

EMPIRE

Serial No. 90248200

Attorney Reference No. 689494.0311

In the Office Action dated February 24, 2021, the Examiner notes that “empire” is a varietal name for alfalfa, almond tree, apple, big bluestem, bluegrass, bristle grass, cabbage, corn, cotton, eggplant, lettuce, meadow grass, melon, millet, oat, onion, pea, peach, rape, ryegrass, setaria, shallot, squash, strawberry, tomato, trefoil, wheat, and zoysia japonica. Those items are all purportedly encompassed by Applicant’s identified “live plants.” Accordingly, Applicant has herein amended and limited its identification of goods to “live plants, namely, spiraea,” thereby obviating the varietal issue.

The Examiner also cited to the following marks as bars to registration, arguing that they are all directed to confusingly similar marks for related goods: Reg. Nos. 1737739 (**ROYAL EMPIRE** for apple trees and apples), 3879413 ( for zoysia grass), 4247215 (**EMPIRE LIVE OAK** for live oak trees), and 5152668 (**EMERALD EMPIRE** for live plants), as well as Serial No. 88715997 ( for agricultural seeds, crop seeds) (which application has been allowed). Applicant respectfully disagrees.

On its face, the applied-for mark is unique in its appearance, sound, connotation and commercial impression from each of the cited marks. TMEP 1207.01(b) citing *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“[a]ll relevant facts pertaining to appearance, sound, and connotation must be considered before similarity as to one or more of those factors may be sufficient to support a finding that the marks are similar or dissimilar.”). It is a standard character mark that contains different wording than any of the cited marks and is pronounced differently, such that it conveys its own distinctive connotation and commercial impression as used on the goods listed in the application. Further, as evidenced by the amendment to its identification of goods submitted herein, Applicant seeks to use its mark on the very specific plant, spiraea, whereas none of the cited marks are used on spiraea. These goods are not so related to the goods identified in the cited registrations or application such that consumers could ever mistakenly believe they emanate from the same source. TMEP 1207.01(a). These are different goods offered to different customers for different purposes, such that there can be little, if any, likelihood of confusion. TMEP 1207.01(a)(i) citing *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1551 (TTAB 2015) (finding no confusion given the difference in the nature of the goods and their channels of trade and the high degree of consumer care likely to be exercised by the relevant consumers). If all these other “empire” marks have been approved to co-exist on the Principal Register, there is no valid basis to preclude Applicant’s mark from also being allowed. Accordingly, Applicant respectfully requests the Examiner give due consideration to this information, withdraw the 2(d) refusal and allow the subject application.

Lastly, in response to the Examiner’s Request for Information, Applicant states for itself that “EMPIRE” has ever been used nor will be used as a varietal or cultivar name, and “EMPIRE” has ever been used nor will be used in connection with a plant patent, utility patent, or certificate for plant-variety protection.