



BAILEY DUQUETTE P.C.

March 24, 2020

Mr. Carl A. Korschak
USPTO— Trademark
Examining Attorney
Law Office 126
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Re: **NON FINAL OFFICE ACTION FX - 88,502,898**
NON FINAL OFFICE ACTION FX DESIGN - 88,502,882

Dear Mr. Korschak:

We are writing further to your office action issued September 24, 2019 in regards to the trademark FX (registration No. 88,502,898) and FX & DESIGN (registration No. 88,502,882).

First, we understand that the objection regarding the likelihood of confusion relates only to the description for international class 1 of the applicant's mark.

Second, with all due respect to the examiner, we do not agree with the elements set out in the Office Action. The compared trademarks, FX and FX & Design from AIREX ("Applicant's mark") and FX from SPRA-Green ("Registered mark"), are not similar in their description and in their distribution channel.

The applicant's trademark is described as follows:

Biochar; Soil amendments for agricultural use, horticultural use, home gardening and landscaping use, waste water filtration use and environmental remediation use; Charcoal for use as a soil conditioner. (International class 1)

The registered trademark is only described as "Lawn fertilizers."

It is evident from the analysis of the descriptions that the products presented under both trademarks are in no way similar. Indeed, it is important to note that fertilizers are not the same as soil amendments.

By definition, a soil amendment does not add concentrated nutrients to the soil but improves the texture of the soil. With a healthy, friable soil consistency, water and air pockets are readily available for plant roots as they spread prolifically in search of nutrients. These amendments can be both organic or inorganic.

However, fertilizers are concentrated nutrient amounts that the customer physically adds to the soil to directly influence plant growth. The addition of these nutrients do not help the soil's texture.

It appears evident from the definition of the term “Soil amendment” and “Fertilizers” that an informed and conscientious consumer would not be confused by the goods sold under the trademarks. In light of the definitions, we are in the opinion that the objection should be withdrawn.

In addition to the definitions, it appears from the description and the use of the trademarks that both trademarks are not using the same channel of trade.

In fact, as demonstrated with the Registered mark specimen, published on the USPTO website in the TSDR application:

(<https://tsdr.uspto.gov/documentviewer?caseId=sn86140916&docId=APP20131214073235#docIndex=1&page=1>) the goods sold under the mark are directed toward the consumer who practices home gardening and as such the goods under the Registered mark are sold in the hardware store.

However, as demonstrated on the Airex Energy website (<https://www.airex-energy.com/en/biochar>) the goods related to the Applicant’s mark are focused on agricultural, horticultural use, water filtration and environmental remedy. The use of the goods are directed toward the industrial sector.

Considering the targeted consumer for each trademark, it is not possible that an average consumer would likely be confused by the goods sold under the trademarks. The goods sold under the Applicant’s mark would never be sold in a hardware store as the purpose of the goods are exclusively for commercial industrial use.

Finally, the term “FX” is diluted and as such has lost its “power” due to the numerous trademarks are using that specific term to describe the same product. In fact, more than 800 live trademarks are using the term “FX” and 291 live trademarks are using the term in relation to the International Class 1.

In light of the weakness of the term “FX”, the description and the different channels of trade, we are in the opinion that the consumer would not likely be confused by both trademarks even if the names are similar.

Do not hesitate to contact the undersigned should you have any question as to this matter.

Sincerely,

/Stephan Matanovic/

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