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December 20, 2005  
GDH/gdh

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Stahlbush Island Farms, Inc.

Serial No. 78224345

Owen Von Flue of Clark, Lindauer, Fetherston, Edmonds, Lippold & Collier, LLC for Stahlbush Island Farms, Inc.

Karen Bracey, Trademark Examining Attorney, Law Office 116 (Meryl L. Hershkowitz, Managing Attorney).

Before Hohein, Walters and Kuhlke, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Stahlbush Island Farms, Inc. has filed an application to register on the Principal Register the mark "FARMERS MARKET," in standard character form, for "canned and frozen fruit and vegetables sold through supermarkets and other retail grocery outlets" in International Class 29.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the

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<sup>1</sup> Ser. No. 78224345, filed on March 11, 2003, which is based on an allegation of a date of first use anywhere and in commerce of September 1, 2002.

mark "THE FARMERS MARKET," which is registered on the Supplemental Register in standard character form for "roasted nuts; processed garlic used as a vegetable, not seasoning; processed artichokes; candied nuts; processed pumpkin seeds; candied fruit; processed sunflower seeds; yogurt covered raisins; dried soybeans; salads, except macaroni, rice and pasta salad; and cole slaw" in International Class 29; "minced garlic; croutons; and bread sticks" in International Class 30; "fresh nuts; raw and fresh vegetables; fresh herbs; fresh mushrooms; and fresh fruits" in International Class 31; and "apple cider" in International Class 32,<sup>2</sup> as to be likely to cause confusion, or to cause mistake, or to deceive.<sup>3</sup> Registration has also been finally refused under Section 2(e)(1) of the Trademark Act, 15

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<sup>2</sup> Reg. No. 2,610,955, issued on August 20, 2002, which sets forth a date of first use anywhere and in commerce of: December 31, 1995 for the goods in International Classes 29 and 31; September 1998 for the goods in International Class 30; and September 1999 for the goods in International Class 32.

<sup>3</sup> Although registration was also finally refused in light of the following two registrations, the Examining Attorney withdrew such registrations as grounds for refusal in her brief: (i) Reg. No. 2,049,764, issued on the Principal Register on April 1, 1997 to the owner of the above-cited Reg. No. 2,610,955, for the mark "THE FARMERS MARKET" and design (with a disclaimer of the words "THE FARMERS MARKET"), as illustrated below,



for "produce, namely fresh fruits and vegetables, distributed through supermarkets" in International Class 31 and which sets forth a date of first use anywhere of March 5, 1995 and a date of first use in commerce of December 31, 1995; combined affidavit §§8 and 15; and (ii) Reg. No. 2,203,928, issued on the Principal Register on November 17, 1998 to a third-party for the mark "FARMERS MARKET" and design (with a disclaimer of the words "FARMERS MARKET"), as reproduced below,

U.S.C. §1052(e)(1), on the ground that, when used in connection with applicant's goods, the term "FARMERS MARKET" is merely descriptive thereof.

Applicant has appealed. Briefs have been filed,<sup>4</sup> but an oral hearing was not requested. We affirm the refusal to



for "vegetable salad, garden salad, vegetable salads containing sliced meat, fish or poultry and other salads not containing macaroni, rice or pasta" in International Class 29 and "bagels, bagel sandwiches, breakfast sandwiches, delicatessen sandwiches, hamburger sandwiches, [and] hot dog sandwiches" in International Class 30 and which sets forth a date of first use anywhere and in commerce for the goods in each class of April 7, 1997; combined affidavit §§8 and 15.

<sup>4</sup> It is noted that applicant's brief is not double-spaced as required by Trademark Rules 2.142(b)(2) and 2.126(a)(1). Nonetheless, inasmuch as the Examining Attorney has not objected thereto and it is clear that applicant's brief would not exceed the 25-page limitation imposed by Trademark Rule 2.142(b)(2) if it were properly double-spaced, such brief has been considered.

The Examining Attorney, however, has objected in her brief to consideration of "applicant's evidence [which was] not properly made of record, or in a form acceptable to be included in the record," asserting that:

Specifically, the examining attorney objects to the third[-] party registrations noted in the applicant's response to the first Office action. The registrations are merely listed by registration number with no information as to the marks contained in those registrations and they were not accompanied by copies from any Office database. The applicant lists these registrations again in its brief and also references information obtained from an online Google® search. The applicant had neither mentioned nor submitted any evidence from an online search until its submission of its brief. The examining attorney submits that this evidence is not properly of record and objects to its inclusion.

Applicant, we note, has not responded thereto by filing a reply brief.

Ordinarily, a mere list of third-party registrations would be insufficient to make such registrations properly of record. The Board does not take judicial notice of third-party registrations, see, e.g.,

register under Section 2(d) but reverse the refusal under Section 2(e)(1).

Turning first to the refusal under Section 2(e)(1) inasmuch as whether applicant's mark is merely descriptive or is instead suggestive has an obvious bearing on the strength of such mark for purposes of the refusal under Section 2(d), it is well settled that a term is considered to be merely descriptive of goods or services, within the meaning of Section 2(e)(1) of the Trademark Act, if it forthwith conveys information concerning any significant ingredient, quality, characteristic, feature, function, purpose, subject matter or use of the goods or services. See, e.g., In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); and In re Abcor Development Corp., 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). It is not necessary that a term describe all of the properties or functions of the

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In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974), and thus the proper procedure for making information concerning third-party registrations of record is to submit either copies of the actual registrations or the electronic equivalents thereof, i.e., printouts of the registrations which have been taken from the U.S. Patent and Trademark Office's own computerized database. See, e.g., In re Consolidated Cigar Corp., 35 USPQ2d 1290, 1292 n. 3 (TTAB 1995); In re Smith & Mehaffey, 31 USPQ2d 1531, 1532 n. 3 (TTAB 1994); and In re Melville Corp., 18 USPQ2d 1386, 1388 n. 2 (TTAB 1991). Nonetheless, because the Examining Attorney, in reply to applicant's response to the initial Office action, failed to so advise applicant of the deficiency therein and thus waived any subsequent objection thereto on such basis, the information provided by applicant as to the third-party registrations listed in its initial response and reiterated in its appeal brief is considered to be of record for whatever limited probative value (due to the absence of an indication of the specific third-party marks which are the subjects of the registrations) it may have. See TBMP §1208.02 (2d ed. rev. 2004). However, the objection to the information referenced in applicant's brief, which it asserts it obtained from an online search, is sustained since such information is plainly untimely under Trademark Rule 2.142(d). Accordingly, such information does not form part of the record herein. Nonetheless, it is pointed out that even if consideration were to be given thereto, it would make no difference in the disposition of this appeal.

goods or services in order for it to be considered to be merely descriptive thereof; rather, it is sufficient if the term describes a significant attribute or idea about them. Moreover, whether a term is merely descriptive is determined not in the abstract but in relation to the goods or services for which registration is sought, the context in which it is being used or is intended to be used on or in connection with those goods or services and the possible significance that the term would have to the average purchaser of the goods or services because of the manner of such use. See *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). Thus, "[w]hether consumers could guess what the product [or service] is from consideration of the mark alone is not the test." *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

However, a mark is suggestive if, when the goods or services are encountered under the mark, a multi-stage reasoning process, or the utilization of imagination, thought or perception, is required in order to determine what attributes of the goods or services the mark indicates. See, e.g., *In re Abcor Development Corp.*, supra at 218, and *In re Mayer-Beaton Corp.*, 223 USPQ 1347, 1349 (TTAB 1984). As has often been stated, there is a thin line of demarcation between a suggestive mark and a merely descriptive one, with the determination of which category a mark falls into frequently being a difficult matter involving a good measure of subjective judgment. See, e.g., *In re Atavio*, 25 USPQ2d 1361 (TTAB 1992); and *In re TMS Corp. of the Americas*, 200

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USPQ 57, 58 (TTAB 1978). The distinction, furthermore, is often made on an intuitive basis rather than as a result of precisely logical analysis susceptible of articulation. See In re George Weston Ltd., 228 USPQ 57, 58 (TTAB 1985).

Applicant, in its brief, concedes that, "without more," the term "FARMERS MARKET" in the cited mark and the other two marks which had been cited against its mark "is descriptive." Applicant also admits in its brief that the fact that the cited mark is registered on the Supplemental Register, as well as the fact that the other two marks which formerly had been cited are each registered on the Principal Register with a disclaimer of the term "FARMERS MARKET," constitute evidence, as relied upon by the Examining Attorney, of the mere descriptiveness of such term. Applicant argues, however, that because its goods are identified as "canned and frozen fruit and vegetables sold through supermarkets and other retail grocery outlets," such an identification "is sufficient to avoid [mere] descriptiveness." In particular, applicant contends that:

The mark [FARMERS MARKET] is merely descriptive if it was used in connection with goods actually purchased and sold at a fruit and vegetable stand or other open-air type market. Canned and frozen fruits and vegetables such at the Applicant's are not sold in a "farmer's market" as that noun is commonly understood.

The examining attorney found Applicant's mark [merely] descriptive because it describes the taste and appearance of the items as items that may be purchased in an open-air market. With all due respect to the examining attorney, it seems clear from this statement that she has not recently visited an open-air farmers market. Farmers markets do not have for sale canned and frozen fruit

and vegetable[s]. Moreover, canned and frozen vegetables taste markedly different from fresh. .... In the context of shopping in a supermarket, the use of FARMERS MARKET on applicant's canned and frozen fruits and vegetables becomes suggestive rather than descriptive.

The Examining Attorney, on the other hand, maintains that "the proposed mark, when considered in conjunction with the identified goods, does nothing more than [merely] describe a feature or characteristic of the goods, namely, that the applicant's goods are, in some manner, like those goods found at farmer's markets." Specifically, the Examining Attorney insists that "applicant's assertion that the mark is not [merely] descriptive because the goods are not sold in an open-air market or fruit stand is not the appropriate test" and that:

Here, there are several facets associated with the goods beyond where they were purchased. The goods may have the look, taste and smell of fresh fruits and vegetables. Additionally, goods at a farmer's market may indeed be in a can or a glass container such as a jar. Items such as applesauce, fruit preserves, pickles, vegetables and the like are frequently seen at farmer's markets and in grocery stores. Given this, the proposed mark is [merely] descriptive of a characteristic or feature of goods that are of a type that stem from a farmer's market.

While, in support of her contention that "applicant's proposed mark 'FARMERS MARKET' is [merely] descriptive of a characteristic, quality or feature of the [applicant's] goods," the Examining Attorney relies in her brief upon the above-noted facts that both the cited registration, as well as the two formerly cited registrations, respectively are registered on the Supplemental Register and on the Principal Register with the term

"FARMERS MARKET" disclaimed, the record also contains the following definitions of such term which the Examining Attorney made of record, from a search of "Dictionary.com (2000)," with the her initial Office Action: (i) "A public market at which farmers and often other vendors sell produce directly to consumers. Also called greenmarket" (definition from "*The American Heritage Dictionary of the English Language, Fourth Edition Copyright © 2000 by Houghton Mifflin Company*"); and (ii) "an open-air marketplace for farm products [syn: greenmarket]" (definition from "*WordNet® 1.6, © 1997 Princeton University*"). In light of such evidence, the Examining Attorney urges that, "[w]hen the [applicant's] mark and the identified goods are considered together, no thought or imagination is needed to understand that the goods are somehow like those purchased at a farmers market." She concludes, therefore, that the term "FARMERS MARKET" is merely descriptive of applicant's goods.

Upon consideration of the evidence and arguments presented, we agree with applicant that, when considered in relation to its particular goods, the term "FARMERS MARKET" is suggestive rather than merely descriptive of applicant's "canned and frozen fruit and vegetables sold through supermarkets and other retail grocery outlets." Specifically, we concur with applicant that such term does not describe, with the requisite particularity, any characteristic, feature or quality of canned and frozen fruits and vegetables of the kinds typically sold through supermarkets and similar retail grocery outlets. The Examining Attorney, we note, has been unable to precisely

identify what significant aspect of applicant's goods the term "FARMERS MARKET" immediately describes, speculating instead only as to such generalities as that "applicant's goods are, *in some manner*, like those goods found at farmer's markets"; that applicant's "goods *may* have the look, taste and smell of fresh fruits and vegetables"; and that "the goods are *somehow* like those purchased at a farmers market" (emphasis added).

At most, while the term "FARMERS MARKET," when used in connection with applicant's goods, serves to evoke or suggest that the canned and frozen fruits and vegetables which it sells through supermarkets and other retail grocery outlets have such characteristics, features or qualities as the taste, texture, appearance and/or smell of the freshly harvested fruits and vegetables which are typically available at farmers markets, it requires imagination, cogitation or a multi-stage reasoning process in order to reach such a determination. Moreover, notwithstanding that the registrations relied upon by the Examining Attorney as evidence of mere descriptiveness are for goods which are specifically different from those marketed by applicant, to the extent that such registrations may nevertheless serve to raise any doubt as to our conclusion that the term "FARMERS MARKET" does not immediately convey significant information about a characteristic, feature or other attribute of applicant's goods, we resolve such doubt, in accordance with the Board's settled practice, in favor of the publication, if otherwise eligible therefor, of applicant's mark for opposition. See, e.g., *In re Rank Organization, Ltd.*, 222 USPQ 324, 326 (TTAB

1984); In re Conductive Systems, Inc., 220 USPQ 84, 86 (TTAB 1983); In re Morton-Norwich Products, Inc., 209 USPQ 791, 791 (TTAB 1981); and In re Gourmet Bakers, Inc., 173 USPQ 565, 565 (TTAB 1972).

Turning now to consideration of the issue of likelihood of confusion, our determination thereof under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on such issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of confusion analysis, two key considerations are the similarity or dissimilarity in the goods at issue and the similarity or dissimilarity of the respective marks in their entireties.<sup>5</sup> Here, inasmuch as applicant's "FARMERS MARKET" mark and the cited registrant's "THE FARMERS MARKET" mark, when considered in their entireties, are virtually identical in sound, appearance, meaning and commercial impression,<sup>6</sup> the focus of our inquiry is accordingly on the strength or weakness of such marks and the similarity or dissimilarity of the respective goods.

Applicant urges in its brief that "consumers can easily distinguish slight differences in goods and services offered in

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<sup>5</sup> The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." 192 USPQ at 29.

<sup>6</sup> Applicant, we observe, does not contend otherwise in its brief nor has it filed a reply brief taking issue with the Examining Attorney's assertion in her brief, with which we concur, that "[t]he inclusion, or not, of the article 'THE' is inconsequential to the 2(d) analysis."

connection with weak marks." The cited registrant's mark, applicant insists, is weak, and thus is entitled to only a narrow scope of protection, "for two reasons: (1) the usage of the mark FARMERS MARKET is relatively ubiquitous; and (2) without more, the mark is descriptive." In this regard, applicant refers to a list of various third-party registrations<sup>7</sup> which it maintains constitute evidence which shows that (case citation omitted):

Consumers are thus exposed to the mark FARMERS MARKET in connection with a wide variety of related products within the same shopping experience. As a consequence of such wide usage, consumer confusion is unlikely because consumers can easily distinguish slight differences in goods and services offered under the same mark even if the goods are related. ....

Applicant, in view thereof, further contends that the "limitation on the scope of goods in the ... application is sufficient to enable consumers to distinguish Applicant's ... goods," and thus preclude a likelihood of confusion, because its frozen and canned

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<sup>7</sup> Specifically, although we note that the list recited sets forth one registration twice and fails to list another (Reg. No. 2648695) which applicant included in its response to the initial Office action, applicant asserts that:

In addition to the registrations [initially] cited by the Examining Attorney, there are at least a dozen ... registrations in effect for a wide scope of consumer goods and services: farmers market and flea market services, Reg. No. 2642918; retail grocery store services, Reg. No. 2798632 and Reg. No. 2548845; raw and fresh vegetables, fresh and roasted nuts, salads, bread, fresh fruit and vegetables, retail grocery store services, Reg. No. 1854765; cosmetics, Reg. No. 2146503; soup, Reg. No. 2247790 and Reg. No. 2247791; seafood, poultry, meats, meats and cheese, salads, bread, fresh fruit and vegetables, retail grocery services, Reg. No. 1854765; fresh fruit and produce, Reg. No. 1954180; stoneware, Reg. No. 1912565; fruit juice beverage, Reg. No. 1881575; [and] hone [sic], ketchup, spaghetti sauce, barbeque sauce, fruit butter, preserves and salad dressing, Reg. No. 1141346.

fruits and vegetables, unlike the goods set forth in the cited registration, "are found in decidedly different areas of modern supermarket and retail grocery stores."

The Examining Attorney, however, contends in her brief that even if the cited mark, as evidenced by its registration on the Supplemental Register, is merely descriptive and hence is weak, such mark is "still entitled to protection against registration by a subsequent user of the same or similar mark for the same or closely related goods," citing *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974) and *Hollister Inc. v. Ident A Pet, Inc.*, 193 USPQ 439 (TTAB 1976) and cases cited therein. While correctly noting, in particular, that "even marks that are registered on the Supplemental Register may be cited under §2(d)," citing *In re Clorox Co.*, 578 F.2d 305, 198 USPQ 337 (CCPA 1978), it is still the case that such a mark is generally entitled to only a narrow scope of protection and thus will preclude registration of another mark only when the respective marks are identical or substantially so. Here, the Examining Attorney observes, the marks at issue are virtually identical. Consequently, she maintains that, if such marks are used in connection with related goods, confusion as to the source or sponsorship of such products would be likely to occur.

As the Examining Attorney goes on to properly point out, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and

not in light of what such goods may actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Moreover, as she also correctly observes, it is well established that the goods at issue need not be identical or even directly competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the respective goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Here, the Examining Attorney insists, the fact that the goods at issue may be "shelved or otherwise displayed in different areas of [supermarkets and grocery] store[s]" does not mean that such goods are unrelated. Instead, she maintains that the evidence which she has made of record, which as stated in her

final refusal consists of both Internet excerpts showing that "many well known companies produce a variety of food items that may include both fresh produce, prepared foods and frozen or canned items" and copies of third-party registrations for marks registered for "fresh produce and canned, frozen and prepared fruits and vegetables," demonstrates that applicant's goods and those of the cited registrant are indeed related. Specifically, she notes that:

In support of this, the examining attorney submitted evidence in the Final refusal that shows, for example, fruit in varying forms that stem from the same source. Fresh pineapples are not found next to canned pineapples or next to packaged fruit cups or bags of raisins or cans of pineapple juice, but they all come from the same source, namely, Dole<sup>®</sup>. The registrant's goods include "processed food items. These processed foods could certainly be in canned or frozen form and as such, constitute the legal equivalents of the applicant's goods. .... The applicant's identification does not exclude "processed" fruits and vegetables, which, as noted, may be in canned or frozen form. As a result, the goods of the applicant are legally equivalent to the goods of the registrant. Further, the ... third[-] party registrations ... are probative in that they demonstrate the goods offered by the applicant and registrants [sic] do indeed emanate from the same source.

In addition to the specific example mentioned above in her brief, it is pointed out that the Internet excerpts submitted in support of the Examining Attorney's position variously show that "Dole Food Company, Inc." uses the mark "DOLE" not only on canned pineapple but also in connection with fresh fruit, such as bananas, and packaged salads of field greens; that "Sunkist Growers, Inc." uses the mark "Sunkist" in connection with not

only fresh citrus fruit but also orange soda, fruit candy, fruit and grain bars, individually wrapped fruit snacks, and packaged pistachios and almonds; and that "Welch's" uses the mark "Welch's" not only for grape juices, jams and jellies but also for fresh table grapes and fruit juice cocktails. Moreover, of the three use-based, third-party registrations<sup>8</sup> which are of record, one covers such goods as "canned fruits, frozen fruits, ... fruit salads, garden salads, [and] vegetable salads," on the one hand, and "fresh fruits, namely apples, blueberries, olives, oranges, peaches, tomatoes; [and] fresh vegetables," on the other; another registration by a different third party lists both "canned fruit, dried fruit, frozen vegetables, ... and fruit-based snack foods" as well as "raw fruits, fresh fruits, raw vegetables, and fresh vegetables"; while a third registration by another third-party sets forth "frozen fruits; namely, frozen avocados, guacamole and dates; and prepared and dried fruits" in addition to listing "fresh fruits; namely, avocados, pineapple, mangos, papaya, and kiwi-fruit."

Based upon consideration of the evidence and arguments presented, we concur with the Examining Attorney that confusion as to the origin or affiliation of applicant's and the cited

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<sup>8</sup> We note in this regard that it is settled that while use-based third-party registrations are not proof that the different marks shown therein are in use or that the public is familiar with them, it nevertheless is the case that such registrations have some probative value to the extent that they serve to suggest that the various goods listed therein are of the kinds which may emanate from a single source. *See, e.g.,* In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993); and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 at n.6 (TTAB 1988), *aff'd as not citable precedent*, No. 88-1444 (Fed. Cir. Nov. 14, 1988).

registrant's goods is likely to result from contemporaneous use in connection therewith of, respectively, the virtually identical marks "FARMERS MARKET" and "THE FARMERS MARKET." Contrary to applicant's assertion, the list of third-party registrations upon which it relies in an attempt to demonstrate the asserted weakness of marks which consist of or include the term "FARMERS MARKET" fail to establish such. Aside from the fact that applicant's list is of essentially no probative value inasmuch as it does not set forth the specific marks which are the subjects of the third-party registrations or state the owners thereof or divulge whether the term "FARMERS MARKET" has been disclaimed or indicate whether the registrations issued on the Principal Register (with or without a claim of acquired distinctiveness) or on the Supplemental Register, it is well settled that the third-party registrations do not demonstrate use of the marks which are the subjects thereof in the marketplace or that the consuming public is familiar with the use of those marks and has learned to distinguish between them. See, e.g., *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 463 (CCPA 1973); and *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973). Applicant, consequently, has not offered any evidence of third-party use to support its argument that the cited mark is so weak that consumers will easily distinguish the source of the cited registrant's goods from that of applicant's goods. Although it is also the case that third-party registrations may in general be given some weight to show the meaning of a mark in the same way that dictionary definitions

would be so used, see, e.g., *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976), the deficiencies in the factual information provided by applicant with respect thereto, as noted above, preclude such use in this instance.

Nonetheless, while the fact that the cited mark is registered on the Supplemental Register is evidence that such mark is merely descriptive of the registrant's goods and thus is weak, the Examining Attorney is correct that even a weak mark is entitled to protection against registration by a subsequent user of the same or substantially identical mark for the same or closely related goods. Here, the rather limited evidence made of record by the Examining Attorney is nevertheless sufficient to persuade us that applicant's "canned and frozen fruit and vegetables sold through supermarkets and other retail grocery outlets" would be considered by ordinary consumers to be so closely related to the cited registrant's fresh and processed fruits and vegetables, namely, its "roasted nuts; processed garlic used as a vegetable, not seasoning; processed artichokes; candied nuts; processed pumpkin seeds; candied fruit; processed sunflower seeds; yogurt covered raisins; dried soybeans; salads, except macaroni, rice and pasta salad; ... cole slaw"; its "minced garlic;" its "fresh nuts; raw and fresh vegetables; fresh herbs; fresh mushrooms; and fresh fruits"; as well as its "apple cider," that confusion as to source or sponsorship of the respective products would be likely to occur. In particular, it would even appear that, as identified, applicant's canned and frozen vegetables would at least encompass the cited registrant's

"processed garlic used as a vegetable, not seasoning" and its "processed artichokes." Moreover, notwithstanding that applicant's canned and frozen fruits and vegetables would be sold in different sections of supermarkets and other retail grocery stores, consumers could readily regard such products as processed versions of the raw and fresh vegetables, fresh mushrooms and fresh fruits marketed by the cited registrant in the fresh produce section of the same retailers, especially when such goods are sold under such virtually identical marks as "FARMERS MARKET" and "THE FARMERS MARKET."

Accordingly, we conclude that consumers who are familiar or otherwise acquainted with the cited registrant's "THE FARMERS MARKET" mark for, *inter alia*, "processed garlic used as a vegetable, not seasoning; processed artichokes;" "raw and fresh vegetables; ... fresh mushrooms; and fresh fruits" would be likely to believe, upon encountering applicant's virtually identical "FARMERS MARKET" mark for "canned and frozen fruit and vegetables sold through supermarkets and other retail grocery outlets," that such closely related food products emanate from, or are otherwise sponsored by or affiliated with, the same source.

**Decision:** The refusal under Section 2(e)(1) is reversed, but the refusal under Section 2(d) is affirmed.