

ESTTA Tracking number: **ESTTA207756**

Filing date: **04/28/2008**

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

Proceeding	76567881
Applicant	Focus Property Group, LLC
Applied for Mark	FOCUS PROPERTY GROUP
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Submission	Reply Brief
Attachments	FOCUS PROPERTY GROUP cl 37 Reply Brief.pdf (10 pages)(42466 bytes)
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

In re Application of:)	
Focus Property Group, LLC)	Law Office 114
Serial No. 76/567881)	
Filed: December 31, 2003)	Trademark Attorney
Trademark: FOCUS PROPERTY GROUP)	Vivian M. First
)	
)	

REPLY BRIEF FOR APPELLANT

INTRODUCTION

Applicant (hereinafter "Appellant") hereby submits this Reply Brief in response to the Examining Attorney's Appeal Brief dated April 7, 2008, and respectfully requests that the Trademark Trial and Appeal Board reverse Examiner's decision rejecting the subject mark as being confusingly similar to U.S. Registration No. 2,359,956 for the mark FOCUS DEVELOPMENT in International Classes 036 and 037 for "real estate management and real estate brokerage," and "real estate development, construction, residential and commercial building and general contracting," respectively.

APPELLANT'S TRADEMARK

Appellant seeks registration on the Principal Register of its mark FOCUS PROPERTY GROUP for "land development and construction services; namely, planning, development and construction of residential communities, custom lot programs and commercial projects" in International Class 037.

ARGUMENT

This communication is responsive to the Examining Attorney's Appeal Brief dated April 7, 2008. Appellant continues to rely on all of the arguments and case law as set forth

in its Appeal Brief dated April 4, 2006, and its Supplemental Brief dated August 7, 2006, with the exception of Appellant's request for leave to amend for concurrent use, which Appellant withdrew in its Office Action Response dated December 4, 2007. Appellant respectfully submits the following reply offering additional arguments and case law in support of the mark's registration.

I. BACKGROUND

Appellant is the owner of a real estate development company working with a variety of builders to create master planned residential communities and commercial properties in the retail, business, and gaming industries. Appellant's mark FOCUS PROPERTY GROUP has been in use in commerce to identify its "land development and construction services; namely, planning, development and construction of residential communities, custom lot programs and commercial projects" since June 10, 2002.

II. APPELLANT'S MARK SHOULD BE ALLOWED REGISTRATION DUE TO HEIGHTED STANDARD OF LIKELIHOOD OF CONFUSION

Throughout the prosecution of this application, Appellant has argued that its mark should be allowed to coexist with the prior Registrant's mark due in part to the nature of the services identified by each. Examiner has rejected this argument, however, and has refuted the case law and arguments submitted by Appellant demonstrating that a heightened standard of likelihood of confusion applies to all of the services at issue here because, (A) the services are expensive; and (B) consumers exercise a greater degree of care when purchasing real estate services.

A. Elevated Likelihood of Confusion Standard Applies to Appellant's and Registrant's Expensive Services.

Appellant's mark is not confusingly similar to Registrant's mark because the services identified are expensive and thus subject to an elevated likelihood of confusion standard, which is not met here. In a likelihood of confusion analysis, the usual determination is whether there is a likelihood of confusion in the mind of an appreciable number of "reasonably prudent" buyers. See AMF, Inc. v. Sleekcraft Boats, 204 U.S.P.Q. 808 (9th Cir. 1979). In making this determination, courts consider the "general impression of the ordinary purchaser, buying under the normally prevalent conditions of the market and giving the attention that such purchasers usually give in buying that class of goods." W.W.W. Pharmaceutical Co. v. Gillette Co., 25 U.S.P.Q.2d 1593, 1599 (2d Cir. 1993).

However, the reasonably prudent purchaser standard is elevated to the standard of the "discriminating purchaser" when making purchasing decisions regarding "expensive" goods. Weiss Assoc., Inc. v. HRL Assoc., Inc., 14 U.S.P.Q.2d 1840 (Fed. Cir. 1990). Even where the goods are not expensive, the reasonably prudent person standard may be elevated to a higher, more discriminating level based on assumptions about the nature of certain buyers. See First Nat'l Bank v. First Nat'l Bank of South Dakota, 47 U.S.P.Q.2d 1847 (8th Cir. 1998); Barbecue Marx, Inc. v. 551 Ogden, Inc., 57 U.S.P.Q.2d 1307 (7th Cir. 2000). As such, courts generally consider the buyer's expertise or sophistication with respect to the purchase of the services at issue, and in instances where the services are expensive or unusual, the buyer can be expected to exercise greater care, thereby decreasing the likelihood of consumer confusion. See Champions Golf Club, Inc. v. The Champions Golf Club, Inc., 38 U.S.P.Q.2d 1161, 1167 (6th Cir. 1996).

Furthermore, Appellant submits that both its and Registrant's services are associated with the development, sale, leasing and brokerage of land parcels, commercial

retail outlets, and upscale homes, which have been classified as “expensive goods” for which a greater degree of care is applicable. See, Charles F. Ryan & Son, Inc. v. Lancaster Homes, Inc., 254 144 U.S.P.Q. 234 (N.Y.A.D. 1964), aff’d., 15 N.Y.S.2d 812 (N.Y. 1965). Similar to the financial and health care industries where courts have found that heightened consumer care minimizes likelihood of confusion, courts have also recognized that consumers generally exercise a higher degree of care when contemplating a real estate related purchase. Century 21 Real Estate Corp. v. LendingTree, Inc., 76 U.S.P.Q.2d 1769, 1780 (3d Cir. 2005) (agreeing with district court about the importance of a real estate purchase to the average consumer and finding that the degree of care with which that purchase is made weighs against a finding of likely confusion); see also, First Nat’l Bank in Sioux Falls v. First Nat’l Bank South Dakota, 47 U.S.P.Q.2d 1847, 1851 (8th Cir. 1998) (no likelihood of confusion between FIRST NATIONAL BANK and FIRST NATIONAL BANK SOUTH DAKOTA design marks for banking services); Freedom Card, Inc. v. JPMorgan Chase & Co., 77 U.S.P.Q.2d 1515, 1526 (3d Cir. 2005) (no likelihood of confusion between FIRST BANK and FIRST BANK SYSTEM design marks for banking services); First Savings Bank, F.S.B. v. First Bank System, Inc., 101 F.3d 645, 653 (10th Cir. 1996) (no likelihood of confusion between "FirstBank" and "First Bank System" service marks where bank logos were visually distinct); Sun Banks of Fla., Inc. v. Sun Fed. Sav. & Loan, 651 F.2d 311, 319 (5th Cir. 1981) (no likelihood of confusion between "Sun Federal Savings" and "SunBanks" service marks); First Bank v. First Bank System, Inc., 909 F.Supp. 657, 661 (S.D. Iowa 1995) (confusion between names "First Bank" and "First Bank Iowa" is reasonably manageable such that equities weigh against permanent injunction), aff’d. 84 F.3d 1040 (8th Cir. 1996); Carefirst of Maryland, Inc. v. FirstHealth of the

Carolinas, Inc., 77 U.S.P.Q.2d 1492, 1510 (TTAB 2005) (marks FIRSTCAROLINACARE and CAREFIRST found not confusingly similar for health care services).

In fact, in Century 21 Real Estate Corp. the court acknowledged that in reference to the average consumer, a real estate purchase is often the most important and expensive single purchase in the consumer's entire life. 76 U.S.P.Q.2d at 1780. Additionally, the Court stated that consumers of real estate services would be expected to exercise great care in learning about the various providers of real estate services available to them, and therefore, "[t]he degree of care weighs against a finding of likely confusion." Id.

In the instant case, consumers are not likely to be confused as to the source of Appellant's services and the Registrant's services due to the expensive nature of each. Similar to Charles F. Ryan & Son, Inc. and Century 21 Real Estate Corp., here the services at issue are classified as expensive; therefore, consumers will exercise a heightened degree of care in selecting a provider of the services. In other words, considering the magnitude of a real estate purchase to the average consumer, it is unlikely that such a consumer would purchase or lease a home or business without first confirming the identity of the source. As such, because purchasers of Appellant's and Registrant's services will be confronted with an "expensive" purchase, they will be likely to research and identify the provider of the services, thereby eliminating any potential consumer confusion as to the source of the services.

B. Consumer Confusion is Not Probable Because a Heightened Degree of Care is Applied by All Consumers When Selecting a Provider of Real Estate Services.

Appellant respectfully requests the Board to consider the weight of the case law which shows that consumers, whether "sophisticated" or "ordinary," exercise a heightened

degree of care when selecting a provider of real estate services, thereby significantly reducing any likelihood of confusion. As such, consumers are not likely to be confused as to the origin of the real estate services provided under Appellant's FOCUS PROPERTY GROUP mark and Registrant's FOCUS DEVELOPMENT marks when confronted with the marks in commerce.

In a recent decision dated August 7, 2007, this Board held that that a heightened degree of care is applied by all consumers when selecting a provider of real estate services. In re 1st USA Realty Professionals, Inc., 84 U.S.P.Q.2d 1581, 1587 (TTAB 2007) (emphasis added). In In re 1st USA Realty Professional, Inc., the Board considered the ex parte appeal of an applicant who was denied registration of its mark 1ST USA (and design) for real estate brokerage and listing services based upon likelihood of confusion with a prior registration for FIRST USA (stylized) for essentially banking, credit card and financial services. 84 U.S.P.Q.2d at 1582-83. In its analysis of the relevant likelihood of confusion factors, the Board found that while consumers of applicant's real estate services (i.e., "people who wish to buy or sell homes") and registrant's financial services (i.e., "people who wish...to have bank accounts or credit cards") were not particularly sophisticated as a class, general consumers still tend to exercise a higher degree of care when purchasing real estate services. Id. at 1587.

While the Board in this particular case ultimately upheld the Section 2(d) refusal to register the applicant's mark, the case turned in large part on the fact that the marks were essentially identical (i.e., "1ST USA" vs. "FIRST USA") and the different nature of the services identified by each. Id. However, regarding the care in purchasing element of the likelihood of confusion analysis, the Board held that this factor weighed in favor of the

applicant because real estate brokerage services are chosen by the general consuming public with a heightened degree of care. Id. at 1587. Nevertheless, the Board found that this element was not dispositive in this case because the related services identified in the prior registration, specifically, the banking, credit card and financial services (no real estate services), were not subject to the same heightened degree of consumer care in purchasing as the real estate brokerage services. Id. In other words, the Board did not consider this element dispositive because of the differing standard of care applied by consumers in purchasing applicant's real estate and registrant's financial services.

In another case, the Appeals Court had occasion to consider the likelihood of confusion between two similar marks (the marks "HMS" and "HMS (and rooftop design)"), both for essentially real estate services. Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 18 U.S.P.Q.2d 1587 (6th Cir. 1991). Again, when considering the degree of consumer care in purchasing element of the likelihood of confusion analysis, the Court held that "because selling one's property is likely the most significant commercial transaction ever undertaken for most people...customers are likely to carefully select the provider of sales services." Id. at 1596 (citing Magnaflux Corp. v. Sonoflux Corp., 109 U.S.P.Q. 313 (CCPA 1956) (confusion is less likely where goods are expensive and are purchased after careful consideration than when they are purchased casually)).

Additionally, while the Court in this case found that one party sold its real estate services exclusively to sophisticated commercial buyers (i.e., real estate brokers), and the other party was selling its real estate services to unsophisticated non-business consumers, the Court held that "buyers of both...[parties]...services are likely to exercise a high degree of care." Id. As such, the Court found that the heightened degree of care exercised by the

relevant purchasers of both parties' real estate services is material in determining whether a likelihood of confusion exists between the two marks. Id.

In the instant case, Appellant respectfully submits that its FOCUS PROPERTY GROUP mark for "land development and construction services, namely, planning, development and construction of residential communities, and commercial projects" is not likely to cause consumer confusion with the prior registration for the mark FOCUS DEVELOPMENT for "real estate management and real estate brokerage; real estate development, construction, residential and commercial building and general contracting." Consumers looking for these types of services are not likely to be considered casual purchasers. In fact, it is more likely that such consumers will exercise a heightened degree of care by educating and familiarizing themselves with the various service providers available in the market in which they intend to enter.

Additionally, similar to In re 1st USA Realty Professionals, Inc., whether the relevant consumers of Appellant's and Registrant's services are in the real estate business or just ordinary purchasers, they are likely to exercise a high degree of care. While Appellant respectfully submits that this factor alone may be dispositive in the likelihood of confusion determination with regard to the marks at issue, Appellant urges the Board to consider the following. Combining the high degree of care exercised by all consumers of real estate services, with the actual differences in sight, sound, meaning and commercial impression between Appellant's FOCUS PROPERTY GROUP and Registrant's FOCUS DEVELOPMENT marks, in addition to the fact that the marks have been coexisting in commerce for over five years without any instances of actual confusion, likelihood of consumer confusion here is not probable.

Appellant: Focus Property Group, LLC
Mark: FOCUS PROPERTY GROUP
Serial No.: 76/567881

III. CONCLUSION

Appellant respectfully requests that Examiner's 2(d) refusal be removed and the Board allow registration of Appellant's mark because the dissimilarities in the marks themselves, in light of the heightened degree of consumer care associated with purchasing the expensive real estate services involved, and in combination with the lack of any actual consumer confusion between the marks, serves to virtually eliminate any likelihood of consumer confusion between Appellant's mark and the prior registration. Accordingly, Appellant respectfully submits that this application is in condition for publication and favorable action is requested.

Respectfully submitted,

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Dated: April 28, 2008

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