

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of: ) Examining Attorney:  
DCI CHEESE COMPANY, INC ) James T. Griffin  
Serial No.: 85/230,097 ) International Class: 029  
Filed: January 31, 2011 ) Date: September 13, 2011  
Mark: COUNTY LINE )

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AMENDMENT AND RESPONSE TO OFFICE ACTION

This Amendment is in response to the Office Action sent via e-mail on March 15, 2011.

**I. Amendment of the Identification of Goods**

Applicant hereby amends its Identification of Goods to state:

cheese; food package combinations consisting primarily of cheese and meat for sale in grocery stores, in International Class 29.

**II. Claim of Prior Registration**

Applicant is the owner of U.S. Registration No. 0339940.

### III. Response to Section 2(d) Refusal

The Examiner refused registration of the Applicant's mark finding that there is a likelihood of confusion under Section 2(d) with THE COUNTY LINE (the "Cited Mark"). As more fully expressed below, Applicant's Mark is not likely to be confused with the Cited Mark because the PTO has previously determined that the marks or similar marks were not confusingly similar when used on similar or related goods; the marks differ; and the channels of trade and goods covered by the respective marks differ.

As an initial matter, while one of the principal factors to consider in determining whether there is a likelihood of confusion is similarity of the marks, a finding of phonetic or visual similarity alone does not mean that the marks are confusingly similar. TMEP 1207.01(b)(i); *In Re Lamson Oil Co.*, 6 U.S.P.Q. 2d 1041, 1042 n.4 (TTAB 1988). Other factors must be considered in determining whether consumer confusion is likely, including the similarity of the goods covered by the respective marks and the activities surrounding their marketing. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (C.C.P.A. 1973).

In determining the issue of likelihood of confusion, the Board and the Courts "assess the 'context in which [the products/services] are found and consider the totality of the factors that could cause confusion among prospective purchasers.'" *Nature's Best, Inc. v. Ultimate Nutrition, Inc.*, 323 F. Supp. 2d 429, 433 (E.D.N.Y. 2004) (citing *Streetwise Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 744 (2d Cir. 1998) and quoting *Gruner & Jahr USA Publishing v. Meredith*

*Corporation*, 991 F.2d 1071, 1078 (2d Cir. 1993)). The question is the “overall impression” of the marks in the context in which they are presented. *Gruner*, 991 F.2d at 1078.

Indeed, regarding the issue of likelihood of confusion, all circumstances surrounding the sale of the goods and/or services are considered. *Industrial Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386 (C.C.P.A. 1973). These circumstances include the marketing channels, identity of the prospective purchasers and degree of similarity between the goods. *Id.*

In situations where a Section 2(d) refusal is based on “closely related” goods/services, the Board and Courts have found in favor of Applications where, as here, the overlap is *de minimis* or lacks clear and convincing evidentiary support. *In re Coors*, 343 F.3d 1340, 68 USPQ 2d 1059 (Fed. Cir. 2003) (rev’g TTAB affirmance of refusal to register an application for BLUE MOON & Design for beer based on a Sec. 2(d) rejection from a registration for BLUE MOON & Design for restaurant services); *In re Broadway Chicken*, 38 USPQ 2d 1559 (TTAB 1996) (reversing refusal to register an application for BROADWAY CHICKEN for restaurant services based on a Sec. 2(d) rejection from a registration for BROADWAY PIZZA for restaurant and bar services).

In light of the aforementioned precedent and argument below, Applicant respectfully requests that the Examiner withdraw his likelihood of confusion objection.

**A. Prior Registration of COUNTY LINE (Stylized) for Identical and Related goods**

Applicant, through its predecessor, registered COUNTY LINE (stylized) (Reg. No. 0339,940) for cheese on October 27, 1936. (A TESS and TARR print-out is attached as Exhibit A). This long-standing mark is identical or nearly identical to the mark at issue and the registered goods are identical and/or related to those described in the application at issue. Notably, the Cited Mark was not in existence at the time of Applicant's prior registration, and neither were cited against the other. Applicant respectfully submits that, as was the case with its prior registration of an identical or nearly identical mark for related goods (and in the case of cheese, identical goods), there is no likelihood of confusion here and registration of COUNTY LINE should be permitted.

**B. Distinct Customers; The Respective Goods Travel is Distinct Channels of Trade**

The Cited Mark specifically excludes the market and channels of trade pertaining to sales in **grocery stores**, delis or food service distribution. While Applicant's cheese products have no limitation, its identification of goods for food package combinations specifically includes such packaged combinations as being for sale in **grocery stores**. Accordingly, the respective channels and customers do not overlap. Further, unlike the Cited Mark, Applicant's foods relate to packaged combinations consisting primarily of cheese and meat for sale in grocery stores. Applicant's "meat" is part of the overall packaged combination

and is not broad enough to include registrant's "barbeque meat products; namely, brisket, sausage, and ribs \*not for sale in grocery stores, delis or food service distribution\*." The goods would not be sold to the same class of purchasers or encountered under circumstances leading one to mistakenly believe the goods originate from the same source. These significant differences in goods, classes of purchasers, and channels of trade preclude consumer confusion. Further, such specific channel limitation by the owner of the Cited Mark, which is a relatively rare occurrence in the listing of such goods, demonstrates clear intent to avoid the grocery store customers and channels. Thus, such areas are also unavailable as part of any zone of natural expansion that might otherwise exist.

### **C. The Marks Are Not Perfectly Identical**

The Cited Mark includes the initial term "THE". Use of such term, while understandably somewhat weak, does present at least some element of distinction such that the marks on their face are not perfectly identical. The marks are also pronounced differently in this respect. Further, the term "THE" appears as the initial term and must be included when viewing the mark in its entirety and in the context of the overall commercial impression. Such sound and visual difference, together with the above-mentioned substantial differences in the customers and channels of trade, contributes to the overall differences and demonstrates a lack of likelihood of confusion.

## **IV. Conclusion**

Applicant submits that its amendment to its Identification of Goods and its claim of ownership of Reg. No. 0339,940 satisfy the Examiner's requirements and more particularly describes Applicant's goods. Applicant further submits that consumer confusion is unlikely with the Cited Mark because: (1) the goods travel in different channels and before different potential customers; (2) the marks' goods differ; (3) the Mark differs from the Cited Mark visually and phonetically; and (4) Applicant's identical or nearly identical mark for identical or related goods registered without citation of the Cited mark or opposition by Registrant. Because Applicant submits that consumer confusion is unlikely and there are no additional outstanding issues with its application, Applicant respectfully requests that the Examiner withdraw his Section 2(d) refusal and allow the application to proceed to publication.

Respectfully submitted,

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