

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<sup>1</sup> Application Serial No. 86757650 was filed on September 15, 2015, based upon Applicant’s  
allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the  
Trademark Act, 15 U.S.C. § 1051(b).

of confusion with the mark SPLENDORGRO (in standard characters) set forth in Registration No. 3128355 owned by the City of Hutchinson, Minnesota, for:

mulch; peat moss; colored wood chips for use as ground cover; and plant seeds, in Class 31, and

compost; potting soil; humus; plant food, in Class 1.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

### I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. With its Appeal Brief, Applicant submits evidence consisting of a copy of a label for its goods and a copy of the Registrant's specimen of use. Relying on Rule 2.142(d), 37 C.F.R. § 2.142(d), the Examining Attorney objected to such evidence submitted by Applicant. Rule 2.142(d) states:

The record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination.

As set forth in the Rule, the record should be complete prior to the filing of the appeal. Moreover, the evidence Applicant seeks to admit was available during the prosecution of its application. Thus, we sustain the Examining Attorney's objection and the evidence Applicant attempts to submit with its Appeal Brief will not be

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<sup>2</sup> Registration No. 3128355 issued August 15, 2006, and renewed.

considered. *See In re Giovanni Food Co.*, 97 USPQ2d 1990, 1990-91 (TTAB 2011) (documents from file of cited registration submitted with applicant's appeal brief are late-filed and not considered; examining attorney's objection sustained); Trademark Board Manual of Procedure § 1207.01 (Jan. 2017).

## II. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Applicant addresses the following factors in this case: the similarity or dissimilarity of the marks, the similarity or dissimilarity of the goods, and similarity of the trade channels and consumers of the goods. *See In re Viterra Inc.*, 671 F. 3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1595-96 (TTAB 1999).

We have considered all of the evidence as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including any evidence and arguments not specifically discussed in this opinion). The other factors we treat as neutral.

### A. Similarity of the Marks

In any likelihood of confusion determination, the marks are compared in their entireties for similarities in appearance, sound, connotation, and commercial impression. *In re Viterra Inc.*, 101 USPQ2d at 1908; *du Pont*, 177 USPQ at 567. It is

improper to dissect a mark when engaging in this analysis. *In re Viterra*, 101 USPQ2d at 1908; *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993).

Applicant's mark is SPLENDOR. The registered mark is SPLENDORGRO. Applicant's mark is similar in sound and appearance to the cited mark. Additionally, likelihood of confusion is often found where, as here, the entirety of one mark, SPLENDOR, is incorporated within the other, SPLENDORGRO. *In re Denisi*, 225 USPQ 624, 626 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner); *In re South Bend Toy Mfg. Co.*, 218 USPQ 479, 480 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing); *see also In re Carlson*, 91 USPQ2d 1198, 1200 (TTAB 2009) (URBANHOUSING found to have same meaning as URBAN HOUSING); *In re L.C. Licensing Inc.*, 49 USPQ2d 1379, 1381 (TTAB 1998) (whether unitary or two separate words, commercial impression is the same). Consumers are also generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered" when making purchasing decisions).

Despite both marks sharing the identical word “SPLENDOR,” which is defined as “great and impressive beauty,”<sup>3</sup> Applicant contends that the connotations of the marks are distinguishable because the registered mark includes the word “GRO,” as a modifier of “grow,” focusing on how a plant will grow.<sup>4</sup> While Registrant’s mark includes a second word “GRO” the mere deletion or omission of this second word from Applicant’s mark is not sufficient to overcome a likelihood of confusion. Applicant’s mark is identical to the first portion of the registered mark and contains no other wording to distinguish it from the registered mark. *See In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (the presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical); *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1773 (TTAB 2014) (“Our precedent instructs that adding a term to a shared first term does not necessarily obviate likelihood of confusion.”); *In re Optica Int’l*, 196 USPQ 775, 778 (TTAB 1977).

Rather than distinguishing or diminishing the connotation of “great and impressive beauty” created by the word SPLENDOR, the word “GRO” focuses the scope of the connotation of Registrant’s mark to great and impressive beauty achieved through “growth.” Inasmuch as both marks are for goods used to facilitate plant

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<sup>3</sup> May 6, 2016 Final Office Action, <http://www.merriam-webster.com/dictionary/splendor> 05/06/2016 Merriam-Webster’s Learner’s Dictionary pp. 28-29.

<sup>4</sup> Applicant’s Brief p. 3 (4 TTABVUE 4) (“...but adds ‘GRO’ to create a fanciful mark, namely SPLENDORGRO focusing on how a plant will grow.”); April 27, 2016 Response to Office Action App p. 1 (“In this fashion, the mark connotes a means of growth, with the word *splendor* as a modifier of *grow*, i.e., Splendid Growth.”).

growth, the marks have similar overall connotations.<sup>5</sup> In this regard, the word “GRO” in the registered mark does not distinguish the commercial impressions of the marks. “GRO” is commonly used in the marketplace to describe goods used for plant growth such that it is at least merely descriptive of Applicant’s and Registrant’s goods.<sup>6</sup> Matter that is descriptive of or generic for a party’s goods is typically less significant or less dominant in relation to other wording in a mark. *See Anheuser-Busch, LLC v.*

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<sup>5</sup> Applicant argues that the marks at issue are not similar, citing cases where marks containing common features were found not likely to be confused. Applicant’s Brief p. 3 (4 TTABVUE 4). However, in those cases, the courts found that the common matter in the marks was weak, descriptive, and/or generic of the parties’ goods or services, and thus, the marks were distinguishable due to the additional source identifying matter in the marks. *See General Mill, Inc. v. Kellogg*, 824 F.2d 622, 3 USPQ2d 1442, 1445 (8th Cir. 1987) (finding the wording “APPLE RASIN CRISP” weak, and thus, the mark “OATMEAL RAISIN CRISP” is different enough to avoid consumer confusion based on the marks’ color schemes, lettering styles, and box designs); *First Sav. Bank F.S.B. v. First Bank Sys. Inc.*, 101 F.3d 645, 40 USPQ2d 1865, 1872 (10th Cir. 1996) (finding the word “BANK” to be generic in the field of financial services, the wording “FIRST BANK” being weakly descriptive); *Luigino’s, Inc. v. Stouffer Corp.*, 170 F.3d 827, 50 USPQ2d 1047, 1049 (8th Cir. 1999) (finding the word ‘LEAN’ in the marks “LEAN CUISINE” and “MICHELINA’S LEAN ‘N TASTY” to be descriptive of food). Here, there is no evidence of record demonstrating that the common feature of the marks, namely the word “SPLENDOR,” is weak, or so widely used, that it should not be afforded a relatively broad scope of protection.

<sup>6</sup> May 6, 2016 Final Office Action attachments from: Dyna-Gro Grow Plant Food p. 11 <http://www.amazon.com/Dyna-Gro-GRO-032-Liquid-Plant-32-Ounce/dp/B0054YQ1WI>; Miracle-Gro, (LEARN AND GROW Articles and videos about Gardening & Landscaping) p. 13, Growing Tomatoes: How to Grow Tomatoes from Seeds, Grow Herbs Indoors p. 15, Growing a Small-Space Vegetable Garden, Growing Carrots: Delicious and Crunchy, Growing Sweet Peppers, How to Grow Strawberries Almost Anywhere, Growing Potatoes, p. 16, Growing Melons, Growing Cucumbers, How to Grow Pumpkins p. 17, How To Grow Onions In The Spring, Growing Cabbage: It’s Delicious and Ornamental, When to Plant Tomatoes in Florida & Growing Tips p. 18, How to Grow Pole Beans, Grow Passionflowers for Delicious Fruit, Canning Your Own Grown Food, Growing Edible, Ornamental Kale, How to Grow Asparagus p. 19, Growing Hot Peppers, Growing Radishes, Growing Swiss Chard p. 20, Growing Cauliflower, Growing Cilantro, a 2-for-1 Herb, Growing Broccoli p. 21, Spring Vegetables to Grow in the Southwest p. 22 <http://www.miraclegro.com/smg/library/shelf/learn-and-grow/fruit-vegetable-and-herb/7500004/27000004> and Sunlight Supply Inc. pp. 23-24 Gro Pro® Grow Bag Round Fabric Pot <https://www.sunlightsupply.com/shop/bybrand/gropro/gro-pro-round-fabric-pots-black> 05/06/2016.

*Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1824-25 (TTAB 2015) (citing *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1342-43, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004)). Thus, “GRO” is less significant in terms of affecting the commercial impression of Registrant’s mark, rendering the word “SPLENDOR” to be the more dominant element of Registrant’s mark.

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 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, 751 (Fed. Cir. 1985). The dominance of the term SPLENDOR in Registrant’s mark SPLENDORGRO is reinforced by its location as the first word in the mark. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered”). *See also Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers would first notice the identical lead word).

Applicant’s mark does not create a distinct commercial impression from the registered mark because it is identical to the dominant wording in the registered

mark, and has no other wording to distinguish it from the registered mark. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (presence of an additional term in the mark does not necessarily eliminate the likelihood of confusion if some terms are identical); *China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123 (Fed. Cir. 2007) (the common word in CHI and CHI PLUS is likely to cause confusion despite differences in the marks' designs); *In re West Point–Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL likely to cause confusion with WEST POINT for similar goods); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967) (THE LILLY as a mark for women's dresses is likely to be confused with LILLI ANN for women's apparel including dresses); *In re United States Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing).

Based on the foregoing, the marks when considered in their entireties are similar in sound, appearance and are substantially similar in overall commercial impression, weighing heavily in favor of finding a likelihood of confusion.

#### B. Comparison of the Goods, Trade Channels and Classes of Customers

Applicant argues that the goods identified in its application are not the same goods as identified in the Registration nor are they closely related as Registrant has used "its mark only on the goods cited in its registration" and "it has not taken any steps



to broaden [its] goods to [include Applicant's] plant growth regulators.”<sup>7</sup> The goods of the parties need not be identical to find a likelihood of confusion. *See On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *In re Accelerate s.a.l.*, 101 USPQ2d 2047, 2050 (TTAB 2012). Rather, the goods need only be related in a manner such that they could give rise to the mistaken belief that they emanate from the same source. *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). Registrant's goods include plant food while Applicant's goods are plant growth regulators for agricultural use. Thus, the goods are related as they both are used to support or otherwise control plant growth.

The evidence confirms that the parties' goods are related in a manner such that confusion is likely. Thus, the fact that the parties' goods are not identical is not determinative. The Examining Attorney submitted copies of eight third-party registrations registered for use in connection with the same goods as those of both Applicant and Registrant.<sup>8</sup> Third-party registrations which cover a number of differing goods, and which are based on use in commerce, although not evidence that

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<sup>7</sup> Applicant's Brief p. 5 (4 TTABVUE 6).

<sup>8</sup> January 4, 2016 Office Action: Registration Nos. 3816394 pp. 5, 37; 3736610 pp. 8-9, 40-41; 3020582 pp. 16, 48; 3050751 pp. 18, 50; 4015687 pp. 20, 52; 4093486 pp. 23, 55; 4171031 pp. 26, 58; 4217695 pp. 29, 61; and 4798324 pp. 31, 63; for marks registered for goods that include Registrant's goods, namely plant food, and Applicant's plant growth regulators for agricultural use. In determining the similarity of Applicant's and Registrant's goods, it is sufficient if likelihood of confusion is established for any item encompassed by the identification of goods. *See In re Wacker Neuson SE*, 97 USPQ2d 1408, 1409 (TTAB 2010) citing *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

the marks shown therein are in use on a commercial scale or that the public is familiar with them, have probative value to the extent that they may serve to suggest that such goods or services are of a kind that may emanate from a single source under a single mark. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

While Applicant's and Registrant's goods are not identical, they are nonetheless similar or related under the second *du Pont* evidentiary factor. Generally, the greater the degree of similarity between the parties' marks, the lesser the degree of similarity required in the parties' goods to support a finding of likelihood of confusion. *See In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Concordia Int'l Forwarding Corp.*, 222 USPQ 355, 356 (TTAB 1983). We find that the requisite relationship between Applicant's and Registrant's goods exists in this case, and that the second *du Pont* factor accordingly weighs in favor of a finding of likelihood of confusion. *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

Although Applicant's goods are limited to plant growth regulators "for agricultural use" Registrant's goods are not limited as to nature, type, channels of trade, or classes of purchasers. Thus, we must presume that Registrant's goods are for uses including agricultural use and that Registrant's goods travel in all normal channels of trade, and are available to the same class of purchasers as Applicant's goods. *See Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("[W]here the likelihood of confusion is asserted with a registered mark, the issue must be resolved

on the basis of the goods named in the registration and, in the absence of specific limitations in the registration, on the basis of all normal and usual channels of trade and methods of distribution.”); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

Additionally, the Examining Attorney submitted evidence from the following websites which offer products of the type listed in Registrant’s registration and Applicant’s application:

- GreenhouseMegastore.com: advertising potting soil and plant growth regulator;<sup>9</sup>
- DoMyOwnPestControl.com: advertising potting soil and plant growth regulator;<sup>10</sup> and
- GreenCityPlastics.com: advertising peat moss and plant growth regulator.<sup>11</sup>

This evidence supports that Applicant’s and Registrant’s goods are sold through the same trade channels, to the same classes of consumers, in the same fields of use.

### III. Conclusion

Applicant’s mark creates a substantially similar commercial impression to the cited mark because Applicant’s mark is identical to the dominant feature of the cited

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<sup>9</sup> May 6, 2016 Final Office Action pp. 36-37, 45-46.

<sup>10</sup> *Ibid.* pp. 50-53, 54-55.

<sup>11</sup> *Ibid.* pp. 58-61.

mark, and the marks are otherwise similar in sight and sound. The parties' goods are related and available to the same consumers in the same trade channels. Accordingly, there is a likelihood of confusion between Applicant's mark SPLENDOR and the cited registered mark SPLENDORGRO.

**Decision:** The refusal to register Applicant's mark SPLENDOR under § 2(d) is affirmed.