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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Gardenlife, Inc.

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Serial No. 77709903

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Salvatore A. Sidoti and D. Ari Sherwin of Curatolo Sidoti Co. LPA for Gardenlife, Inc.

Sally Shih, Trademark Examining Attorney, Law Office 106 (Mary I. Sparrow, Managing Attorney).

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Before Quinn, Kuhlke and Taylor, Administrative Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Gardenlife, Inc. has filed an application to register on the Principal Register the mark EZ GRO (in standard character form) for goods ultimately identified as "living flowers and plants and plant seeds" in International Class 31.<sup>1</sup>

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the

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<sup>1</sup> Serial No. 77709903, filed April 8, 2009, and alleging a bona fide intention to use the mark in commerce. As discussed *infra*, the word "GRO" has been disclaimed.

ground that the proposed mark is likely to be confused with the mark in U.S. Registration No. 2053995, EEZY-GRO (in typed format), for "flower pots and planters" in International Class 21.<sup>2</sup> The examining attorney also made final a requirement for a disclaimer of the word "GRO."

Applicant appealed. Both applicant and the examining attorney filed briefs and applicant filed a reply brief.

In its reply brief, applicant included a disclaimer of the word "GRO" which, on remand,<sup>3</sup> was accepted by the examining attorney. Accordingly, the sole issue on appeal is whether there is a likelihood of confusion between applicant's mark EZ GRO and the cited registered mark, EEZY-GRO.

Before we begin our likelihood of confusion analysis, we must discuss an evidentiary matter. The examining attorney has objected to the materials attached to applicant's brief,<sup>4</sup> arguing that they are untimely. We agree. As noted by the examining attorney and set forth in 37 C.F.R. § 2.142(d), "[t]he record in the application

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<sup>2</sup> Issued April 22, 1997, renewed.

<sup>3</sup> The application was remanded to the examining attorney for the sole purpose of considering applicant's proffered disclaimer.

<sup>4</sup> The materials include: (i) copies of web pages from registrant's website; and (ii) an excerpted copy [1-50] of search results from a search of the Trademark Electronic Search System (TESS) for the term "(gro)[COMB]," along with copies of twenty-three of the listed records.

should be complete prior to the filing of an appeal." As such, the evidence submitted in the first instance with applicant's brief is untimely. Accordingly, the examining attorney's objection is sustained and this new evidence has not been considered in this decision.<sup>5</sup>

Turning now to the merits of the appeal, 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 Co., 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. 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).

We first consider the *du Pont* factor of the similarity/dissimilarity of the marks and compare applicant's mark EZ GRO and registrant's mark EEZY-GRO in

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<sup>5</sup> We point out that the evidence primarily was submitted to support applicant's claim that a disclaimer of "gro" was not necessary. With applicant's disclaimer of the term, the issue is moot. In any event, even if we had considered the remaining evidence, our decision would be the same.

their entireties in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Applicant essentially maintains that the marks are dissimilar enough in appearance to avoid a finding of likelihood of confusion; its mark utilizes a different spelling of "easy" than the precise variant of that word adopted by registrant. The examining attorney, on the other hand, maintains that there is no correct way to pronounce a mark; that applicant's mark EZ GRO and the registrant's mark EEZY GRO are phonetic equivalents and thus sound similar; and that such similarity in sound may be sufficient to support a finding of likelihood of confusion.

We find the marks EZ GRO and EEZY-GRO substantially similar in terms of appearance, both comprised of two terms; the second in each being the identically misspelled word GRO ("grow"), the first in each being different fanciful spellings of the word "easy," respectively EZ and EEZY. Although registrant's mark contains two additional letters, they are not likely to be recognized and do not serve as distinguishing features because of their imbedded placement within the overall structure of registrant's mark. In addition, and contrary to applicant's contention, the hyphen in registrant's mark is not a distinguishing feature and serves mainly as spacing between the two terms. See *Goodyear Tire & Rubber Co. v. Dayco. Corp.*, 201 USPQ 485, 489 n.4 (TTAB 1978) (difference of hyphen insignificant).

In terms of sound, it is settled that there is no correct way to pronounce a trademark. See *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969) and *Interlago AG v. Abrams/Gentile Entertainment Inc.*, 63 USPQ2d 1862 (TTAB 2002). See also *In re Microsoft Corp.*, 68 USPQ 1195 (TTAB 2003) (it is not possible to control how consumers will vocalize marks). Applicant's allusions to the contrary notwithstanding, we find the marks are phonetic equivalents, which will be pronounced identically. See

RE/MAX of America, Inc. v. Realty Mart, Inc., 207 USPQ 960, 964 (TTAB 1980) (similarity in sound alone may be sufficient to support a finding of likelihood of confusion). See also, for example, Molenaar, Inc. v. Happy Toys Inc., 188 USPQ 469 (TTAB 1975); and In re Cresco Mfg. Co., 138 USPQ 401 (TTAB 1963).

In sum, despite the minor differences in spelling, when compared in their entireties, the marks EZ GRO and EEZY-GRO are substantially similar in appearance and identical in sound. While admittedly both marks are highly suggestive in meaning, they suggests the same idea, i.e., that both applicant's and registrant's goods facilitate easy growth. As such, applicant's mark and the cited mark are highly similar commercial impression.

The *du Pont* factor of similarity/dissimilarity of the marks thus favors a finding of likelihood of confusion.

We now turn to a consideration of the *du Pont* factors of the relatedness of the goods, channels of trade and classes of purchasers. It is settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the cited registration. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and The Chicago Corp. v.

North American Chicago Corp., 20 USPQ 2d 1715 (TTAB 1991). Further, it is a general rule that the goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Where the goods in an application or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of goods encompasses not only all goods of the nature and type described therein, but that the identified goods are provided in all channels of trade which would be normal therefor, and that they would be purchased by all potential customers thereof. See, e.g., In re Elbaum, 211 USPQ 639 (TTAB 1981).

In this case we compare applicant's "living flowers and plants; flower and plant seeds" with registrant's

"flower pots and planters." On the face of the respective identifications, it is clear that the goods are complementary items that are commonly used together; registrant's goods being vessels into which applicant's living plants and seeds may be placed for the purpose of potting plants or creating container gardens.

In addition, the examining attorney has made of record various use-based third-party registrations showing that a common mark has been registered by the same entity for both seeds and/or plants and flower pots and/or planters. These third-party registrations may serve to suggest that the types of goods involved herein may emanate from a single source. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (Although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods and/or services are of a type which may emanate from a single source"). See also *Albert Trostel & Sons*, 29 USPQ2d at 1786.

These registrations include, by way of example:

Registration No. 1859361 for, inter alia,  
flower, vegetable and herb seeds and clay



animals and clay replicas of plants used as planters;

Registration No. 2832702 for, inter alia, living plants and seeds, namely, plant, grass, flower, perennial, vegetable and herb seeds and plant trays and containers; and

Registration No. 3662618 for planters for flowers and plants, with or without seeds.

The examining attorney has also made of record copies of third-party registrations showing that the same entity may render retail store and on-line services that feature both types of goods included in applicant's application and the cited registration. Examples include:

Registration No. 277058 for retail store services and mail order catalog services featuring gift items including planters and living plants and seeds;

Registration No. 3702981 for on-line retail store services featuring, inter alia, seeds and decorative pots and planters; and

Registration No. 3509884 for retail store services and on-line retail store services featuring, inter alia, planters and plants and seeds.

Based on the goods as identified and the third-party registrations, we find that applicant's living plants and seeds and registrant's flower pots and planters are complementary and closely related goods, all being gardening items, which may be sold by the same source under the same mark.

We find unpersuasive applicant's argument that the goods are unrelated because registrant's goods are inanimate objects whereas its goods are living plants and seeds. As noted, the goods need not be identical for a finding of likelihood of confusion; they need only be related in such a way that consumers mistakenly believe a commonality of source. See *Albert Trostel & Sons Co.*, *supra*. As discussed, applicant's living plants and seeds and registrant's flower pots and planters are complementary items that may be used together in potted arrangements or container gardens.

We also find unavailing applicant's contention that the "divergent" classification of the respective goods supports a finding that the goods are unrelated. It is well recognized that the system of dividing goods into classes is a USPTO administrative convenience and that a determination on the relatedness of the respective goods is not restricted by this artificial boundary. See *Jean Patou Inc. v. Theon Inc.*, 9 F.3d 971, 29 USPQ2d 1771 (Fed. Cir. 1993); *Graco Inc. v. The Warner-Graham Company*, 164 USPQ 400, 402 (TTAB 1969).

Furthermore, in the absence of any limitations to the channels of trade or classes of purchasers in both applicant's application and the cited registration, we

presume that both applicant's and registrant's goods are or will be sold in all the usual trade channels, including garden centers, nurseries and via the internet and to all the usual classes of purchasers, including ordinary consumers. See *In re Elbaum, supra*.

In view of the foregoing, the *du Pont* factors of the relatedness of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion.

Applicant has relied on a variety of cases to bolster its contention that there is no likelihood of confusion between its mark and the cited mark. However, as is often noted by the Board and the Courts, each case must be decided on its own merits. The determination of registrability of a mark in another case does not control the merits in the case now before us. See *In re Nett Designs Inc.*, 236 F.3d 1339, 51 USPQ2d 1564, 1566 (Fed.Cir. 2001). See also, *In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); and *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001).

Finally, to the extent that EZ GRO and EEZY-GRO are highly suggestive and somewhat weak terms for applicant's and registrant's respective goods, and such weakness raises a doubt as to the likelihood of confusion, any such doubt must be resolved in favor of the registered mark. See *In*

re Hyper Shoppes, 837 F.2d 463, 6 USPQ2d 1025, 1025 (Fed. Cir. 1998); and In re Martin's Famous Pastry Shoppe, Inc. 221 USPQ 364 (TTAB 1984). That is, it is well settled that even a weak mark is entitled to protection against the registration of a very similar mark for closely related goods. See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (likelihood of confusion is to be avoided as much between weak marks as between strong marks).

Here, after careful consideration of all of the arguments and the evidence of record, we conclude that purchasers familiar with registrant's flower pots and planters sold under the EEZY-GRO mark would be likely to believe, upon encountering applicant's mark EZ GRO for living flowers and plants and flower and plant seeds, that such goods originate from or are sponsored by or affiliated with the same source.

**Decision:** The refusal to register under Section 2(d) of the Trademark Act is affirmed.