

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark: CONTOUR)
Serial No.: 88/910,421) Examining Attorney
Filing Date: May 11, 2020) Hanno Rittner
Our Docket No. 5723-332732) Law Office 119

RESPONSE TO OFFICE ACTION

Dear Examining Attorney Rittner:

This responds to the Office Action dated June 17, 2020 for U.S. Serial No. 88/910,421 for the CONTOUR mark claiming the following goods:

Class 17: plastic shrink film

I. Identification of Goods - Amendment

Applicant’s mark has been refused in part due to an indefinite identification of goods. In response, Applicant requests an amendment to its existing identification of goods as follows:

Class ~~16~~ 17: **Transparent plastic flexible shrink packaging film sold in bulk to industrial and commercial manufacturers for wrapping and packaging**

II. Section 2(d) Refusal – Likelihood of Confusion

The Examining Attorney has cited the following Registrations as preliminary grounds for refusal for likelihood of confusion (“Registrant’s Marks”):

Mark	Owner	Goods/Services	Reg. No.
CONTOUR	Goex Corporation; 802 US HWY 14 East Janesville Wisconsin 53545	Class 17: Extruded Plastic Sheeting for use in Manufacturing high temperature resistant thermoformed packaging	1586758
GHD CONTOUR	Jemella Group Limited; Bridgewater Place, Water	Class 17: plastic packaging, namely, bags, bubble packs, and film; all the aforesaid goods being in the field of hair care, hair styling and beauty care	4750423

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As discussed in greater detail below, Applicant respectfully disagrees that there is any potential likelihood of confusion between Applicant’s CONTOUR mark and Registrants’ Marks because: (1) the goods are significantly different; (2) the channels of marketing and trade and target consumers are wholly distinct; and (3) the burden of proof to find a likelihood of confusion has not been met. As such, Applicant respectfully requests that the subject trademark application be approved for publication.

1. The Respective Goods Are Significantly Different

The vast differences between Applicant’s and Registrant’s respective goods serve to negate any likelihood of confusion. The cumulative effect of differences in the essential characteristics of the goods involved is a fundamental inquiry mandated by Section 2(d) of the Trademark Act. *Interstate Brands Corp. v. Celestial Seasonings, Inc.*, 198 U.S.P.Q. 151, 153 (C.C.P.A. 1978).

Applicant has amended its identification of goods to clarify the nature, scope, and purpose of the goods. Applicant’s narrowly defined goods include specifically “*Transparent plastic flexible shrink packaging film sold in bulk to industrial and commercial manufacturers for wrapping and packaging*” in Class 17. Applicant submits that its amended goods in Class 17 and Registrant’s goods are so different that confusion is not likely.

A review of Registrant’s relevant goods, as described in its identification--“ *Extruded plastic sheeting for use in manufacturing high temperature resistant thermoformed packaging*”—plainly reveals that Registrant’s extruded plastic sheeting is used specifically for manufacturing high temperature resistant thermoformed packaging, are wholly unrelated to Applicant’s claimed transparent plastic flexible shrink packaging film sold in bulk for use by industrial and commercial

manufacturers. Furthermore, as described in more detail below, a review of Registrant's and Applicant's respective goods in the marketplace further demonstrates the significant differences between the goods. Jemella Group's goods under the mark GHD CONTOUR are further afield as they are for use in the field of hair care, hair styling and beauty care. Such goods are completely unrelated to applicant's goods.

Applicant Berry Global, Inc. ("Applicant") is a leading global manufacturer and marketer of various plastics materials across various industries, who, under its CONTOUR mark, will offer specifically transparent plastic flexible shrink packaging film for use by industrial and commercial manufacturers for wrapping and packaging applications.

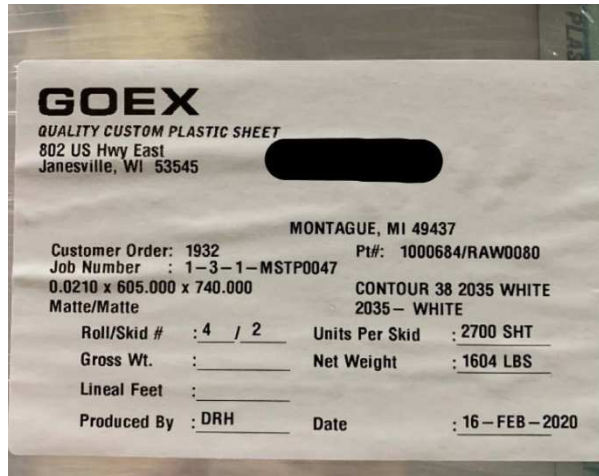
More specifically, Applicant's goods under its CONTOUR mark include specialized transparent plastic flexible shrink packaging film that is *specially designed* for businesses in the commercial and industrial market for their further use in connection with wrapping and packaging products that are sold in bulk to downstream suppliers. See

<https://www.berryglobal.com/products/packaging/flexible/shrink>. The following are examples of the type of goods Applicant will offer in the industrial market under the CONTOUR mark:

<https://catalog.berryglobal.com/products/shrink/shrink>.

In stark contrast, Registrant, Goex Corporation (Goex), is a Wisconsin based company that offers various rigid plastic sheeting. (See attached **Exhibit A**: Specimens submitted by Registrant for its registration, and see

<https://tsdr.uspto.gov/documentviewer?caseId=sn73810451&docId=SPE20200305154806#docIndex=1&page=1>.



Specifically, Registrant Goex’s CONTOUR goods include extruded plastic sheeting and as shown in the photograph above, the CONTOUR product is a white sheet material (shown on the label as having 2700 sheets of material per skid)– which has nothing to do with Applicant’s transparent plastic flexible shrink packaging film, which is sold in bulk rolls. As further evidence depicting Registrant’s distinct goods is a link to their website that describes some of the uses for their sheet material:

<https://www.goex.com/industries/consumer>

Registrant’s product is used for manufacturing specific thermoformed goods such as household detergent and cleaning devices, hardware and tools, electronics, automotive components, appliances and sporting equipment.

This evidence clearly demonstrates that Registrant’s goods, as described in its registration and as shown in its specimens and the marketplace, are significantly different from Applicant’s specialized transparent plastic flexible shrink packaging film. Indeed, Applicant’s goods and Registrant’s goods highlighted by the Examining Attorney are not related beyond the mere fact that Registrant’s identifications of goods list “plastic” – though, Applicant notes that even this remote similarity is limited given that there is a significant difference between plastic flexible shrink packaging film and extruded plastic sheeting used for thermoforming products. The two

serve wholly distinct purposes. Applicant's specific transparent shrink packaging film is ideal for use in the further manufacturing of products that are shrink wrapped and bundled for resale. These are indeed the exact products Applicant will offer under its CONTOUR mark. On the other hand, Registrant's extruded plastic sheeting used for thermoforming individual products and not used in wrapping or packaging.

Further, there is insufficient evidence of record to demonstrate that Applicant's and Registrant's goods are sufficiently related to establish a likelihood of confusion—that is, more than a theoretical possibility of confusion. The Trademark Office has not provided relevant evidence to demonstrate the relatedness of Applicant's and Registrant's significantly different goods. The Trademark Office must provide sufficient evidence showing that the goods are related to support a finding of likelihood of confusion. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (finding Office had failed to establish that wine and vodka infused with caffeine are related goods because there was no evidence that vodka and wine emanate from a single source under a single mark or that such goods are complementary products that would be bought and used together). To demonstrate relatedness of the respective goods, the Examining Attorney merely pointed to the fact that both Applicant and Registrant offer “plastic” and argued that this demonstrates the goods are related for purposes of a likelihood of confusion analysis. These arguments, and notably the lack of evidence of record, is insufficient to demonstrate relatedness between the respective goods.

In view of the specific differences between the goods and the lack of relevant evidence, the Examining Attorney has not met the burden of establishing that confusion is likely to occur.

As the Federal Circuit stated,

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with *de minimis* situations but with the practicalities of the

commercial world, with which the trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems Corp., 21 U.S.P.Q.2d at 1391 (Fed. Cir. 1992), citing *Witco Chemical Co. v. Whitfield Chemical Co., Inc.*, 418 F.2d 1403, 1405, 164 U.S.P.Q. 43, 44-45 (CCPA 1969), *aff'g* 153 U.S.P.Q. 412 (TTAB 1967). Therefore, Applicant submits that, particularly in the practicalities of the commercial world, no confusion is likely between the respective marks in this case.

Further, along with CONTOUR and GHD CONTOUR the following registrations are also on the principal register:

Mark	Owner	Goods/Services	Reg. No.
CONTOURA	BASF SE; Carl-Bosch- Strasse 38 Ludwigshafen am Rhein FED REP GERMANY 67056	Class 17: Plastics and resins in extruded form for use in manufacture	5704236
DUETS CONTOURS	Gemini, Inc.; 103 Mensing Way Cannon Falls MINNESOTA 55009	Class 17: Flexible plastic engraving sheet stock to provide a microsurfaced engravable surface	5122781
CONTOUR	Aristech Surfaces, LLC; 7350 Empire Drive Florence Kentucky 41042	Class 17: Acrylic solid surface plastic sheets for use in the manufacture of countertops and other architectural surfaces	5757871
ENTOUR	Owned by Applicant – Berry Global, Inc.	Class 16: plastic packaging pouches	5656179

Copies of these registrations are attached. Since the following CONTOUR trademarks are able to co-exist on the principal register, it would seem that applicant's mark, with the narrowly tailored goods should also be able co-exist on the register. Also, Applicant already has a

registration for ENTOUR for plastic related goods and therefore it would be a logical step to also allow registration of Applicant's current mark.

2. The Channels of Marketing and Trade and Likely Purchasers Are Vastly Different

A likelihood of confusion is further precluded when there is no reasonable probability that the same customers will encounter opposing marks. See *In re Fesco, Inc.*, 219 U.S.P.Q. 437, 439 (T.T.A.B. 1983). Applicant and Registrant are in dramatically different businesses selling wholly distinct goods to significantly different consumers. Pursuant to *TMEP §1207.01*, "The issue is not whether the respective marks themselves, or the goods or services offered under the marks, are likely to be confused but, rather, whether there is a likelihood of confusion *as to the source or sponsorship of the goods or services* because of the marks used thereon. See, e.g., *Paula Payne Prods. Co. v. Johnson's Pub'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (C.C.P.A. 1973) (emphasis added) ("[T]he question is not whether people will confuse the marks, but rather whether the marks will confuse people into believing that *the goods they identify emanate from the same source.*") (emphasis added)." The strong distinctions between not only Applicant's and Registrant's respective businesses, but also the respective channels of marketing and trade and likely purchasers of their goods are sufficient to dispel any likelihood of consumer confusion about the source or sponsorship of the goods.

Applicant is a packaging and materials manufacturer that will direct its CONTOUR goods at professional and sophisticated business entities seeking specialized transparent plastic flexible shrink packaging film for use in wrapping and packaging operations. Under its CONTOUR mark, Applicant will operate on a business-to-business platform when selling the relevant goods. Only

sophisticated businesses with industrial and commercial needs seeking specially designed industrial non-woven fabric will be purchasing Applicant's goods under its CONTOUR mark.

Registrant, extruded sheet products are sold on an entirely different business to business platform, specifically, to businesses that manufacture thermoformed plastic parts. The channels of marketing and trade for Registrant's CONTOUR goods do not flow through or overlap in any way with the flexible shrink packaging film industry; rather, Registrant deals exclusively with business that make thermoformed products. The relevant purchasers of Applicant's goods are sophisticated businesses seeking a flexible shrink packaging film and they can use in the further wrapping and packaging of other products. It is inconceivable that a sophisticated company looking for extruded thermoformable sheets such as that offered by Registrant under its CONTOUR mark is going to encounter, let alone be confused by, Applicant's flexible shrink packaging film intended for use in packaging and wrapping operations offered to wholly different sophisticated companies specifically in the packaging industries.

Although a consumer could arguably encounter both companies in the "same location," such as on the Internet through online research, this is a tenuous connection at best. Here, not only are the respective goods offered in completely different channels of marketing and trade, but also there is no way to use the goods for similar purposes considering Applicant's flexible shrink packaging film industry bear no relation whatsoever to the thermoformable sheet material that the Registrant offers under its CONTOUR mark for use with thermoforming products. These differences, coupled with the difference in the relevant purchasers of the respective goods, and the level of sophistication involved for the businesses seeking to purchase the respective goods, ensure confusion is not likely.

3. The Burden of Proof to Find a Likelihood of Confusion Has Not Been Met

The Trademark Office must meet its burden of proving that Applicant's mark, when used in connection with the Applicant's goods, so resembles the Registered mark when used with Registrant's goods, as to be likely to cause confusion, to cause mistake, or to deceive the relevant purchasing public. *See In re Giovanni Food Co.*, 97 U.S.P.Q.2d 1990, 1991 (T.T.A.B. 2011) (“[W]e determine that the Office has not met its burden of proving likelihood of confusion”); *see also* 15 U.S.C. §1052(d). A refusal should be based on comparison of the *entire* marks, an *understanding of the relevant industries*, an *analysis of the marketplace*, and the likely reaction of prospective purchasers. Substantial evidence is now before the Trademark Office to show that confusion is not likely. To maintain this refusal in view of these submissions, significant contrary evidence would be necessary.

Therefore, Applicant respectfully requests that the Examining Attorney allow the subject application to proceed toward registration.

Conclusion

All matters in the Office Action having been addressed above, Applicant respectfully requests the Examining Attorney withdraw the objection and pass Applicant's CONTOUR mark to publication.

Dated: December 17, 2020

Respectfully submitted,

By: /Mark J. Nahnsen/

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