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IN THE UNITED STATES PATENT TRADEMARK TRIAL AND APPEAL BOARD

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BRIEF ON APPEAL FROM FINAL REJECTION

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STATEMENT OF INTEREST

Applicant, Pulsafeeder, Inc., a Delaware Corporation, is a wholly owned entity of IDEX Corporation, a publicly traded corporation of Delaware.

DESCRIPTION OF THE RECORD

This is an appeal from the final rejection of February 24, 2005, under 15 U.S.C. §1052(d) of Application Serial No. 78/377,288 for the mark OMNI. The rejection is based upon prior United States Registrations Nos. 2,698,971 for the mark OMNI & Design and 1,833,697 for the mark OMNICOM. The record includes applicant's March 2, 2004 intent-to-use application for use on "mechanical diaphragm metering pumps used in chemical metering," an office action of September 21, 2004 rejecting the application under 15 U.S.C. §1052(d) on the basis of the above two identified registrations and U.S. Registration 2,315,993 for the mark OMNIMETER, the applicant's response of February 9, 2005, a final rejection of February 24, 2005, which withdrew the '993 registration rejection, an amendment to allege use and its attached specimen of June 6, 2005, and the notice of appeal of July 27, 2005.

Each of the office actions has attachments including printouts of examining attorney-requested searches.

STATEMENT OF ISSUES

The sole issue presented is the correctness of the examining attorney's refusal under Section 2(d) to register the mark OMNI in international class 9 for "Mechanical Diaphragm Metering Pumps Used in Chemical Metering" based upon a determination of likelihood of confusion with Registration No. 1,833,697 for the mark OMNICOM, in international class 9 for "PC based computer software used to communicate with devices for the measurement of liquid and gas flow" and in international class 16, for "computer program user manuals for use in communication with devices for the measurement of liquid and gas flow," and with Registration No. 2,698,971 for the mark OMNI & Design in international class 9 for "flow measurement and control computers for the measurement of liquid hydrocarbon and gas flows."

FACTUAL BACKGROUND

The instant application for the mark OMNI is for goods identified as “Mechanical diaphragm metering pumps used in chemical metering.” A diaphragm pump is a very specific type of pump having a pumping chamber on one side of a flexible moveable diaphragm, the pumping chamber having automatic valve controlled inlet and outlet ports. In a mechanical diaphragm pump the opposite side of the diaphragm from the pumping chamber is operatively connected to a reciprocating drive that causes the diaphragm to oscillate through a determined distance (stroke), thus increasing the volume of the pumping chamber by a predetermined amount on the backstroke of the diaphragm and reducing the volume of the pumping chamber by the same predetermined amount on the forstroke of the diaphragm. Such mechanical diaphragm pumps have well known utility in the fixed delivery of precise quantities of pumped fluids since the displaced volume per stroke is constant as long as the stroke setting remains consistent.

Thus, a mechanical diaphragm pump can be used to dispense accurate discrete amounts of a liquid merely by controlling the number of strokes and the distance of each. Metering pumps are used in a wide variety of settings and have been sold by applicant at least as early as 1946 (U.S. Trademark Registration 902,588).

Metering pumps are used in situations where metered (i.e. specifically measured and controlled injection) quantities of fluid are required. The specific description of the goods in the instant application is for metering pumps used in chemical metering. Such usages would include many industrial processes and water treatment. Normally such pumps are time-activated where at pre-set time intervals a predetermined number of strokes will dispense a predetermined quantity of chemical. Such chemicals can include, for example, chlorine or other chemicals for water treatment or water purification or formula chemicals for injection of predetermined

quantities into a batch processing regime in a chemical plant or injection of fertilizer into a water stream in agricultural environments and a wide variety of other cases.

Control of the pump can be by means of different types of inputs, the most general being time based. Other inputs can be sensor based, for example activating the pump in response to a sensor detected level change in the conductivity of the treated fluid bath or a deviation from an established baseline setting of some other condition. Such systems would find use, for example, in chemical injection in water based air conditioning systems to protect against legionnaires disease. In general, it can be said that mechanical diaphragm chemical metering pumps are employed in a variety of industrial and water treatment systems. As such, the pumps are sold through specialized channels of commerce to sophisticated buyers, including both OEM and replacement markets. These products are not consumer items and would never be subject to an impulse purchase. Diaphragm metering pumps are available in a range of sizes, capacities, performance characteristics, chemical compatibility, life expectancies, and the like and are normally chosen based upon an engineering analysis of the specific use.

Basis for the Rejection

The cited registrations, OMNICOM, Registration 1,833,697 and OMNI & Design, Registration 2,698,971, are both owned by the same company, Omni Flow Computers, Inc., and are respectively for: computer software and computer program user manuals and for computers, all specifically relating to the measurement of liquid and gas flow. Similar to the applicant's chemical metering pumps, these products would inherently be sold to sophisticated customers for very specific and highly technical uses. The measurement of liquid and gas flow, particularly in the liquid hydrocarbon market (Registration 2,698,971) is again not a consumer market and the computers software and programming manuals therefore are highly specialized, narrow focused, and would be relatively expensive.

In the initial office action the examining attorney cited a catalogue sheet from Omega.com for a PHD-190 series chemical metering system. The examining attorney's position was that that citation established that: "some chemical metering systems combine electrical controllers and chemical metering pumps." The actual description from that online catalogue is that the PHD-190 series combines a pulse frequency controller with a diaphragm type pump in one compact unit. In the control mode, deviations from set point are converted to pulses which vary the stroke rate of the metering pump. As the set point is approached, the pump feed slows down to minimize chemical loss and overshoot of the end point. Variation of the stroke rate is controlled by a front panel potentiometer or through process controlled operations by external electric or mechanical pacing or by closed lube control. This is one way in which a diaphragm metering pump may be controlled.

In the second office action the examining attorney cited additional materials, apparently both from an electronic search from the trademark law library and from searches of Internet advertised industrial catalogue houses. Among the items cited is an August 1, 2004 Water World excerpt which apparently, in relationship to a company called Walchem.com, states that it manufactures and supplies on-line analytical instruments and metering pumps providing integration of sensor, pump and electronic technologies for chemical control. Also cited is a reference to a Wallingford Software Inc., a company that develops water management software solutions to support planning and operations in water distribution, sewage, river management and coastal engineering. A third cited reference is to Wanner Engineering Inc. which claims to manufacture a hydraulically balanced diaphragm metering pump, however citing Warren Rupp, Inc. as the pump supplier (a sister company of the applicant). Another citation is to a publication "Business and Industry Adhesives and Sealants Industry," February 2004, relating to progressive cavity pumps for controlled dispensing of abrasive and highly viscous materials. This excerpt merely states that systems are available with the ability to automatically monitor and correct

ratios but require the use of gear or corialysis-type flow meters with the proper software. Presumably this refers to monitoring the output from a continuous output pump. Another citation from Euromoney Institutional Investor PLC merely references as a headline “Metering pump; New developments: products, services and software.” A citation from apparently Designfax of April 1, 2003, is headlined “Pulse Free Metering Pump” and references a QX series metering pump that can be operated through a computer interface utilizing the companies PumpWorks Software. Flow rates, pressure and other operating parameters can be controlled.

The examiner further cited Registration No. 2,138,982 for a design trademark for VALCOR where the goods and services include fluid flow control products, including metering pumps and various valves. An additional citation was to Registration No. 2,523,284 for the mark WEBMASTER for electrical controllers, electrical sensors, metering pumps, and parts thereof for liquid chemical process, namely, water treatment, metal finishing, chemical transfer, photo processing and industrial chemical control. Another citation, Registration No. 2,484,773 for the mark LIQUIPRO by Liquid Metronics Incorporated, is for specialty pumps customized for chemical injection applications and replacement parts thereof; chemical injection systems comprised of metering pumps, tanks, electrical controllers and piping, and for fluid metering pumps for injecting chemicals, diaphragm and packed plunger metering pumps and replacement parts therefor; electronic controllers for water treatment systems.

The examining attorney also cited Registration No. 2,542,436 for the mark LMI to the same company, Liquid Metronics Incorporated, for goods including chemical injection pumps and parts therefor, solenoids, diaphragms, electronic controllers for chemical injection pumps and metering pumps, etc.

Lastly, the examining attorney cited a number of internet-found pages dealing with LMI chemical metering pumps and describing certain metering pumps or separate controllers. The type 9 control is stated to be designed for easy integration into chemical feed systems and has the

ability to control the stroke rate manually or by electrical signal generated by a flow meter, controller, transmitter, PLC or other device.

From these citations the examining attorney has taken the position that “in view of the evidence of record it is clear that the applicant’s chemical metering pumps and the registered software and hardware controllers for devices are related.”

ARGUMENT

The examiner’s position is based upon a number of cases including *Guardian Products Co., Inc. v. Scott Paper Co.*, 200 USPQ 738 (TTAB 1978); and *in re International Telephone and Telegraph Corp.*, 197 USPQ 910 (TTAB1978). According to the examining attorney, these cases establish that the goods and services of respectively the applicant and the cited registrant need only be related in some manner, or the conditions surrounding their marketing be such that they would be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods and services come from a common source. It is respectfully submitted that, in this instance, this is too broad an interpretation of those cases or of the law relating to rejections under Section 2(d). The mere fact that the goods may be related in some manner is not in itself sufficient to establish a likelihood of confusion. Almost all goods are related in some manner. Manufactured goods are broadly related in the fact that they are all the result of a manufacture, whereas raw materials are all related in respect of the fact that they are products of nature, yet it is submitted that the law would not assume that such a tenuous degree of relationship gives rise to a likelihood of confusion, even in those instances where the marks were identical.

Moreover, the fact that the goods may be encountered by the same purchasers is not in itself sufficient to establish a likelihood of confusion. A walk through the aisles of Wal-Mart, or

a perusal of any general industrial supply catalogue would establish a basic encounter relationship for most products.

On the contrary, the case law cited by the examiner establishes a necessity for a much closer relationship. For example, in *re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565 223 USPQ 1289 (Fed. Cir. 1984), the goods involved were bread and cheese. The CAFC began its analysis from *E.I. DuPont de Nemours & Co.* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). That often cited and strongly followed case establishes a thirteen point test for determining likelihood of confusion. In the *Martin's Famous Pastry Shoppe* case, the court proceeded to analyze many of those factors and emphasized the “complimentary use” that existed between bread and cheese concluding “we agree with the Board that the complimentary nature of bread and cheese cannot be ignored***.”

Similarly, in *in re Corning Glass Works*, 229 USPQ 738 (TTAB1978), the issue was between the mark CONFIRM for a buffer solution equilibrated to yield predetermined dissolved gas values in blood gas analyzers and CONFIRMCELLS for diagnostic blood reagents for laboratory use. After determining that the marks were essentially the same, the TTAB concluded that the products, due to the specific descriptions given, would be used by the same personnel in the hospital's laboratory for blood analysis work. In a footnote the TTAB emphasized the fact that the use by the same personnel was important because those persons are likely to have an important voice in purchasing decisions. In other words, in *Corning Glass Works* the TTAB found that not only were the goods closely related to one another but that they would be used by the same personnel in the same setting in related procedures and that those persons would have a voice in the purchasing decision.

The examining attorney has also cited *Guardian Products Company, Inc. v. Scott Paper Company*, 200 USPQ 738 (TTAB 1978). That case was an opposition involving the mark SCOTTGUARD for “disposable examination gowns” and a number of Guardian registrations for

a variety of medical, surgical, hospital, sickroom, and invalid products. This case, although utilizing verbiage similar to that set out in the examining attorney's final rejection, turned, in major part, on the Board's focus on the goods as described in the application and in the registrations and its determination that the goods were all of the same general type and could be classified under the broad heading of "Medical, Hospital and Sickroom supplies." Thus, the decision is predicated upon a finding that not only are the marks the same (SCOTTS being the house mark), but the goods described were of the same category.

Thus, looking at those cases establishes that the broad approach adapted by the examining attorney is not supported. In *Martin's Famous Pastry*, the marks were identical and the products were determined to be complimentary. In *Corning Glass Works* the marks were determined to be essentially the same essentially and the products were determined to be used by the same people who had purchasing influence in the same environment in performing related laboratory operations. In *Guardian*, the marks were determined to be essentially the same and the products to be competitive.

Of the remaining cases cited by the examiner, the *Rexel* case offers no insight into the TTAB's reasoning as to likelihood of confusion, simply concluding that staplers and pencils were sufficiently close to lead to a likelihood of confusion.

On the contrary though, *International Telephone and Telegraph* cited by the examining attorney does appear to stand for a proposition that irrespective of the similarity or competitiveness or same channels of trade, etc. of the goods, that a likelihood of confusion can be found if the goods are related in some manner or that if the conditions and activities surrounding the marketing are such that they could be encountered by the same person under circumstances that would cause the similarity of the marks used therein to give rise to mistaken belief that they originate from or in some way associated from the same producer. That case, decided some five years after the Federal Circuit's *DuPont* decision does not cite or reference the

DuPont case and is clearly at odds with *DuPont*, essentially saying that finding any level of either one of two of the thirteen points would be sufficient to establish likelihood of confusion irrespective of the other factors.

It is respectfully submitted that the *International Telephone and Telegraph Corporation* TTAB decision is not in accordance with either the Federal Circuit Law or with the law of the other Circuit Courts of Appeals, the majority of which reference some form of the Polaroid multi-factor test found in *Polaroid Corp. v. Polarad Electronics Corp.* 287 F2d 492, 128 USPQ 411 (2nd Circuit 1961) Cert. Den. 368 US820, 131 USPQ 499 (1961) and similar to the *DuPont* factors.

Applicant respectfully urges this Board to reject such a loose approach to finding a likelihood of confusion and submits that a correct standard requires more than just some tangential relationship between the goods or some possibility of encounter by the same person. For goods to be considered to be related, there must be a relationship in the commercial sense, i.e. they are either competitive, substitutable, used for the same purposes or for complimentary purposes or otherwise commercially associated. For encounter purposes, the goods should be encountered in association with the making of a purchase decision that would call for the purchase of one or the other of the goods and where it can be anticipated that a person in such a position would naturally be exposed to the goods of the other, other than by happenstance. These requirements would not exist in this case.

It is submitted that in this instance a likelihood of confusion does not exist for a number of reasons and that significant departures exist from the indications of a potential for likelihood of confusion that would be apparent from an application of the *DuPont* factors.

Although the marks are somewhat the same, they are not identical, either in a side-by-side comparison or in the abstract. Certainly the mark OMNI is different from the mark OMNICOM, and the COM suffix of the mark OMNICOM cannot be ignored in connection with

the goods listed for that registration. COM itself is a suffix of meaning in connection with computers and the goods listed are computer software, and computer program user manuals. Although the mark OMNICOM includes the entirety of the mark OMNI, there is more than sufficient difference to provide distinctiveness to both marks. This is particularly true in view of the fact that the preface OMNI itself has a well-accepted and known meaning, being Latin for “all” or for “universally.”

In fact, OMNI is so commonly used as a sole, or part of a trademark that it appears in 69 current live registrations in international class 9, the class of the instant application according to a TESS search conducted September 6. The word “omni” is also registered repeatedly for computers and computer related materials.

The second registration relied upon by the examiner; Registration 2,698,971 is for the word OMNI in a design format, including a specific type style and a logo design. While that registration and applicant’s block application may have greater similarity than the OMNICOM registration, they are clearly distinctively and recognizably different.

Thus, for the first of the *DuPont* factors, with respect to one of the cited registrations, the marks are not the same or similar, and for the second of the registrations are sufficiently dissimilar as to be distinctive.

The second of the *DuPont* factors is the similarity-dissimilarity of the goods and services. The first of the registrations, OMNICOM, is for computer software used to communicate with devices for the measurement of liquid and gas flow, and for computer program user manuals for use in such communication. The second registration, the ‘971 registration, is for flow measurement and control computers for the measurement of liquid hydrocarbon and gas flows. The applicant’s goods are mechanical diaphragm metering pumps used in chemical metering. Clearly the goods are not the same, and are not competitive, nor are they interchangeable, substitutable or useable for the same purpose. It is the examining attorney’s position that they

are related in that a chemical metering pump could be used in association with an electronic control. Chemical metering pumps are, as pointed out above, used in many different environments and for many different purposes, and while it is possible that in some environments one of the parameters to be taken into consideration in determining the extent of operation of the metering pump, either its duration of operation, frequency or stroke length, may include information either related to the flow from the pump or to the flow of fluid in some portion of installation in which the pump is used, this does not make either computer software, program user manuals or flow measurement and control computers products related to the metering pump. In point of fact, such devices would not be used. The standard use for flow measurement in metering pump situations is to use a flow meter which outputs a series of pulses reflecting flow past the meter sensor. Those pulses would be used as the input to the metering pump controller and no separate stand-alone dedicated computer, software or user manual would be involved.

At this point the record does not establish any commercial relationship whatsoever between the products of the registrant and the products of the applicant, nor is there any reason to assume any such relationship. The registrant's products, as clearly set forth in the '971 mark, relate to liquid hydrocarbon and gas flows. This is the type of equipment that would be used in pipelines, and the pumps associated with such pipe lines are not diaphragm metering pumps.

While it is certainly known that chemical metering pumps, including the applicant's chemical metering pumps, can be equipped with controllers, and that those controllers, especially in this day, may include computational capabilities, that particular fact is not unique to the applicant's products, or to chemical metering pumps, but extends across substantially all areas of modern life where computational capability is a standard feature of most controllable devices.

To simply postulate the existence of a relationship between a pump and computer software used to communicate with a flow measurement device, or for a computer used to

measure the flow of hydrocarbons and gas, requires a huge broadening of the term “related.” At that point almost everything becomes related in one sense or another. As was pointed out in the applicant’s response to the first office action, fluidic systems not only may employ pumps, they employ a vast variety of devices. This does not mean that each of those devices is sufficiently related to each of the others or to the pumps as to create a likelihood of confusion because of the use of a common word as a trademark.

Thus, relatedness should be relative to some degree of closeness between the products. Without any consideration of commercial closeness, simply saying that because in some instances a metering pump may be used in a system that includes or employs other goods or services that therefore if the marks are substantially the same, or similar, there will be a likelihood of confusion would lead to absurd results. A common use for a metering pump is in water cooling towers used in air conditioning systems in hotels for the injection of chemicals to prevent legionnaires disease. Air conditioning systems commonly employ thermostats, and hotels commonly provide thermostats in each guest room. Nonetheless, there is not a sufficient degree of relatedness between a guest room thermostat and a chemical metering pump employed in the cooling tower to create a likelihood of confusion, even though both may be found in association with the same system in the same environment.

Any relatedness here is even more remote. The goods of the applicant and registrations would not be commercially related. The registrant’s goods are highly specific, specialized computers and computer software and manuals used to measure liquid hydrocarbon and gas flows. The applicant’s goods are chemical metering pumps. The materials cited by the examining attorney as a result of the search do establish that metering pumps employ controls and to that extent metering pumps and metering pump controls are certainly related goods. This, however, does not extend the concept of controls to goods as specific as those specified in the cited registrations. The ‘971 registration is for a very specific type of dedicated use computer,

one used for the measurement of liquid hydrocarbon and gas flows. There is nothing in that registration that would indicate that such a computer would have any utility in association with the applicant's goods. At best, it can be assumed that the registrant's computers, software and manuals very specifically deal with the measurements and control of the flow of hydrocarbon fluids and gasses but not that they could be used with, or even adapted for use with, chemical metering pumps or that anybody who uses such computers, software or manuals would have the slightest connection with or interest in chemical metering pumps.

None of the information selected by the examining attorney from the Lexis-Nexis database search offers any connection or association or relationship between the measurement of liquid hydrocarbon and gas flows and the use of chemical metering pumps.

There is no showing anywhere in this record that the goods of the registrant and the goods of the applicant would ever find themselves used in the same system or even in the same environment or by the same personnel or purchased together or by the same buyers.

A third of the *DuPont* factors relates to the channels of trade. Again, in this instance there is no evidence of any commonality of channels of trade. The channels of trade for chemical metering pumps are established at least in part by the examiner's search of online industrial supply catalogues showing metering pumps. The channel of distribution of the registrant's goods can be inferred from the very specific nature of the products themselves. These are limited purpose, limited utility, limited market computer programs and computers. Clearly, in both instances the products are sold to sophisticated purchasers and are acquired for unrelated purposes by technically trained individuals. The injection of chemicals in precise amounts into a process or system by the use of metering pumps is not undertaken by unknowledgeable consumers. Specific purpose flow measurement computers for liquid hydrocarbons and gas flows would similarly not be purchased by other than highly trained technical people.

A fourth of the *DuPont* factors is the conditions under which buyers would purchase, i.e. impulse versus sophisticated purchasing. In this instance, from the above, it is clear that the purchases are made by sophisticated buyers.

A fifth factor is the fame of the prior mark. It is noted that the registered trademarks date back to a use as early as 1991, whereas the instant application was filed as an intent-to-use but has since established use. Other than those factors there is no indication of fame.

Another of the *DuPont* factors is the commonality of use of the mark in question. It is pointed out above the word “omni” is a standard prefix having a known Latin meaning and has been registered many times for a variety of terms and services. This is not a coined or fanciful designation.

Two of the factors under the *DuPont* test relate to the existence of confusion, nature, extent and duration. No confusion has been referenced in the factual history of this application.

A further *DuPont* factor is the variety of goods on which a mark has been used, referencing the registrant’s use. Here, the registrant’s use, although involving two different registrations each of which employs the prefix “omni” or a logo version thereof, shows usage only on a single type of product. It is noted that the registrant’s corporate name is Omni Flow Computers, Inc., thus indicating that the products described in the registrations constitute substantially the business of the registrant.

Another of the *DuPont* factor is the extent of potential confusion. In this instance the entire basis for the examining attorney’s rejection is an assertion of relatedness of products. As pointed out above, that relatedness does not exist between the goods of the applicant’s application and the goods specified in the registrations. The only argument for relatedness is that in both instances the applicant’s goods and the registrant’s good may be used in association with flow sensors, however neither the applicant’s goods nor the registrant’s goods include flow sensor. It is therefore submitted that there is no substantial likelihood of confusion, and in fact

other than from an examination induced attempt to find relatedness, there is no reason to expect that in the real world even a de minimis likelihood of confusion would exist. The products are remote from one another both in purpose, in type of goods, and in use. There is nothing in any of the materials found by the examining attorney to believe that any individual making a purchase decision would be exposed at the same time to the products of the applicant and of the registrant since those products are incapable of being used to solve any common problem.

The remaining factors of the *DuPont* test are not applicable in this instance.

SUMMARY

It is respectfully submitted that the refusal to register should be reversed. Following the analytical approach set forth in the *DuPont* case, considering the materials located by the examining attorney, the limited nature of the registrations cited, the distinct dissimilarity of the applicant's goods and their uses, there is no basis for a determination of the existence of a likelihood of confusion. A reversal of the rejection is requested.

Respectfully submitted,

Dennis A. Gross 24,410