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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **The Wealden Co.**

Serial No. 75/202,743

Jean Emery of **Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.** for **The Wealden Co.**

Sarah A. Otte, Trademark Examining Attorney, Law Office 104
(**Sidney Moskowitz**, Managing Attorney).

Before **Hairston, Holtzman** and **Rogers**, Administrative
Trademark Judges.

Opinion by **Rogers**, Administrative Trademark Judge:

The Wealden Co. has filed an application to register the mark VERO-BEST ORGANIC FARMS. The goods are identified as "fresh fruits and citrus products, namely, orange, tangerine, and grapefruit marmalades," in International Class 29, "fresh fruits and citrus products, namely, fresh oranges and grapefruit," in International Class 31, and "citrus products, namely, orange and grapefruit juice," in

International Class 32.¹ The Examining Attorney refused registration of applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), because of the prior registration of VERO for "fresh grapefruit," also in class 31.²

When the Examining Attorney made the refusal of registration final, applicant appealed. Both applicant and the Examining Attorney have filed briefs, but an oral argument was not requested. We affirm the refusal.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *See In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In the analysis of likelihood of confusion presented by this case, key considerations are the similarities of the marks, the virtually identical nature of the goods, and the presumptively similar classes of consumers for these goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

¹ Serial No. 75/202,743, filed November 21, 1996, based on applicant's allegation of a bona fide intention to use the mark in commerce.

² Registration No. 1,272,062, issued March 27, 1984, based on a claimed date of first use of February 13, 1974. A Section 8 affidavit was filed and accepted.

Considering the goods first, we note that both identifications cover "fresh grapefruit." Moreover, we agree with the Examining Attorney's conclusion that the additional goods for which applicant proposes to use its mark are closely related to "fresh grapefruit."³

We reject applicant's argument that registrant's registration covers use of its mark only for "conventionally grown fresh grapefruit" and not organically grown grapefruit. Registrant's identification includes no such restriction. For that matter, while applicant claims, as discussed further below, that all its products are organically grown, its identification does not include this restriction. As we must, we assess the similarity of goods or services based solely on the identifications of goods.

We discount applicant's argument that all its goods, because they are organically grown, are more expensive than registrant's goods, and would not be sold in the same channels of trade or be purchased by the same classes of consumers. Applicant filed a considerable amount of evidence with its appeal brief, much of which appears intended to support this argument. The Examining Attorney,

³ The Examining Attorney has made of record third-party registrations, which are probative evidence of the relatedness of the goods. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

however, objected to consideration of any of this evidence, and we find the objection well taken. See Trademark Rule 2.142(d). We have not considered the evidence.

We must presume that the respective goods move in all normal channels of trade and to all usual classes of consumers therefor. See *CBS Inc. v. Morrow*, 218 USPQ 198, 199 (Fed. Cir. 1983). Even if we were to consider applicant's evidence regarding the nature of its goods, and conclude that consumers of such goods are sophisticated, it is well settled that even sophisticated consumers are not necessarily immune to source confusion. See *Weiss Associates Inc. v. HRL Associates Inc.*, 14 USPQ2d 1840, 1842 (Fed. Cir. 1990) (similarity of products overshadows sophistication of purchasers); and *Aires Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, 1747 (TTAB 1984) (where goods are legally identical, even discriminating purchasers can be confused when marks are similar). In short, in view of the fact that the involved goods are the same or closely related, applicant cannot avoid a finding of likelihood of confusion unless there are significant differences in the involved marks.

Turning, then, to the marks, we find registrant's mark to be a distinctive one. It is neither descriptive nor suggestive of registrant's goods. A consumer that sees

registrant's mark VERO and subsequently discovers that registrant is located in Vero Beach, Florida may draw a correlation. We have no evidence, however, that registrant's goods are sold in such a manner as to promote recognition that registrant's mark is the first word of a geographical place name. Likewise, we have no evidence that Vero Beach, Florida is routinely referred to simply as VERO. Thus, there is no basis on which to conclude that consumers would, when confronted with registrant's mark, immediately think only of Vero Beach.⁴ Further, applicant concedes that VERO has different meanings in other languages and, thus, registrant's mark may even be perceived by consumers as a foreign term arbitrarily used as a mark for registrant's fresh grapefruit. Accordingly, registrant's mark must be considered arbitrary in relation to the identified goods.

In regard to applicant's mark, we note that there is a disclaimer of the descriptive terms ORGANIC FARMS. While we do not, as a result, exclude the disclaimed matter from our comparison of the marks, we note that descriptive matter typically is less significant than other components of trademarks. *Tektronix, Inc. v. Daktronics, Inc.*, 189

⁴ We acknowledge that, in an inter partes context, a record might be built that would support a contrary finding.

USPQ 693 (CCPA 1976). The more significant component of applicant's mark, VERO-BEST, is similar to registrant's mark in both appearance and sound.

We reject the Examining Attorney's contention that the hyphen in VERO-BEST ORGANIC FARMS breaks the mark into VERO and BEST ORGANIC FARMS. The argument is inconsistent with the Examining Attorney's observation that the only reason applicant was not required to disclaim the laudatory term BEST is the fact that VERO-BEST is a unitary phrase. We find the hyphen tends to unify VERO-BEST and to create a double entendre. Consumers will see the combination as equivalent to "the best of Vero" but may also think of "very best." This is not, however, sufficient for us to conclude that applicant's mark, when used for the identified goods, will not create a likelihood of confusion among consumers familiar with registrant's mark.

We agree with the Examining Attorney's argument that consumers familiar with VERO brand fresh grapefruit, when confronted with fresh grapefruit and related goods bearing the mark VERO-BEST ORGANIC FARMS, may very well conclude that registrant has expanded its product line. See *In re Imperial Jade Mining, Inc.*, 193 USPQ 725 (TTAB 1976).

In view of the identity, in part, of the involved goods, and the relatedness of others, the presumptive

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similarity of channels of trade and classes of consumers,
and the similarity of the marks, we find a likelihood of
confusion or mistake by consumers.

Decision: The refusal under Section 2(d) is affirmed.

P. T. Hairston

T. E. Holtzman

G. F. Rogers

Administrative Trademark
Judges, Trademark Trial
and Appeal Board