ESTTA Tracking number: **ESTTA118834**
Filing date: **01/10/2007**

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

Petition for Cancellation

Notice is hereby given that the following party requests to cancel indicated registration.

Petitioner Information

Name	Continental Promotion Group, Inc.		
Entity	Corporation	Citizenship	Arizona
Address	4904 Eisenhower Boulevard, Suite 250 Tampa, FL 33634 UNITED STATES		

Attorney information	J. Todd Timmerman Shumaker, Loop & Kendrick, LLP 101 East Kennedy Boulevard, Suite 2800 Tampa, FL 33602 UNITED STATES ttimmerman@slk-law.com Phone:813-229-7600

Registration Subject to Cancellation

Registration No	2578064	Registration date	06/11/2002
Registrant	Cents Per Gallon Inc. 7408 Siemens Road Wendell, NC 27591 UNITED STATES		
Goods/Services Subject to Cancellation	Class 035. First Use: 1998/04/00 , First Use In Commerce: 1998/04/00 Goods/Services: Promoting the goods and services of others through the distribution of discount cards for gasoline		

Attachments	28mr3035scn7159_000_111109_102508.pdf (11 pages)(447806 bytes)

Signature	/J. Todd Timmerman/
Name	J. Todd Timmerman
Date	01/10/2007

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

In the Matter of Registration No. 2,578,064 of CPG
Registrant: Cents Per Gallon Inc.
Registration Date: June 11, 2002

CONTINENTAL PROMOTION GROUP, INC.,	)	
Petitioner,	)	**Cancellation No. _____**
v.	)	
CENTS PER GALLON INC.,	)	
Registrant.	)	

PETITION FOR CANCELLATION

Petitioner, Continental Promotion Group, Inc. ("Petitioner"), an Arizona corporation whose address is 4904 Eisenhower Boulevard, Suite 250, Tampa, Florida 33634, believes that it is and will continue to be damaged by the registration of the mark shown in Registration No. 2,578,064, and petitions for cancellation of the same. The grounds for this Petition for Cancellation are as follows:

1. Petitioner is the owner of the mark CPG, which Petitioner uses for promoting the sale of goods and services of others through various means and media.

2. Petitioner began using the mark CPG on or about June 30, 1989.

3. Petitioner is the owner of Registration No. 2,259,349 of the mark CPG for "promoting the sale of goods and services of others through the distribution of printed materials, contest development and rebate processing," applied for on May 1, 1998 and issued on July 6, 1999

(the "Registration"). A true and correct copy of Petitioner's Registration is attached hereto as Exhibit "1."

4. Petitioner is further the owner of Application Serial No. 76/656,545 for registration of the mark CPG (and design) for "promoting the sale of goods and services of others through the development of customized promotional campaigns, the management and fulfillment of consumer rebate promotions, prepaid promotional card management services, the fulfillment of premium, sample and gift card promotions, the administration of sweepstakes, games, and contests, the administration of consumer retention programs, the administration of business-to-business trade performance incentive promotions, and call center, data processing and customer support staff services," filed March 7, 2006 (the "Application"). Petitioner's Application is currently pending and under examination by the United States Patent and Trademark Office.

5. On September 1, 2006, the examining attorney initially refused registration of Petitioner's mark CPG (and design) as shown in Petitioner's Application based, *inter alia*, on a perceived likelihood of confusion between Petitioner's mark CPG (and design) and the mark CPG for "promoting the goods and services of others through the distribution of discount cards for gasoline" shown in Registration No. 2,578,064, applied for on March 14, 2001 and issued on June 11, 2002 (the "Intervening Registration"), under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). A true and correct copy of this Intervening Registration is attached hereto as Exhibit "2." Petitioner responded with argument on October 4, 2006, but the examining attorney's refusal was made final on December 8, 2006. A true and correct copy of the Office Action (less its lengthy exhibits) making the examining attorney's refusal final is attached hereto as Exhibit "3."

6. If the mark CPG (and design) shown in Petitioner's Application is confusingly similar to the mark CPG shown in the Intervening Registration, then the mark shown in the Intervening Registration is likewise confusingly similar to the mark CPG shown in Petitioner's senior Registration under Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d). Accordingly, the Intervening Registration should never have been granted, should be canceled, and should be removed from the Principal Register.

7. In addition, on information and belief, the mark CPG shown in the Intervening Registration has been abandoned by the owner of the Intervening Registration.

8. Petitioner's attempt to register its mark CPG (and design) will be impaired by the continued registration of the abandoned mark shown in the Intervening Registration.

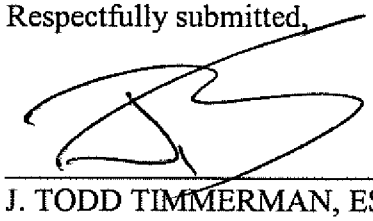
9. Petitioner will be damaged by the registration of the mark shown in the Intervening Registration, in that Petitioner's Application has been refused due to the registration of the abandoned mark shown in the Intervening Registration, which should not, in any event, have been granted over Petitioner's senior Registration. The continued existence of the Intervening Registration will continue to impair Petitioner's attempt to register its mark CPG (and design).

10. To the best of Petitioner's knowledge, the Intervening Registration is currently owned by Cents Per Gallon Inc., a North Carolina corporation whose address is 7408 Siemens Road, Wendell, North Carolina 27591.

11. This Petition for Cancellation is accompanied by the prescribed fee of $300.

WHEREFORE, Petitioner requests that Registration No. 2,578,064 of the mark CPG be canceled and removed from the Principal Register.

Respectfully submitted,



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Attorneys for Petitioner, Continental Promotion Group, Inc.

January 10, 2007.

Int. Cl.: 35

Prior U.S. Cls.: 100, 101 and 102

Reg. No. 2,259,349

United States Patent and Trademark Office

Registered July 6, 1999

SERVICE MARK
PRINCIPAL REGISTER

CPG

CONTINENTAL PROMOTION GROUP, INC.
(ARIZONA CORPORATION)
422 S. MADISON DRIVE
TEMPE, AZ 85281

FOR: PROMOTING THE SALE OF GOODS AND SERVICES OF OTHERS THROUGH THE DISTRIBUTION OF PRINTED MATERIALS, CONTEST DEVELOPMENT AND REBATE PROCESSING, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 6-30-1989; IN COMMERCE 6-30-1989.

SER. NO. 75-477,892, FILED 5-1-1998.

CURTIS FRENCH, EXAMINING ATTORNEY

EXHIBIT

1

Int. Cl.: 35

Prior U.S. Cls.: 100, 101 and 102

Reg. No. 2,578,064

United States Patent and Trademark Office

Registered June 11, 2002

SERVICE MARK
PRINCIPAL REGISTER

CPG

CENTS PER GALLON INC. (NORTH CAROLINA CORPORATION)
7408 SIEMENS ROAD
WENDELL, NC 27591

FOR: PROMOTING THE GOODS AND SERVICES OF OTHERS THROUGH THE DISTRIBUTION OF DISCOUNT CARDS FOR GASOLINE, IN CLASS 35 (U.S. CLS. 100, 101 AND 102).

FIRST USE 4-0-1998; IN COMMERCE 4-0-1998.

SER. NO. 76-224,403, FILED 3-14-2001.

ALEXANDER L. POWERS, EXAMINING ATTORNEY

EXHIBIT
2

Timmerman, J. Todd

From: ECom103 [Ecom1033@USPTO.GOV]
Sent: Friday, December 08, 2006 4:40 PM
To: Timmerman, J. Todd
Subject: TRADEMARK APPLICATION NO. 76656545 - CPG - N/A - Message 1 of 8
Attachments: ExhibitA.jpg; ExhibitB.jpg; ExhibitC.jpg; ExhibitD-1.jpg; ExhibitD-2.jpg; ExhibitE-1.jpg

[Important Email Information]
UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 76/656545

APPLICANT: Continental Promotion Group, Inc.

76656545

CORRESPONDENT ADDRESS:
J. Todd Timmerman
Shumaker, Loop & Kendrick, LLP
101 East Kennedy Boulevard, Suite 2800
Tampa FL 33602

RETURN ADDRESS:
Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

MARK: CPG

CORRESPONDENT'S REFERENCE/DOCKET NO: N/A

CORRESPONDENT EMAIL ADDRESS:
ttimmerman@slk-law.com

Please provide in all correspondence:

1. Filing date, serial number, mark and applicant's name.
2. Date of this Office Action.
3. Examining Attorney's name and Law Office number.
4. Your telephone number and e-mail address.

OFFICE ACTION

RESPONSE TIME LIMIT: TO AVOID ABANDONMENT, THE OFFICE MUST RECEIVE A PROPER RESPONSE TO THIS OFFICE ACTION WITHIN 6 MONTHS OF THE MAILING OR E-MAILING DATE.

MAILING/E-MAILING DATE INFORMATION: If the mailing or e-mailing date of this Office action does not appear above, this information can be obtained by visiting the USPTO website at http://tarr.uspto.gov/, inserting the application serial number, and viewing the prosecution history for the mailing date of the most recently issued Office communication.

Serial Number 76/656545

This letter responds to applicant's communication filed on October 4, 2006. The applicant argued against the refusal to register the mark under Section 2(d) in view of two registered marks. The trademark examining attorney has considered applicant's arguments regarding the refusal to register the

EXHIBIT 3

mark under Trademark Act Section 2(d). Accordingly, the following refusal has now been withdrawn: (1) Section 2(d) – Likelihood of Confusion Refusal re: CPGNETWORK.
The following requirement has been satisfied and is now withdrawn: (1) Recitation of Services. TMEP §714.04.

Section 2(d) - Likelihood of Confusion Refusal: CPG – Registration No. 2578064

Registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the mark for which registration is sought so resembles the marks shown in U.S. Registration Nos. 2578064 as to be likely, when used in connection with the identified goods, to cause confusion, or to cause mistake, or to deceive. The examining attorney has considered the applicant's arguments carefully but has found them unpersuasive. For the reasons set forth below, the refusal under Trademark Act Section 2(d), 15 U.S.C. §1052(d), is now made **FINAL** with respect to U.S. Registration No. 0785783. 37 C.F.R. §2.64(a).
The applicant applied to register the mark "CPG" with a design element for "promoting the sale of goods and services of others through the development of customized promotional campaigns, the management and fulfillment of consumer rebate promotions, prepaid promotional card management services, the fulfillment of premium, sample and gift card promotions, the administration of sweepstakes, games, and contests, the administration of consumer retention programs, the administration of business-to-business trade performance incentive promotions, and call center, data processing and customer support staff services."
The registered mark is "CPG" in typed form for "promoting the goods and services of others through the distribution of discount cards for gasoline."
Applicant should note that prior decisions and actions of other trademark examining attorneys in registering different marks are without evidentiary value and are not binding upon the Office. Each case is decided on its own facts, and each mark stands on its own merits. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973); *In re International Taste, Inc.*, 53 USPQ2d 1604 (TTAB 2000); *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984); *In re Consolidated Foods Corp.*, 200 USPQ 477 (TTAB 1978).

Similarity of the Marks

Trademark Act Section 2(d) bars registration where an applied-for mark so resembles a registered mark that it is likely, when applied to the goods and/or services, to cause confusion, mistake or to deceive the potential consumer as to the source of the goods and/or services. TMEP §1207.01. The Court in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973), listed the principal factors to consider in determining whether there is a likelihood of confusion. Among these factors are the similarity of the marks as to appearance, sound, meaning and commercial impression, and the relatedness of the goods and/or services. The overriding concern is to prevent buyer confusion as to the source of the goods and/or services. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993). Therefore, any doubt as to the existence of a likelihood of confusion must be resolved in favor of the registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); *Lone Star Mfg. Co. v. Bill Beasley, Inc.*, 498 F.2d 906, 182 USPQ 368 (C.C.P.A. 1974).
The marks are compared for similarities in sound, appearance, meaning or connotation. *In re E .I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1536 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *In re Mack*, 197 USPQ 755 (TTAB 1977); TMEP §1207.01(b).
The marks are compared in their entireties under a Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (C.C.P.A. 1976). *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987);

TMEP §1207.01(b)(viii).

When a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a purchaser's memory and to be used in calling for the goods or services. Therefore, the word portion is normally accorded greater weight in determining likelihood of confusion. *In re Dakin's Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987); *Amoco Oil Co. v. Amerco, Inc.*, 192 USPQ 729 (TTAB 1976); TMEP §1207.01(c)(ii).

Regarding the first prong of the test, the literal portions of both marks are identical in sound and appearance. Similarity in sound alone may be sufficient to support a finding of likelihood of confusion. *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963); TMEP §1207.01(b)(iv). Regarding the issue of likelihood of confusion, the question is not whether people will confuse the marks, but whether the marks will confuse people into believing that the goods they identify come from the same source. *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (C.C.P.A. 1972). For that reason, the test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. The question is whether the marks create the same overall impression. *Recot, Inc. v. M.C. Becton,* 214 F.2d 1322, 54 USPQ2d 1894, 1890 (Fed. Cir. 2000); *Visual Information Inst., Inc. v. Vicon Indus. Inc.*, 209 USPQ 179 (TTAB 1980). The focus is on the recollection of the average purchaser who normally retains a general rather than specific impression of trademarks. *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975); TMEP §1207.01(b). Considering the above, the marks of both parties are sufficiently similar to cause a likelihood of confusion under Section 2(d) of the Trademark Act.

Relatedness of the Services

Turning to the second prong of the test, the services of the parties need not be identical or directly competitive to find a likelihood of confusion. Instead, they need only be related in some manner, or the conditions surrounding their marketing are such that they would be encountered by the same purchasers under circumstances that would give rise to the mistaken belief that the services come from a common source. *On-line Careline Inc. v. America Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985); *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984); *Guardian Prods. Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); *In re Int'l Tel. & Tel. Corp.*, 197 USPQ 910 (TTAB 1978); TMEP §1207.01(a)(i).

Likelihood of confusion is determined on the basis of the goods or services as they are identified in the application and the registration. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computer Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990). Since the identification of the applicant's goods and/or services is very broad, it is presumed that the application encompasses all goods and/or services of the type described, including those in the registrant's more specific identification, that they move in all normal channels of trade and that they are available to all potential customers. TMEP §1207.01(a)(iii).

Applicant's services are "promoting the sale of goods and services of others through the development of customized promotional campaigns, the management and fulfillment of consumer rebate promotions, prepaid promotional card management services, the fulfillment of premium, sample and gift card promotions, the administration of sweepstakes, games, and contests, the administration of consumer

retention programs, the administration of business-to-business trade performance incentive promotions, and call center, data processing and customer support staff services." In particular, applicant's "promoting the sale of goods and services of others through the development of customized promotional campaigns" and "prepaid promotional card management services" could in fact be identical to registrant's "promoting the goods and services of others through the distribution of discount cards for gasoline." Discount cards are often distributed as part of a customized promotional campiagn. Futhermore, prepaid promotional card management services may incldue management of the distribution of discount gasoline cards.

Sophistication of Consumers

Applicant argues that those that purchase applicant's goods are sophisticated purchasers and, thus, confusion with respect to applicant's goods and registrant's goods is unlikely to occur.
The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983); TMEP §1207.01(d)(vii).

Furthermore, where the relevant consumer is comprised of both those with knowledge with respect to the goods and the general public, the standard of care when purchasing the goods is equal to that of the least sophisticated purchaser in the class. *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1304 (TTAB 2004) (as stated in *KOS Pharmaceuticals Inc., v. Andrx Corp.*, 369 F.3d 700, 70 USPQ2d 1874 (3d Cir. 2004), and citing *Checkpoint Sys., Inc., v. Check Point Software Techs., Inc.*, 269 F.3d 270, 285, 60 USPQ2d 1609, 1617-1618 (3d Cir. 2001)).

Any doubt regarding a likelihood of confusion is resolved in favor of the prior registrant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); TMEP §§1207.01(d)(i).

Therefore, with the contemporaneous use of highly similar marks with identical literal portions, consumers are likely to reach the conclusion that the services are related and originate from a common source. As such, registration must be refused under Trademark Act Section 2(d). This refusal is now made **FINAL**.

Response Guidelines

If applicant fails to respond to this final action within six months of the mailing date, the application will be abandoned. 15 U.S.C. §1062(b); 37 C.F.R. §2.65(a). Applicant may respond to this final action by:

(1) submitting a response that fully satisfies all outstanding requirements, if feasible (37 C.F.R. §2.64(a)); and/or

(2) filing an appeal to the Trademark Trial and Appeal Board, with an appeal fee of $100 per class (37 C.F.R. §§2.6(a)(18) and 2.64(a); TMEP §§715.01 and 1501 *et seq.*; TBMP Chapter 1200).

In certain circumstances, a petition to the Director may be filed to review a final action that is limited to procedural issues, pursuant to 37 C.F.R. §2.63(b)(2). 37 C.F.R. §2.64(a). *See* 37 C.F.R. §2.146(b), TMEP §1704, and TBMP Chapter 1201.05 for an explanation of petitionable matters. The petition fee is $100. 37 C.F.R. §2.6(a)(15).
If applicant has questions about its application, please telephone the assigned trademark examining attorney directly at the number below.

/Seth A. Rappaport/
Seth A. Rappaport
Trademark Examining Attorney
Law Office 103
Phone: (571) 270-1508
Fax: (571) 270-2508

HOW TO RESPOND TO THIS OFFICE ACTION:

- ONLINE RESPONSE: You may respond using the Office's Trademark Electronic Application System (TEAS) Response to Office action form available on our website at http://www.uspto.gov/teas/index.html. If the Office action issued via e-mail, you must wait 72 hours after receipt of the Office action to respond via TEAS. **NOTE: Do not respond by e-mail. THE USPTO WILL NOT ACCEPT AN E-MAILED RESPONSE.**
- REGULAR MAIL RESPONSE: To respond by regular mail, your response should be sent to the mailing return address above, and include the serial number, law office number, and examining attorney's name. **NOTE: The filing date of the response will be the *date of receipt in the Office*,** not the postmarked date. To ensure your response is timely, use a certificate of mailing. 37 C.F.R. §2.197.

STATUS OF APPLICATION: To check the status of your application, visit the Office's Trademark Applications and Registrations Retrieval (TARR) system at http://tarr.uspto.gov.

VIEW APPLICATION DOCUMENTS ONLINE: Documents in the electronic file for pending applications can be viewed and downloaded online at http://portal.uspto.gov/external/portal/tow.

GENERAL TRADEMARK INFORMATION: For general information about trademarks, please visit the Office's website at http://www.uspto.gov/main/trademarks.htm

FOR INQUIRIES OR QUESTIONS ABOUT THIS OFFICE ACTION, PLEASE CONTACT THE ASSIGNED EXAMINING ATTORNEY SPECIFIED ABOVE.