

ESTTA Tracking number: **ESTTA473641**

Filing date: **05/22/2012**

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

Proceeding	91195943
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Date	05/22/2012
Attachments	Barrie_Brief.pdf (29 pages)(189382 bytes)

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

Integrated Management Information, Inc.)	
)	
Opposer,)	
)	
v.)	Opposition No. 91195943
)	
Frank Barrie)	
)	
Applicant)	

APPLICANT/DEFENDANT FRANK BARRIE'S ANSWERING BRIEF

Respectfully Submitted,

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I. INTRODUCTION

Applicant, Frank Barrie, proceeding *pro se*, submits this memorandum in response to the opposition of the Opposer, Integrated Management Information, Inc. and in support of his application to register the mark Know Where **Your Food** Comes From.com (and Design) on the Principal Register.

On December 2, 2009, the Applicant filed an application to register a trademark on the Principal Register of a mark described as follows:

"The mark consists of the earth with North America and South America outlined by use of fruit and vegetable shapes and the words "know where **your food** comes from.com" circling clockwise around the top with a long directional arrow circling counterclockwise around the bottom." The colors blue, white, and black were "claimed as a feature of the mark."

This mark, consisting of words and a unique artistic design, also highlighted in darker ink and a much *thicker* typeface the words "**your food**," so that these two words would stand out from the other words.

The Applicant agrees with the statement by the Opposer in the Introduction to its Trial Brief dated April 24, 2012 that the Applicant seeks to register the above mark for the activities as described as follows:

"International Class 035: *Promoting* health and environmental awareness within people so that they can lead a clean and healthy life; *Promoting* public awareness of shopping locally; *Promoting* public awareness of the need for sustaining local agriculture; *Promoting* the goods and services of others *by providing a website* at which users can link to local agriculture sources [emphasis added]."

Not once does the Applicant use the word "*verification*" or related words such as "*verify*" or "*verifying*" to describe the activities for which his mark will be utilized. In contrast, the Opposer, in the Introduction to its Trial Brief, uses the word "*verification*"

and related forms of this word to describe the activities for which it uses its "where food comes from" marks. The Opposer's contention that "the services are closely related" is without merit. Moreover as discussed in this brief, there is no likelihood of confusion between the Opposer's marks and applicant's mark.

The Examining Attorney, Saima Makhdoom, by an Office Action dated March 13, 2010, initially refused registration of the Applicant's mark. Upon reconsideration, the Examining Attorney issued an Examiner's Amendment dated May 26, 2010 noting as follows:

"The examining attorney has searched the Office's database of registered and pending marks and has found no conflicting marks that would bar registration under Trademark Act Sec.2(d)."

The Examining Attorney ultimately and correctly determined that the Applicant's application for a trademark was properly granted in light of his agreeing to add to the record the following disclaimer statement:

"No claim is made to the *exclusive* right to use "KNOW WHERE **YOUR FOOD** COMES FROM.COM" apart from the mark as shown [emphasis added]."

In light of the fact that the words, know where your food comes from, are "descriptive" and not "arbitrary," the Attorney Examiner's requirement that the Applicant disclaim exclusive rights to these words was the correct decision.

Therefore, pursuant to TBMP Sec 801 and 37 C.F.R. Sec 2.128, the Applicant requests an Order denying the Opposition of Integrated Management Information, Inc. and approving the registration of his Application Serial No. 77883973.

II. DESCRIPTION OF THE RECORD

In addition to the documents described by the Opposer in its Description of the Record included in its Trial Brief dated April 24, 2012, the record also includes "Excerpts (specified below) from the discovery deposition [taken by the opponent on June 30, 2011] of Frank Barrie with selected exhibits [Opposer's Exhibits 1, 2, 3, 6, 8, 9, 12, 16, and 17], dated June 30, 2011." The excerpts, as delineated in the *Opposer Integrated Management Information, Inc's Notice of Reliance* dated November 17, 2011, are as follows:

Pages: Lines

21: 15 to 22:13

28: 10 to 20

28: 21 to 29:19

30: 1-12

33: 11-15

34: 13-25 to 35: 1-6

41: 1-25 to 42: 1-16

65: 10-25 to 67:17

71: 6-22

86: 8 to 87: 19

97: 7 to 98: 5

102: 7-13

108: 15-25

116: 15-25

134: 17 to 137: 12

III. ISSUE PRESENTED

The Applicant agrees with the Opponent's statement of the issue in its Trial Brief:
Whether there is a likelihood of confusion between the Opposer's marks WHERE FOOD COMES FROM and WHERE FOOD COMES FROM VERIFIED (and Design) and Applicant's mark KNOW WHERE **YOUR FOOD** COMES FROM.COM (and Design).
The applicant maintains there is no likelihood of confusion and his application for registration of his mark should be granted.

IV. STATEMENT OF FACTS

A. Applicant Frank Barrie's use of "know where your food comes from.com (and Design)"

1. The Applicant first started using "know where **your food** comes from.com (and Design)" in commerce on March 11, 2010 when he launched his website using the domain name, www.knowwhereyourfoodcomesfrom.com. [Discovery Deposition of Frank Barrie ("Barrie"), taken June 30, 2011, page 87, line 18]. "Know where **your food** comes from.com (and Design)" is at the top of *every page* that appears on the website www.knowwhereyourfoodcomesfrom.com, with the following additional 13 words prominently displayed to the right of the mark: "Promoting *local* and *sustainable* agriculture that cares for people, animals, land and water [emphasis in original]." [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 8, pages 1-7, 10, 12, and 16].

2. The Applicant's website was created for "someone who's interested in knowing where their food comes from, that they want to eat food that is grown locally, so it's not transported hundreds or thousands of mile," and the website would be of interest to individuals who have "a concern for preserving farmland and local family farms." [Discovery Deposition of Frank Barrie, taken June 30, 2011, page 116, lines 19-25].

The Applicant detailed "three big areas of information on the website:

[L]istings of farmers markets, which are selling the produce of family farms located locally to the market. The second big area on the website is the directory of community supported agriculture farms. I have pages for every state and each of the Canadian provinces . . . And those farms are local farms where people in the community buy a share in the farm's produce. And the third big area of information on the website are the

listings of farm-to-table restaurants, which are restaurants that show a commitment to using food that is locally grown. [Discovery Deposition of Frank Barrie, taken June 30, 2011, page 41, lines 6-22].

3. The Applicant's website includes a Mission statement which provides as follows:

In the words of the Kentucky farmer and writer, Wendell Berry, 'Every time you make a decision about food, you are farming by proxy.' *The Art of the Commonplace*, edited by Norman Wirzba (Berkeley, CA, Counterpoint, 2003). This website, knowwhereyourfoodcomesfrom.com is for people who, in Berry's words, have not 'given proxies to the corporations to produce and provide all of their food.'

Knowwhereyourfoodcomesfrom.com will promote local agriculture by encouraging consumers to eat locally grown foods, which are produced in a sustainable and healthy way, or 'organically' grown, so as to preserve and support small farm economies and to ensure a healthy environment for future generations. Although the total quantity of calories produced on farms in North America has increased greatly in this era of industrial agriculture, such increase is rooted in *unsustainable* growing practices reliant upon heavy use of chemical pesticides, herbicides and fungicides, fossil fuels and soil and tillage practices that result in considerable soil erosion. When certain foods cannot be grown locally, this site will promote tropical foods that are grown in a sustainable way that 'cares for people, land, and water' and are 'fair-traded.'

Knowwhereyourfoodcomesfrom.com will provide directories of (1) farmers' markets, (2) local farm to table restaurants, (3) CSA (community supported agriculture) farms, (4) local providers of cheese, honey, pasture grazed meat, eggs and similar foods that can be produced by small farm economies, (5) food co-ops which promote and sell local foods, and (6) providers of fair-traded tropical foods. This site also will have areas for (1) recipes using fresh, unprocessed foods, readily available from local agricultural sources, (2) gardening tips, (3) the review of books and literature, films, educational programs and seminars, which promote local, sustainable, organic agriculture, (4) articles on local growers and providers of food and related subjects, and (5) current 'food news.'

This site is also for people who have become aware of the dismal fact that nearly all animals eaten by Americans come from factory farms and who share the realization, so clearly articulated by Jonathan Safran Foer, in his powerful and personal story on becoming an 'engaged vegetarian,' *Eating Animals* (New York, Little Brown and Co., 2009), that the industrial agricultural model is not sustainable for three main reasons: (antibiotic overuse in raising 450 billion land animals each year, (2) the sewerage produced by farmed animals in the United States which is "30 times as much waste as the human population- roughly 87,000 pounds of shit *per second*," and (3) the 'profoundly cruel systems' which produce meat as a product. Industrial agriculture has 'externalized the costs' for environmental degradation, human disease and animal suffering, which will haunt American generations to come, unless we begin to know where our food comes from and farm by proxy in a way that supports farming that cares for people, animals, land and water. We encourage visitors to send us your recommendations of farmers' markets, community supported agriculture (CSA) farms, and farm-to-table restaurants by

visiting the *contact us* page. [Emphasis in original]. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 8, page 1].

4. The following eight tabs appear near the top of each page of the Applicant's website, just below the mark and the 13 words to the right of the mark as noted above in paragraph "1": (1) Mission, (2) Farm to Table, (3) CSA Farms, (4) Reviews, (5) Food News, (6) Recipes, (7) Gardening and (8) Contact. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 8, page 1].

5. As of June, 2011, the website had 225 pages and 55 posts available for visitors to view on-line. [Discovery Deposition of Frank Barrie, taken June 30, 2011, page 137, lines 9-12].

6. The Applicant, Frank Barrie, is the sole operator of the website www.knowwhereyourfoodcomesfrom.com and does not have any employees though some friends have contributed restaurant reviews to the website. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 8, page 12, last line (contributor of restaurant review of Schlafly Bottleworks shown as "(Ethan Bennett 1/29/11)"].

7. The Applicant "realized the importance of having an attractive and distinctive 'brand identity' for his website" and retained a graphic design firm, Brownstone Graphics of Albany, New York to develop a logo for www.knowwhereyourfoodcomesfrom.com. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 5, lines 22-25]. He decided to file an application to register the mark at issue on the Principal Register when he realized "how wonderful it was" and realized the importance of protecting "a branding." [Discovery Deposition of Frank Barrie, taken June 30, 2011, page 30: lines 4-6]. His mark is used to brand and create an identity for his information

website which in many ways is like a blog. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 9, lines 2-3]. The website "is very personal and opinionated and 'national' since it has relevance nationwide (and in Canada) as well." [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 2, lines 12-13].

8. The Applicant's business plan prepared in 2009 is in sync with his website's Mission Statement when it notes in section III, Business Description, that "knowwhereyourfoodcomesfrom.com will be a website designed to promote small, sustainable, local agriculture by encouraging *consumers* to eat locally grown foods, which are produced in a sustainable and healthy way, or 'organically' grown [emphasis added]. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 6]. The Opposer's counsel appears to be confused about Applicant's services, as she substituted the term "customer" for "consumer" when reading the preceding excerpt from the Applicant's business plan. *The Opposer* has customers, *not the applicant* whose website provides information to consumers. [Discovery Deposition of Frank Barrie, taken June 30, 2011, page 71, lines 10-15].

9. The Applicant has received no revenue from the operation of his website. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, p. 3, Answer to Interrogatory No. 7]. The Applicant's "hope is for revenue from advertising appearing on www.knowwhereyourfoodcomesfrom.com." [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 6, section VI, Income and Expenses of business plan]. The Applicant's costs to start up his website were approximately

\$5,000.00 to \$6,000.00 though his significant effort to write and develop content for the website cannot be valued easily in monetary terms. The biggest expense, of approximately \$2,600.00, was to Brownstone Graphics which designed the logo and website for the Applicant. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 4, line 9].

10. There have been *no instances* where email, mail, telephone calls or inquiries were received by the Applicant that were intended for the Opposer [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 5, answer to interrogatory No. 16]. Opposer did not introduce any evidence to prove that there have been instances of confusion.

11. The Applicant first became aware of the Opposer's mark with design by the letter dated January 8, 2010 of Opposer's attorney, Cheryl L. Burbach. It wasn't until the filing by attorney Burbach of her formal Notice of Opposition on August 5, 2010, that he became aware that Opposer had obtained a trademark for the four words, where food comes from, unassociated with any imagery at all. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 7, answer to interrogatory No. 24].

12. When the Attorney Examiner, Saima Makhdoom, issued the Office Action on March 13, 2010, she attached 18 pages of information in the public realm concerning local agriculture. Included were documents showing the widespread interest in local foods and local agriculture reflected by organizations promoting "a strong accessible

local food culture" such as Common Ground Athens of Athens, Georgia, and a website that promotes "pick-your-own farms." [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 3, pp. 5-25]. Attorney Examiner Makhdoom also included information on the word mark, "know where your produce came from," as well as the Opposer's word mark, "where food comes from." It should also be observed that on June 16, 2011, the applicant, Real Time Farms, LLC of Ann Arbor, Michigan, filed an application (Serial Number 85348637) for the word mark, "know where your food comes from." [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 3, pp. 5-25]. It is a matter of common knowledge, appropriate for judicial notice, that there has been an explosion of interest in local farms and foods and "knowing where your food comes from," including the United States Department of Agriculture's "Know Your Farmer, Know Your Food and (KYF2) program" and the "I Will Know My Food.com " marketing campaign of Stonyfield Organic. [*Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, at Footnote 5, notes "facts of common knowledge are appropriate for judicial notice."

B. Opponent Integrated Management Information, Inc. and its Use of the Marks, "Where Food Comes From" and "Where Food Comes From VERIFIED (and Design)"

13. Opponent Integrated Management Information, Inc. d/b/a IMI Global is a publicly-traded company, whose founder, John Saunders, is also the Chairman of the Board and Chief Executive Officer (CEO). The company has "two primary areas of revenue" which CEO Saunders described as follows:

One is what we call our U.S. verified services, which are verification services. . . . [T]hat would include all of the revenues generated from our auditing procedures. So when we perform an audit for a ranch, whether that audit is on site or off site, they pay for those services. . . . The second part of the revenue sources are what we call hardware, and that's . . . the identification tags that are used - - the ISO [International Standards Organization]-compliant tags, the radiofrequency tags that are used as the Social Security number for the cattle that we -- and the livestock that we verify. [Deposition of John Saunders, taken November 17, 2011, p. 117, line 20 to p. 118, line 11].

The specific revenues for these "two primary verification services" were treated by the Opposer as a "trade secret/confidential." Applicant requests that the Trademark Trial and Appeal Board take note of these specific revenues in the redacted portions of the deposition of John Saunders taken on November 17, 2011 at p. 119, Lines 13-16. It is requested that the revenues from the two primary areas of the Opposer's business be compared to the revenues and expenses of the Where Food Comes From aspect of the Opposer's business, disclosed earlier in the deposition and also treated by the Opposer as a "trade secret/confidential." This information appears in the redacted portions of John Saunders' deposition, (expenses) at page 70, lines 21-24 and (revenue) at page 71, lines

15-19. The Trademark Trial and Appeal Board is requested to note that the Where Food Comes From aspect of the Opposer's business is not significant when compared to the corporation's "two primary areas of revenue."

14. The Opposer's "key competitors" include Micro Beef Technologies, which was in the process of being acquired by Animal Health Company based in Idaho at the time of Mr. Saunder's deposition on November 17, 2011. Animal Health Company sells "a wide array of products," including "feed components" such as antibiotics which are added to animal feed. [Deposition of John Saunders, taken November 17, 2011, page 112, lines 3-10]. Another key competitor is Sterling Solution described by Mr. Saunders as follows: [T]hey're certified through the USDA, too, so they have the same qualifications that we do to certify products, primarily beef, I believe, for export markets. [Deposition of John Saunders, taken November 17, 2011, page 112, lines 15-18].

15. The Opposer also owns the trademark "U.S. Verified" which is "used with the exported beef to Japan." [Deposition of John Saunders, taken November 17, 2011, page 123, lines 14-19]. Mr. Saunders noted that the Opposer does business as IMI Global "as we realized that our business was more of an international -- had an international scope to it." [Deposition of John Saunders, taken November 17, 2011, page 124, lines 6-9]. At one time, Smithfield Foods was the Opposer's largest customer, for whom it "provided export verification." Mr. Saunders' testified: "it was of their pork for the European Union program." [Deposition of John Saunders, taken November 17, 2011, page 109, lines 15-17].

16. The Opposer treated the name of its largest customer (as of the time of the deposition of Mr. Saunders) as a trade secret/confidential, and I request that the Trademark Trial and Appeal Board take note of the identity of this customer in the redacted portions of the deposition of John Saunders taken on November 17, 2011 at page 115, Lines 21-24. This customer is clearly not a small, family farm operation. Further, Mr. Saunders was "familiar with the fact that there are four giant meat packing companies that slaughter and market . . . beef cattle" and that the Opposer conducts business directly with "all of them." [Deposition of John Saunders, taken November 17, 2011, page 124, lines 10-17]. The Opposer treated the details of its business with the four giant meat packing companies as a trade secret/confidential, and the Applicant requests that the Trademark Trial and Appeal Board take note of this major aspect of the Opposer's business in the redacted portions of the deposition of John Saunders taken on November 17, 2011 at page 124, line 14 to page 125, line 25.

17. The Opposer does "not produce any food." In Mr. Saunder's words, "We are purely a third-party verification of others' brands and others' food that they are producing." [Deposition of John Saunders, taken November 17, 2011, page 28, lines 19-21]. He "built a business focused on verifying the authenticity of claims that were made about food" [Deposition of John Saunders, taken November 17, 2011, page 96, lines 9-10]. The Opposer's mark, which includes the design of a tree, was registered for the following services:

For food quality verification services, namely verifying the origin and handling practices of food production." [Deposition of John Saunders, taken November 17, 2011, page 23, lines 12-19, Exhibit 3].

Opposer's service mark for the four words, Where Food Comes From, as registered on the supplemental register on October 6, 2009, includes the same description of services:

For food quality verification services, namely verifying the origin and handling practices of food production. In class 42 (U.S. CLS 100 and 101)." [Deposition of John Saunders, taken November 17, 2011, Exhibit 2].

In contrast, the Applicant promotes local agriculture and does not provide any verification and/or auditing services at all.

18. During his direct examination, Mr. Saunders described "the types of businesses or consumers you would target or do business with?" as follows:

[O]ur largest *customer* base are farmers and ranchers, so either people that raise or grow their food are our largest *customer* base. We work with, as I mentioned, growers, people that somehow consolidate either multiple products or specific products, and then the processors, the companies which on a large or small scale are making those products into foods that can be eaten by consumers on a large or on a small scale . . . And then finally and most importantly, the retailers and the restaurants that would be selling those products [emphasis added]." [Deposition of John Saunders, taken November 17, 2011, page 40, lines 7-24].

In contrast, the Applicant provides information services on his website to consumers and does not have any "customers." Mr. Saunders noted that his corporation provided services to "individual consumers," only in response to *a leading question* by Attorney Burbach at the very end of her questioning of him concerning the types of businesses or consumers the Opposer does business with. [Deposition of John Saunders, taken November 17, 2011, page 40, line 25 to page 41, line 2].

19. The Opposer's CEO John Saunders' made clear that the products Opposer verifies and audits are distributed internationally (see paragraph 15 above) and

throughout the nation:

Attorney Burbach: And are some of those producers what we would call, like, local farms that provide local food supply?

Mr. Saunders: Local to where they are. *They're distributed across the country*, so we have producers from Washington to Florida, and in their local markets, in their regional markets, sure, they're local [emphasis added]. [Deposition of John Saunders, taken November 17, 2011, page 37, lines 1-8].

20. The Opposer does not provide a listing of farmers markets on its website because, according to Mr. Saunders, "we have not identified a farmers market which would comply with the standards and the requirements of Where Food Comes From." [Deposition of John Saunders, taken November 17, 2011, page 87, line 23 to page 88, line 1]. In contrast, the Applicant's website, as noted in Paragraphs "2", "3" and "4" above, promotes farmers markets by providing listings of farmers markets throughout the United States and Canada, and this information is at the core of the mission of the Applicant's website.

21. The Opposer advertises on a television program called *Cattlemen to Cattlemen* every week, as well as "business trade magazines, Supermarket News, Restaurant News, Meat and Processing, Dairy Today" [Deposition of John Saunders, taken November 17, 2011, p. 45, lines 1-2, and lines 18-20]. In contrast, the Applicant advertises in the *Coop Scoop*, the newsletter of the food co-operative he belongs to in Albany, New York. [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 16, page 4, answer to interrogatory No. 12].

22. The appearance and look of the home pages for the Opposer and the Applicant's websites are in the record at: 1) Opposer's website, www.wherefoodcomesfrom.com [Deposition of John Saunders, taken November 17, 2011, Exhibit 5], and 2) Applicant's website [Discovery Deposition of Frank Barrie, taken June 30, 2011, Opposer's Exhibit 8, p. 1 or Deposition of John Saunders, taken November 17, 2011, Exhibit 25].

23. The Opposer's trademark of Where Food Comes From VERIFIED (and design), as registered on August 24, 2010 on the Principal Register of the United States Patent and Trademark Office, as approved by Examining Attorney Mary Rossman, includes the following limitation or disclaimer:

"NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE 'WHERE FOOD COMES FROM VERIFIED', APART FROM THE MARK AS SHOWN."
[Deposition of John Saunders, taken November 17, 2011, Exhibit 3].

The Opposer's "Service Mark" for the words, Where Food Comes From, as filed on May 12, 2009 on the Supplemental Register of the United States Patent and Trademark Office, as approved by Examining Attorney Brian Neville, inexplicably, does not include the above limitation or disclaimer. [Deposition of John Saunders, taken November 17, 2011, Exhibit 2].

V. STATEMENT OF LAW AND ARGUMENT

Section 2(d) of the Lanham Act, codified at 15 U.S.C. Sec 1052(d), precludes the registration of a mark that so resembles "a mark or trade name previously used in the United States by another . . . as to be likely, when used on or in connection with the goods of the applicant, *to cause confusion, or to cause mistake, or to deceive* [emphasis added]." Applicant maintains that his mark of Know Where **Your Food** Comes From.Com (and design) does not so resemble the Opposer's marks to cause confusion, mistake, or to deceive. Accordingly, the Trademark Trial and Appeal Board should deny Opposition No. 91195943 and confirm Attorney Examiner Saima Makhdoom's Amendment dated May 26, 2010 approving Trademark Application No. 77883973, made after examining Opposer's mark, and permit the registration of the Applicant's mark on the Principal Register.

A. No Likelihood of Confusion

The 1973 decision in *In re E.I. DuPont deNemours & Co.*, 177 U.S. P.Q. 563, 476 F.2d 1357 remains a reliable guide to resolving the type of issue at hand: "that confusion is likely because of concurrent use of the marks of an applicant and a prior user on their respective goods" (476 F.2d 1357, at 1360). In this earlier matter, now nearly 40 years old, the court emphasized the legislative history of the Lanham Act: "The legislative history [footnote omitted] of the Act as a whole describes its objectives as making registration 'more liberal,' dispensing with 'mere technical prohibitions and arbitrary provisions' and modernizing the trademark statutes 'so that they will conform to

legitimate *present-day* business practice [emphasis added]' (*In re E.I. DuPont deNemours & Co.*, 476 F.2d 1357, at 1360).

The Applicant agrees with opposing counsel that the application of the Dupont factors to the facts in this case is appropriate. Still, it must be stressed that the matter at hand involving the applicant's use of a distinctive and creative mark for branding purposes for his internet website involves a "business practice" well-beyond the imagination of the court in the Dupont matter. The Applicant maintains that the most dispositive fact is that the appearance and look of the home page for the Opposer's website, www.wherefoodcomesfrom.com to any reasonable person cannot be confused with the home page of the Applicant's website.

In addition, it is important to emphasize the fact that the Opposer disclaimed *exclusive* right to use "WHERE FOOD COMES FROM VERIFIED (and Design)" apart from the mark as shown. The registration for this mark as approved by Attorney Examiner May Rossman provides:

"NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE 'WHERE FOOD COMES FROM VERIFIED', APART FROM THE MARK AS SHOWN."

Similarly, as noted in the Introduction to this answering brief, the Examining Attorney Saima Makhdoom ultimately and correctly determined that the applicant's application for a trademark was properly granted in light of his agreeing to add to the record the following disclaimer statement:

"No claim is made to the *exclusive* right to use "KNOW WHERE YOUR FOOD COMES FROM.COM" apart from the mark as shown [emphasis added]."

Attorney Examiners Mary Rossman and Saima Makhdoom made the correct determination to require such disclaimers in light of the fact that the words, "where food comes from" and "know where your food comes from," respectively, are "descriptive" and not "arbitrary." Opposer's other mark, consisting of words only, Where Food Comes From, is clearly a *weak mark*, merely consisting of descriptive language and should not have been approved by the Attorney Examiner Brian Neville. The Applicant understands that this is not a cancellation proceeding, and such issue is not before the Board. Nonetheless, he maintains that only two of the three Attorney Examiners properly applied the Trademark Law.

Turning to the DuPont factors, it is first noted that there is "no litmus rule which can provide a ready guide to all cases," and "The ultimate question of the likelihood of consumer confusion has been termed a question of fact" (*Dupont*, 476 F2d 1357, at 1360). Although the DuPont case sets forth 13 evidentiary factors to be considered, the court wisely noted that it is not helpful or necessary "to inject broad maxims . . . which do not aid in deciding. Only the facts can do that" (*Dupont*, 476 F2d 1357, at 1362).

The two most relevant DuPont evidentiary factors are (1) a comparison of the marks at issue and (2) a comparison of the goods and/or services of the applicant and the opposer. The mark for which the Applicant seeks trademark protection is a powerful logo consisting of words *and* an image of the earth.

Focusing first on the words, the Applicant's logo consists of six words (excluding ".com"): know, where, your, food, comes, from. In comparison, one of the Opposer's

marks has only four words: where, food , comes, from, and its second mark has those four words as well as the word “verified.” In addition, the Applicant’s mark highlights the words “**your food**” in bold black lettering for emphasis, while the Opposer's marks do *not* include the word "your". In sum, the Applicant's mark has as two dominant words, "your food," while the Opposer's marks lack the key words "your" and "know."

The words included in Applicant’s logo are not the same words which have been previously registered. The insistence by the Opposer's principal, John Saunders, that "they're exactly the same words" ([Deposition of John Saunders, taken November 17, 2011, page 101, line 4] is incorrect.

The facts in this matter are different from those in *In Re Hyper Shoppes (Ohio), Inc.*, 837 F. 2d 463 (Fed. Cir. 1988) where registration was refused for the trademark "Bigg's" and "bigg's" because of a prior registration of the trademark "Biggs"; same word and sound with only an "apostrophe" distinguishing the marks refused registration. Similarly, in *In re Majestic Distilling Co.*, 315 F. 3d 1311 (Fed. Cir. 2003), the applicant sought to register the identical words "Red Bull" for tequila which were previously registered by Stroh Brewery for its malt liquor. Nor, in the case at hand, is it a matter of comparing only **one** word as in *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490 (1987) where registration was refused to Canadian Imperial Bank of Commerce's COMMCASH mark for banking services since the mark COMMUNICASH was already registered by Crocker National Bank. Moreover, all of the marks in these cases can be considered "arbitrary" marks, as compared to the weak, descriptive word marks involved

in the matter at hand. [*Cf.*, *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (T.T.A.B. 2001), wherein the word "Dakin," described as the prominent feature of the marks at issue, is not simply "descriptive," and Judge Holtzman *rejected* the argument that "Dakin" is weak and not entitled to a broad scope of protection]. Similarly, in *In re Opus One, Inc.*, 60 U.S.P.Q.2d 1812, at 1814 (T.T.A.B. 2001), Judge Bottorff also noted that the *strong* mark of OPUS ONE for wine "is entitled to a broad scope of protection." In contrast, the words, "where food comes from" are *weak* and *descriptive*, and therefore are not entitled to a broad scope of protection. *These words gain no meaning as a phrase over and above the generic meaning of the constituent terms.*

It is also relevant to examine whether the words included in the Applicant's mark are "phonetically equivalent" to the words included in the Opposer's marks (*Trak, Inc. v. Traq, Inc.*, 212 USPQ 846, at 850 (TTAB 1981). The sound of the words in Opposer's mark are simply not "phonetically equivalent" to those in the Applicant's mark. In fact, only one of the first three first words in Applicant's mark ("know where your") appears in Opposer's mark ("where"). "Where" simply does not sound like "Know where your."

In addition, the creative image of the earth, which is a crucial feature of the Applicant's mark, is at the least equally, and arguably *more*, important than the words to the overall commercial impact and appeal of the mark, since the words, know where your food comes from, are "descriptive" matter (*In re National Data Corp.*, 224 USPQ 749, at 752, 753 F. 2d 1056 (Fed. Cir. 1985). This image plus the words "know where **your food** comes from" creates a potent expression of the wave of mounting concern for

the future of agriculture in the United States. This earth image, in a sky blue color with North America and South America outlined by use of fruit and vegetable shapes appearing in white and some blue lines and a long directional arrow circling counterclockwise around the bottom appearing in the same sky blue color, together with the Applicant's six, descriptive words, when viewed together as the complete mark for which trademark protection is sought, cannot possibly lead to confusion when compared to the Opposer's marks. The Opposer's marks, one consisting of four words alone, "where food comes from," and the second, adding the word "verified" are clearly distinguishable from the Applicant's six words. The Opposer's mark *plus design* is also easily distinguishable, and not only because this mark disclaimed the exclusive right to use the four words. In addition, the imagery of the logo designs are each unique and very distinguishable. The Opposer's mark is in various shades of green, and the prominent image is a stylized tree design. The many differences of the design of the Applicant's mark in itself offers "sufficient distinctiveness to create a different commercial impression" (*In re Dixie Restaurant, Inc.*, 105 F.3rd 1405, at 1407 (Fed Cir. 1997)). The matter at hand is easily distinguishable from the situation in *In re Sawyer of Napa Inc.*, 222 U.S.P.Q. 923, at 924 (T.T.A.B. 1983), relied upon by Opposer, where the applicant in that case added nothing to a word mark "that would aid in distinguishing between the two marks."

Finally, the Opposer incorrectly states in its brief that "Both marks contain circles and the words appear directly over the top of a circle" (Opposer's Trial Brief, page 12).

The Opposer's design has two circles, with four words placed between the outer and inner circles, which forms a border around “where food comes from.” The Applicant's design has *no circles* at all. The shape of the earth is round, but there are *no circles* in the design, and the words in Applicant's design are not *directly over* the top of the earth but nearly a quarter inch above the earth image.

B. Comparison of Good and Services

The Applicant's mark, as discussed in detail in the above Statement of Facts is used for purposes of branding an *internet information website*. The information provided at the Applicant's website, as detailed in the Statement of Facts, cannot be confused by a website visitor with information provided at the Opposer's website, wherefoodcomesfrom.com.

The purposes of the websites are completely different. The Opposer has and seeks *customers* in order to sell its services of verification and auditing or hardware for livestock, also detailed at length in the Statement of Facts, while the applicant promotes local agriculture to *consumers* by providing information on an internet website. Further, a review of the Statement of Facts establishes that the Opposer is part of the system of industrial agriculture in the United States, with customers that include the four giant meat packing corporations and a huge customer whose identity it will not reveal publicly, as detailed in the Statement of Facts.

The Opposer's verification and auditing services, as detailed in Paragraph "13" above, are not for the purpose of *promoting local agriculture*. In contrast, the Applicant's website is solely focused on the promotion of local agriculture, including CSA farms, farmers markets, and farm to table restaurants, as detailed in the Statement of Facts..

Finally, it should be noted that the Opposer's website, www.wherefoodcomesfrom.com requires fewer words for a visitor to type into a search engine to find a website. If anything, visitors will be much more likely to land on the Opposer's website than the applicants, in error. In any event, if by some chance Opposer's customers mistakenly added "know" and "your" to the name of Opposer's website and landed on Applicant's website, they would quickly note that there is no mention of "verification" and would restart their search. In sum, the parties have two very distinct types of users, and ranchers who wish to obtain verification services and individuals who seek verification of the source of meat will instantly realize they are on the wrong website if they do add "know" and "your" when making an Internet search and mistakenly access Applicant's site.

VI. CONCLUSION

The application to register the mark Know Where **Your Food** Comes From.com (plus design) should be granted. The Opposer's contention that there is a likelihood of confusion between the applicant's mark and its Where Food Comes From marks should be rejected and the Opposition to registration should be denied.

Dated: May 22, 2012

Respectfully Submitted

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CERTIFICATE OF FILING

I hereby certify that the foregoing *Answering Brief* is being filed electronically with the United States Patent and Trademark Office- Trademark Trial and Appeal Board.

Dated May 22, 2012

/s/ Frank W. Barrie
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Answering Brief has been served via U.S. mail, postage prepaid, on this 22nd day of May, 2012 upon the opposer's attorney:

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