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SIMMS/md

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U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Free-Flow Packaging Corporation

Serial No. 74/675,535

Edward S. Wright of Flehr, Hohbach, Test, Albritton &
Herbert LLP for Free-Flow Packaging Corporation

Jeri J. Fickes, Trademark Examining Attorney, Law Office
108 (Dave Shallant, Managing Attorney)

Before Simms, Quinn and Chapman, Administrative Trademark
Judges.

Opinion by Simms, Administrative Trademark Judge:

Free-Flow Packaging Corporation, a California
corporation, has appealed from the final refusal of the
Trademark Examining Attorney to register the mark shown
below

 **DIAMOND PACK™**
THE CROWN JEWEL OF PAPER PACKAGING

for fan-folded or pleated paper sheets which can be crumpled and wrapped about objects packed in cardboard cartons such as cardboard boxes.¹ The Examining Attorney has refused registration under Section 2(d) of the Act, 15 USC §1052(d), on the basis of Registration No. 1,643,593, issued May 7, 1991, for the mark DIAMOND-PAK for dunnage devices, namely, selectively expandable cellular void fillers constructed from corrugated paperboard.² Applicant's attorney and the Examining Attorney have submitted briefs but no oral hearing was requested.

We affirm.

Relying upon a dictionary definition of dunnage ("cushioning or padding used in a shipping container to protect fragile articles against shock and breakage"), the Examining Attorney argues that registrant's selectively expandable void fillers made from corrugated paperboard are closely related and potentially competing products to applicant's paper sheets which are used to protect objects packed in cardboard cartons. According to the Examining Attorney, both products are paper shipping products which

¹ Application Serial No. 74/675,535, filed May 15, 1995, based upon applicant's bona fide intention to use the mark in commerce. Applicant has disclaimed exclusive rights to use the words "PAPER PACKAGING" apart from the mark as shown.

² Office records show that a Section 8 and 15 affidavit or declaration has been filed.

can perform the function of cushioning goods being shipped. The Examining Attorney argues that these products could be sold in the same channels of trade to the same purchasers or users. The Examining Attorney argues that the respective goods may differ in form but not in function. In support of her refusal, the Examining Attorney has submitted a number of third-party registrations purportedly demonstrating that a supplier of one type of packaging material also makes other types.³

With respect to the marks, the Examining Attorney argues that the words DIAMOND PACK dominate in applicant's mark and that that dominant portion of applicant's mark closely resembles the registrant's phonetic equivalent DIAMOND-PAK. Also, the Examining Attorney argues that the diamond design in applicant's mark simply reinforces the word "DIAMOND," and that the other words in applicant's mark are laudatory words with little trademark significance.

³ For example, one registration lists the following description: "core and panels of paper, coated and uncoated, for packing and protective products, packaging containers made primarily of paper, void fillers made primarily of paper used for packaging, pads and containers for packaging and transporting of material, panels made of paper products for use in material handling, and dunnage panels made of paper products." Another registration, since canceled, lists the following goods: "Protective packaging, shipping and cushioning material made predominantly of paper and cardboard but including plastic forms and foils and

Applicant, on the other hand, maintains that the respective marks are different in commercial impression. With respect to the goods, applicant argues that the respective goods are different and are sold in different channels of trade. More particularly, applicant relies upon a different definition of "dunnage" ("temporary blocking or bracing installed by the shipper in the hold of a ship, in railroad car, or in a truck to protect freight during shipment") and argues that a "void filler" is a term of art in the trucking industry to denote a material which is used to prevent loads from shifting during transport. Applicant's attorney has also submitted two product sheets from the registration file of the cited mark indicating the nature of registrant's goods. Therefore, according to applicant, registrant's goods are honeycomb panels with diamond-shaped cells which are used in the trucking industry. Applicant, on the other hand, is a manufacturer of loose fill protective packing material with applicant's particular products here being either wrapped about items or crumpled and placed in a cardboard box with the items being shipped. Applicant maintains that its goods are not selectively expandable, are not void fillers, and are not

combinations thereof, all made in the form of envelopes, boxes, bags, sheets and rolls."

cellular products made of corrugated paperboard. Applicant also maintains that its goods are used by manufacturers who sell products and are not used in the transportation industry. With respect to the third-party registrations, applicant maintains that these do not show that the manufacturers of void fillers also make loose fill materials or protective wraps for the packaging industry.

In response to applicant's arguments, the Examining Attorney maintains that registrant's product sheets do not contain a definition of the term "void filler" and that such products could fill voids between cartons or within a carton, or both. Moreover, the Examining Attorney argues that applicant is using product literature to limit a description of goods in a registration, which is not permissible. Finally, the Examining Attorney argues that even if one product is for external cushioning of a package and one is for use within a cardboard container, these products are nevertheless closely related and may emanate from the same source.

First, we agree with the Examining Attorney that the respective marks are very similar in commercial impression. In this regard, the dominant part of applicant's mark is almost identical to the registered mark. While we must consider the other aspects of applicant's mark, the diamond

design and the phrase "THE CROWN JEWEL OF PAPER PACKAGING" do little to distinguish the marks as to source or origin. Any differences do not serve to avoid confusion, in our judgment. In fact, these other aspects of applicant's mark tend to reinforce the "DIAMOND" portion of its mark.

With respect to the goods, the Examining Attorney is correct that, generally, extrinsic evidence may not be used to limit a description of a product or service. See, for example, *In re Elbaum*, 211 USPQ 639 (TTAB 1981). All we know about registrant's goods are that they are selectively expandable cellular void fillers constructed from corrugated paperboard. There is no restriction in that identification of goods with respect to the channels of trade in which those goods are sold, nor is there any indication that those goods are sold only to the trucking industry.⁴ Likewise, there is no restriction in applicant's application to indicate that its paper sheets designed to cushion objects within cardboard cartons are limited as to any particular channel of trade or class of purchaser. We agree with the Examining Attorney that registrant's corrugated paperboard void fillers are related to applicant's paper sheets designed to cushion objects within

⁴ Indeed, even the definition which applicant relies upon does not restrict dunnage material to the trucking industry.

cardboard cartons. Accordingly, when such commercially related products are sold under such similar marks as we have here, we conclude that purchasers, aware of registrant's DIAMOND-PAK corrugated paperboard products, may well believe that applicant's paper packing sheets emanate from or are otherwise sponsored or endorsed by registrant.

Decision: The refusal of registration is affirmed.

R. L. Simms

T. J. Quinn

B. A. Chapman
Trademark Administrative
Judges, Trademark Trial
and Appeal Board