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

Proceeding	76567881
Applicant	Focus Property Group, LLC
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Submission	Appeal Brief
Attachments	FOCUS PROPERTY GROUP cL 37 TTAB Appeal Brief.pdf (9 pages)
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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)	Law Office 114
Serial No. 76/567881)	
Filed: December 31, 2003)	Trademark Attorney
Trademark: FOCUS PROPERTY GROUP)	Vivian M. First
_____)	

BRIEF FOR APPELLANT

INTRODUCTION

Applicant (hereinafter "Appellant") hereby appeals from Examiner's final refusal to register the above identified trademark, dated August 4, 2005, and respectfully requests that the Trademark Trial and Appeal Board either reverse Examiner's decision rejecting the subject mark as being confusingly similar to U.S. Registration No. 2359956 for the mark FOCUS DEVELOPMENT in International Class 036 for "real estate management and real estate brokerage."

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 Office Action dated August 4, 2005. Appellant respectfully submits the following response offering arguments in support of 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 since June 10, 2002.

II. NO LIKELIHOOD OF CONFUSION

A. Marks Differ in Sight, Sound, Meaning and Commercial Impression

Appellant respectfully maintains that that there is no likelihood of confusion between its mark and the cited registration for FOCUS DEVELOPMENT. The marks themselves are dissimilar in their entirety in appearance and pronunciation.

Likelihood of confusion requires that confusion be probable, not simply possible. See, *HMH Publishing Co. v. Brincat*, 183 USPQ 141, 144 (9th Cir. 1974); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 136 USPQ 508, 518 (9th Cir.) *cert. denied*, 374 U.S. 830, 37 USPQ 913 (1963); *J.B. Williams Co. v. Le Conte Cosmetics, Inc.*, 186 USPQ 317, 319 (9th Cir. 1975).

With regard to meaning and overall commercial impression, the term "development," which is used by the cited registrant, conveys several different meanings in addition to its association with the real estate industry. For example, "development" is

used to describe the acquisition of something over time, growth or improvement, as well as the process of producing photographic images. Therefore, it is not accurate to presume that consumers would automatically associate FOCUS PROPERTY GROUP and FOCUS DEVELOPMENT with one another.

B. Examiner Must Consider Entire Multi-word Mark

The marks in question are multi-word marks, which must be analyzed in their entirety, rather than considering each portion of a mark independently. See, *California Cooler, Inc., v. Loretto Winery, Ltd.*, 774 F.2d 1451, 1455 (9th Cir. 1985), 4 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 11:27, at 11-54, 11-55 (4th ed. 2004).

Marks are found to be confusingly similar when they are the same in appearance, sound and meaning. See, *Horn's, Inc. v. Sanofi Beaute, Inc.*, 963 F. Supp. 318, 322 (S.D.N.Y. 1997) (citing *Revlon, Inc. v. Jerell, Inc.*, 713 F. Supp. 93, 98 (S.D.N.Y. 1989)).

Furthermore, according to the Trademark Manual of Examining Procedure, "similarity of marks in one respect - sight, sound or meaning - will not automatically result in a finding of likelihood of confusion even if the goods are identical or closely related." TMEP § 1207.01(b)(i), citing *In re Lamson Oil Co.*, 6 U.S.P.Q.2d 1041, 1043 (TTAB 1987). When evaluated as a whole, Applicant's FOCUS PROPERTY GROUP mark is very different from the cited registration for FOCUS DEVELOPMENT in sight (visual appearance), and sound (pronunciation) at the very least.

The Examiner further contends that the disclaimed matter in both marks simply serves to inform the consumer of the nature of the respective services, and does not modify the meaning or commercial impression of the word FOCUS, therefore, consumers will identify the services by the word FOCUS alone.

However, "the use of identical, even dominant words in common does not automatically mean that two marks are similar." See, *General Mills, Inc. v. Kellogg Co.*, 824

F.2d 622, 3 U.S.P.Q.2d 1442, 1445 (8th Cir. 1987). "Rather, in analyzing the similarities of sight, sound, and meaning between two marks, a court must look to the overall impression created by the marks and not merely compare individual features." *Id.* Professor McCarthy has stated in his treatise that this "anti-dissection" rule is violated in instances in which the "focus is on a prominent feature of conflicting marks and likelihood of confusion is decided solely upon that feature, ignoring all other elements of the mark." *McCarthy*, §23:41 at 23-125,126 (4th ed. 2004).

Recent case law further supports this premise as well. See, *Shen Manufacturing Co., Inc. v. The Ritz Hotel Limited*, 393 F.3d 1238, 73 U.S.P.Q.2d 1350 (Fed. Cir. 2004). The court in that decision reasoned that "while there are often discrete terms in marks that are more dominant and, thus, more significant to the assessment of similarity, the law forbids the type of dissection proposed..." "The ultimate conclusion of similarity or dissimilarity must rest on consideration of the marks in their entirety." (quoting *Hewlett-Packard Co. v. Packard Press, Inc.* 281 F.3d 1261, 1268 (Fed. Cir. 2002).

In that regard, Appellant maintains that the overall impression of each mark in its respective entirety does not result in a likelihood of consumer confusion. Appellant contends that "property group" and "development" are not necessarily identical in meaning, as it does not follow that each is indicative of services somehow associated with real estate. As previously asserted, "development" may well be associated with an extensive variety of goods or services ranging from photography services to computer software or even personal improvement.

It is also critical to note that it is the entire mark that consumers will use to identify the services provided thereunder. It does not necessarily follow that the consumer will consider just one word contained in the marks at issue. One similar word contained in two marks does not automatically keep the consumer from distinguishing between them,

especially where the consumer is considered a "discriminating purchaser" as in the case of expensive goods, e.g., a home.

Examiner relies on TMEP § 1207.01 (d) (viii), which provides that the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are immune from source confusion, citing *In re Decombe*, 9 USPQ2d 1812 (TTAB 1988) and *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). In relying on that section, the Examiner excluded a very pertinent portion, namely, the sentence following these case citations, which is as follows: "**However**, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion."

Appellant does not mean to assert that its consumers have specialized knowledge of the construction and development industry, rather, that it would be unusual for a consumer to purchase a home without first confirming the identity of the builder. The purchase of a home is not a casual transaction. Furthermore, as a developer, Applicant is also selling parcels of land to builders. Such builders are also paying a very high dollar amount for land parcels, and these type of transactions are not casual purchases.

C. Elevated Standard Applied to Expensive Goods

There is an elevated standard applied to expensive goods relative to the potential for the likelihood of consumer confusion. In that instance, the reasonably prudent purchaser standard is elevated to that of a "discriminating purchaser." See, *Weiss Assoc., Inc. v. HRL Assoc., Inc.*, 902 F.2d 1546 (Fed. Cir. 1990) (quoting treatise). Appellant submits that its services are associated with the development and sale of land parcels, commercial retail outlets, and upscale homes, which have been classified as "expensive goods," for which such greater degree of care is applicable. See, *Charles F. Ryan & Son, Inc. v. Lancaster Homes, Inc.*, 254 N.Y.S. 2d 473 (N.Y.A.D.1964), *aff'd.*, 15 N.Y.S.2d 812 (N.Y. 1965). The court in that decision found it "almost incomprehensible" that a purchaser

would not confirm the identity of the builder when entertaining the idea of making such a substantial purchase. In that regard, Appellant maintains that the buyer of land parcels, or a home, takes "great care" in making such purchase such that likelihood of confusion is minimized. Furthermore, Appellant is a real estate developer, and, as such, provides its goods and services to builders rather than directly to the home buyer. Builders are highly sophisticated purchasers, and land is considered unique and a high dollar purchase. For this reason, a builder would take great care not to confuse services offered under the mark FOCUS DEVELOPMENT with FOCUS PROPERTY GROUP.

In addition, when the question of registerability is a "close case, any doubt on the matter should be resolved in Applicant's favor, and the mark should be published for purposes of opposition." See, *In re Waverly Inc.*, 27 U.S.P.Q. 2d 1620, 1624 (TTAB 1993).

Those in the industry itself can decide whether or not they believe that registration of the mark FOCUS PROPERTY GROUP for real estate listings, leasing and brokerage services will inhibit their right to compete with Appellant.

D. Appellant's Mark Should Be Permitted to Co-exist

The fact that the USPTO has permitted FOCUS DEVELOPMENT to co-exist with FOCUS 2000 (U.s. Reg. No. 2,372,203) in class 037 for "construction services, namely, laying out, and custom construction of residential, commercial, and public buildings" supports Appellant's argument that its mark should garner the same treatment, especially since the FOCUS 2000 mark was permitted to register less than two months after registration of FOCUS DEVELOPMENT became final.

The Examiner contends that the term "2000" suggests a modern focus, as in a focus for the new millennium. If the Examiner is willing to accept this connotation, she should likewise accept the argument that "development" does not automatically identify real estate services, especially since the terms "focus" and "development" are both used in

the field of photography. Therefore, FOCUS DEVELOPMENT is not likely to be confused with FOCUS PROPERTY GROUP by the discriminating purchaser.

Appellant has been using its FOCUS PROPERTY GROUP mark since June 10, 2002; therefore, the mark has been used concurrently with Registrant's FOCUS DEVELOPMENT mark since Registrant's first use in commerce date of March of 1993. During this time, Appellant has not been aware of any actual confusion between the two marks. As such, Appellant believes that there is no likelihood that confusion will develop in the future, as the marks themselves and the marketing channels have not overlapped and caused confusion in the past four years.

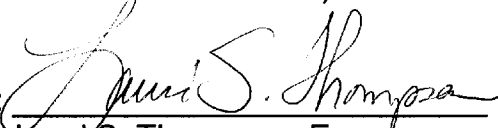
For the above stated reasons, Appellant respectfully requests that the 2(d) refusal be lifted.

III. CONCLUSION

Appellant respectfully requests that Examiner's 2(d) refusal be removed and the Board allow registration of Appellant's mark. Accordingly, Appellant respectfully submits that this application is in condition for publication and favorable action is requested.

Respectfully submitted,

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