

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

Mailed: Sept. 21, 2004

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re CFS Holdings, Inc.

Serial No. 76373265

Kimberly A. Chasteen, Ian D. Titley and Craig L. Mytelka of
Williams Mullen for CFS Holdings, Inc.

Charles Joyner, Trademark Examining Attorney, Law Office
112 (Janice O'Lear, Managing Attorney).

Before Seeherman, Hanak and Bucher, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

CFS Holdings, Inc. has appealed from the final refusal
of the Trademark Examining Attorney to register GARDEN
HARVEST as a trademark for "freeze dried vegetables" in
Class 29 and "freeze dried herbs" in Class 30.

Registration has been refused pursuant to Section 2(d) of
the Trademark Act, 15 U.S.C. §1052(d), on the ground that
applicant's mark so resembles the mark GARDEN HARVEST,
previously registered by another, for "fresh fruit, namely

tomatoes,"¹ that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive.

Both applicant and the Examining Attorney have filed briefs.² Applicant initially requested an oral hearing, but subsequently withdrew this request.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

¹ Registration No. 2447846, issued May 1, 2001.

² With its brief applicant filed a consented request for remand which was granted. When the Examining Attorney, after consideration of the additional evidence submitted by applicant, maintained the refusal of registration, the Board allowed applicant time to file a supplemental appeal brief. Applicant chose not to do so, and we have therefore considered its original (and only) brief.

The marks are both GARDEN HARVEST in typed form, and they are therefore identical in appearance, pronunciation, connotation and commercial impression.³ This factor weighs in favor of a finding of likelihood of confusion.

"Where the applicant's mark is identical to the registrant's mark, as it is in this case, there need be only a viable relationship between the respective goods or services in order to find that a likelihood of confusion exists." In re Opus One Inc., 60 USPQ2d 1812, 1815 (TTAB 2001), citing In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993); In re Concordia International Forwarding Corp., 222 USPQ 355 (TTAB 1983). Here, the Examining Attorney has presented evidence of such a relationship through third-party registrations showing that entities have registered a single mark for both fresh fruits and dried vegetables. See, for example, Reg. Nos. 2584758, 2168302, 2248319 and 2281230. Third-party registrations which individually cover a number of

³ Applicant concedes that its mark "is identical to the registrant's mark as to sound and connotation and quite similar as to appearance." Brief, p. 4. It is not clear why applicant would say the marks are "quite similar" as to appearance rather than "identical." To the extent that applicant is referring to the appearance of the marks as actually used, any differences in such actual use would have no effect on our determination herein because applicant is not seeking registration limited to a particular form of the mark, nor is the cited mark limited to a particular form.

different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant and the Examining Attorney have discussed at some length whether freeze dried herbs and vegetables would be within the normal scope of expansion of the business of the registrant. In connection with this, applicant has submitted several third-party registrations in which the listed goods are fresh fruits, but not vegetables or other items.⁴ Applicant has also stated that none of these registrants has expanded their business beyond providing fresh fruit. The fact that some registrants have registered their marks for only fresh fruit does not prove that companies engaged in selling fresh fruits never sell anything else. Indeed, belying applicant's statement are the third-party registrations discussed above, as well as Internet materials submitted by the Examining Attorney advertising that the Dole company offers, under the mark DOLE, such items as apples, bananas, grapes, strawberries, broccoli, carrots, celery and lettuce. We also note that

⁴ In point of fact, applicant asserts that "providing freeze dried fruits" is not "within the normal expansion of business for registrants who provide fresh fruit." Brief, p. 4. Applicant's goods are, of course, freeze-dried herbs and vegetables, not fruit.

third-party registrations submitted by applicant in support of its argument, discussed infra, that the cited mark is weak, are for not only fresh fruits but include fresh vegetables and fresh herbs. See Reg. No. 26294774 (fresh vegetables, fresh fruit and fresh herbs); Reg. No. 2676449 (fresh fruit and vegetables, including potatoes, tomatoes, bell peppers, onions, cucumbers, squash, green onions, kales and strawberries); Reg. No. 22171011 (fresh fruit and vegetables and raw nuts).

Moreover, in order to support a holding of likelihood of confusion, it is sufficient if the respective goods of the applicant and registrant are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978).

As already indicated, the third-party registrations indicate that fresh fruit and dried vegetables are goods which many emanate from a single source under the same mark. Fresh tomatoes and freeze-dried herbs and vegetables are also goods which are complementary in nature, as all of

these items can be used in making sauces or for pizza toppings, or freeze-dried herbs can be used in salads along with tomatoes, or simply be combined into a tomato-and-herb salad. Further, these items may be purchased for such use in the course of a single-shopping trip.

Applicant has pointed out that there is no per se rule that all food products are to be deemed related goods by virtue of their capability of being sold in the same food markets. We agree. See *Interstate Brands Corporation v. Celestial Seasonings, Inc.*, 576 F.2d 926, 198 USPQ 151 (CCPA 1978). However, our finding that applicant's goods are related to those identified in the cited registration is not based on the mere fact that they are all food products that may be sold in the same channels of trade, but on the complementary nature of the goods, and the fact that goods of this type may be sold by entities under a single mark. The factor of the similarity of the goods favors a finding of likelihood of confusion.

Although not argued in the briefs, we also note that the involved goods are ordinary consumer items that would be purchased by the general public, and that these items are inexpensive and likely to be purchased without great deliberation or care. This factor, too, favors a finding of likelihood of confusion.

Applicant has argued that the cited registration is a weak mark, and has submitted, in support of this contention, six registrations for marks which contain the word HARVEST.⁵ Contrary to applicant's argument, these registrations are not evidence of the use of the marks, or that "consumers have been conditioned to accept that the mark 'HARVEST' when used in conjunction with fresh fruit is simply a descriptive word." Brief, pp. 7-8. Third-party registrations can, of course, be used to show that a term has a particular significance in an industry. See *Mead Johnson & Company v. Peter Eckes*, 195 USPQ 187 (TTAB 1977). We acknowledge that the term HARVEST, as used for fruits and vegetables, conveys the suggestion that these items have the flavor or freshness or ripeness of having just been harvested. See the definitions of "harvest" submitted by the Examining Attorney: "the act or process of gathering in a crop"; "the crop that ripens or is gathered in a season; the amount or measure of the crop gathered in a season; the time or season of such gathering."⁶ We

⁵ At the time of applicant's submission one of these registrations had been published for opposition, but had not yet registered. The third-party marks are GRATEFUL HARVEST, HARVEST SENSATIONS, HARVEST SELECT, TREASURED HARVEST, BARNIER FRESH HARVEST and CASCADE HARVEST.

⁶ The American Heritage Dictionary of the English Language, 3d ed. © 1992. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C. Gourmet*

disagree, though, that HARVEST is a descriptive or generic term for fruits and vegetables, or that the dictionary definitions or third-party registrations show that HARVEST is descriptive or generic.

Moreover, even if we view the cited mark, GARDEN HARVEST, as a suggestive mark which is entitled to a more limited scope of protection than an arbitrary mark, the fact remains that applicant's mark is identical to this mark. The scope of protection to be accorded the registration certainly extends to prevent the registration of the same mark for related goods.

The final factor discussed by applicant is that of the absence of likelihood of confusion. Applicant asserts that there have been no instances of actual confusion. However, applicant's application is based on an intent-to-use its mark, rather than actual use. There is no evidence in the record to show that applicant's mark has been used or advertised to such an extent that there has been an opportunity for confusion to occur if it were likely to occur. Thus, we can give no weight to this factor.

Finally, we note applicant has pointed out that in the duPont case "both the registered mark and the applicant's

Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Ser No. 76373265

mark were identical and the goods were both cleaning products," but that "despite this, the Court found that there was no likelihood of confusion." Brief, p. 3. However, a major factor in that case, which is conspicuously absent here, is that the registrant therein had consented to the registration of the applicant's mark. In the present case, we find that all of the duPont factors on which there is evidence, and particularly the identical marks and the related goods, favor a finding of likelihood of confusion.

Decision: The refusal of registration is affirmed.