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FEED - KAL1143-032

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# UNITED STATES PATENT AND TRADEMARK OFFICE

**SERIAL NO:** 77/109062

**MARK:** ORGANIC HARVEST FEED



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**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/main/trademarks.htm>

**TTAB INFORMATION:**

<http://www.uspto.gov/web/offices/dcom/ttab/index.html>

**APPLICANT:** Kalmbach Feeds, Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

KAL1143-032

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## EXAMINING ATTORNEY'S APPEAL BRIEF

The applicant has appealed the examining attorney's final refusal to register the mark ORGANIC HARVEST FEEDS for "mixed animal feed." Registration was refused under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d) because there is a likelihood of confusion between the mark for which registration is sought and one prior registration.

### FACTS

On February 16, 2007, the applicant applied to register the mark ORGANIC HARVEST FEEDS for "mixed animal feed."

On June 7, 2007, the examining attorney refused registration of the mark under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), citing U.S. Registration Nos. 1,304,671 and 2,007,505, and required a disclaimer of the term "ORGANIC" in addition to the previously disclaimed term "FEEDS."

On August 7, 2007, the applicant submitted a response to the Office Action arguing against the refusal under Sections 2(d) of the Trademark Act, including noting that Registration No. 2,007,505 was a dead registration. In addition, the applicant entered the requested revised disclaimer.

On August 28, 2007, the examining attorney issued a final refusal under section 2(d) of the Trademark Act with respect to Reg. No. 1,304,671 only.

On September 7, 2007, the applicant requested reconsideration of the final action. On October 2, 2007, the examining attorney summarily denied the applicant's request for reconsideration concerning the refusal under Section 2(d) of the Trademark.

On February 15, 2008, the undersigned examining attorney was assigned the instant application.

On February 28, 2008, the applicant filed a notice of appeal. The Trademark Trial and Appeal Board (hereafter "TTAB") acknowledged the appeal. On April 28, 2008, the applicant filed its brief and the applicant's appeal brief was forwarded to the examining attorney.

### ISSUE

The applicant's mark is confusingly similar to the mark in U.S. Registration No. 1,304,671 such that when used with the identified goods it is likely to cause confusion, to cause mistake and to deceive and should therefore be refused registration under Section 2(d) of the Trademark Act.

### ARGUMENTS

The examining attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), because the applicant's mark, when used on or in connection with the identified goods, so resembles the mark in U.S. Registration No. 1,304,671 as to be likely to cause confusion, to cause mistake, or to deceive. TMEP §§1207 *et seq.*

The law applicable to this refusal is well settled. There are two steps in an analysis to determine whether there is a likelihood of confusion. First, the marks themselves must be compared for similarities in appearance, sound, connotation and commercial impression. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Second, the goods must be compared to determine if they are related or if the activities surrounding their marketing are such that confusion as to origin is likely. *See Herbko Int'l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi).

The applicant's mark is ORGANIC HARVEST FEEDS for "mixed animal feed." Registration No. 1,304,671 is HARVEST for goods including "livestock feed."

#### **A. Similarity of the Marks**

Similarity in appearance and meaning are two considerations in determining whether there is a likelihood of confusion between marks. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973); TMEP §1207.01(b). Similarity in any one of these elements may be sufficient to find a likelihood of confusion. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1043 (TTAB 1987); *see* TMEP §1207.01(b). The applicant's argument that its mark is dissimilar in sound, appearance and meaning is unpersuasive.

The applicant's and the registrant's marks both contain the term HARVEST. Marks may be confusingly similar in appearance where there are similar terms or phrases or similar parts of terms or phrases appearing in both applicant's and registrant's mark. *See Crocker Nat'l Bank v. Canadian Imperial Bank of Commerce*, 228 USPQ 689

(TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987) (COMMCASH and COMMUNICASH); *In re Phillips-Van Heusen Corp.*, 228 USPQ 949 (TTAB 1986) (21 CLUB and "21" CLUB (stylized)); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re Collegian Sportswear Inc.*, 224 USPQ 174 (TTAB 1984) (COLLEGIAN OF CALIFORNIA and COLLEGIENNE); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983) (MILTRON and MILLTRONICS); *In re BASF A.G.*, 189 USPQ 424 (TTAB 1975) (LUTEXAL and LUTEX); TMEP §1207.01(b)(ii)-(iii). This is especially so when the shared term is suggestive of the goods. The term "harvest" connotes a mature crop or a time of year for gathering mature agricultural crops. Thus, a consumer encountering the applicant's and the registrant's marks likely would assume that the goods were edible, or at minimum, cultivated and extracted from the soil. As such, the marks share a similar appearance and convey a similar meaning.

The applicant's mark also conveys a strikingly similar commercial impression to that of the registrant. This is because the applicant's mark encompasses the registered mark in its entirety. The additional language in the applicant's mark does little to differentiate the marks because the additional wording is either highly descriptive or generic. Thus, the mere addition of a term to a registered mark generally does not obviate the similarity between the marks nor does it overcome a likelihood of confusion under Trademark Act Section 2(d). See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004) (GASPAR'S ALE and JOSE GASPAR GOLD); *Coca-Cola Bottling Co. v. Jos. E. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105

(C.C.P.A. 1975) (BENGAL and BENGAL LANCER); *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (C.C.P.A. 1967) (THE LILLY and LILLI ANN); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002 (TTAB 1988) (MACHO and MACHO COMBOS); *In re Corning Glass Works*, 229 USPQ 65 (TTAB 1985) (CONFIRM and CONFIRMCELLS); *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE and CREST CAREER IMAGES); *In re Riddle*, 225 USPQ 630 (TTAB 1985) (ACCUTUNE and RICHARD PETTY'S ACCU TUNE); *In re Cosvetic Labs., Inc.*, 202 USPQ 842 (TTAB 1979) (HEAD START and HEAD START COSVETIC); TMEP §1207.01(b)(iii).

Similarity in sound is a third consideration in determining whether there is a likelihood of confusion. In this instance, the applicant's mark is dissimilar from that of the registrant's mark. However, dissimilarity in sound does not detract from the same overall meaning impression conveyed by both marks. This is because the additional terms, ORGANIC and FEEDS, respectively, are highly descriptive and generic for applicant's goods. Although a disclaimed portion of a mark certainly cannot be ignored, and the marks must be compared in their entireties, one feature of a mark may be more significant in creating a commercial impression. Disclaimed matter is typically less significant or less dominant when comparing marks. See *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii).

Even if disclaimed matter were not afforded less significance when deciding whether marks are confusingly similar, the additionally wording "organic" and "feeds" reinforce the similar commercial impressions shared by the applicant's and registrant's

marks. When shopping for identical goods, as is the case here, a consumer faced with the prospect of choosing HARVEST or ORGANIC HARVEST FEEDS would likely believe that the latter merely represents the organic line of the HARVEST line of feed products. Thus, the terms “ORGANIC” and “FEEDS” reinforce the similarity of the applicant’s mark and the registrant’s marks, because these terms are so plainly descriptive in the context of the goods, that they offer no significant source-identifying value.

Accordingly, the marks are similar in appearance and meaning and overall commercial impression. As such, the marks are confusingly similar.

### **B. Similarity of the Goods**

The second step in determining whether there is a likelihood of confusion is to compare the goods. The goods are compared to determine whether they are similar or commercially related or travel in the same trade channels. *See Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164-65, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002); *Han Beauty, Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 1336, 57 USPQ2d 1557, 1559 (Fed. Cir. 2001); TMEP §§1207.01, 1207.01(a)(vi). If the marks of the respective parties are nearly identical as they are in this case, the relationship between the goods of the respective parties need not be as close to support a finding of likelihood of confusion as might apply where differences exist between the marks. *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *Amcor, Inc. v. Amcor Indus., Inc.*, 210 USPQ 70, 78 (TTAB 1981); TMEP §1207.01(a).

The applicant is seeking registration for “mixed animal feed.” The owner of Registration No. 1,304,671 is HARVEST for goods including “livestock feed.” These goods are inclusive of each other, and thus highly related. The applicant argues that the

term “harvest” is diluted for Class 31 goods. The examining attorney objects to the applicant’s evidence, which consists of a list of third party registrations. The mere submission of a list of registrations or a copy of a private company search report does not make such registrations part of the record. *See, e.g., In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998); *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1561 n.6 (TTAB 1996). Even if the Board finds the cited registrations are of evidentiary value, these registrations are not persuasive. First, the cited registrations are unlike the applicant’s in that the applicant’s mark encompasses the registered mark in its entirety with the mere addition of generic and highly descriptive wording. Second, the applicant’s goods and the registrant’s goods are identical. Finally, even assuming the applicant had shown the cited mark was “diluted” for animal feed goods, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods. This protection extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); *see, e.g., In re Clorox Co.*, 578 F.2d 305, 18 USPQ 337 (C.C.P.A. 1978); *In re Hunke & Jochheim*, 185 USPQ 188 (TTAB 1975).

Finally, it is noted that if the goods of the respective parties are “similar in kind and [ ] closely related” as they are here, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987); *see Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1242, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); TMEP §1207.01(b).



Accordingly, the similarity in appearance and meaning of the applicant's mark and the registrant's mark, the overall commercial impression of the marks, and the identical nature of the applicant's and registrant's goods is sufficient to sustain a finding that the marks are confusingly similar under Section 2(d) of the Trademark Act. Therefore, it is respectfully requested that the refusal to register the intended mark on the Principal Register under Trademark Act Section 2(d), 15 U.S.C Section 1052(d), be affirmed.

#### CONCLUSION

For the foregoing reasons, it is respectfully requested that the refusal to register applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. Section 1052(d), be affirmed.

Respectfully submitted,

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