

## Example Case Write-Up – Fresh Start Case

### Part One

Colgate-Palmolive's (CP) Fresh Start brand of concentrated laundry detergent is facing a potential situation of trademark infringement and consumer confusion in the Southern California marketplace. In particular, CP was trying to decide whether or not to take Coast Detergents to court. Coast, a Los Angeles-based firm, supplies several Southern California supermarket chains with private label detergents. Some of these chains include Ralphs, Vons, and Alpha Beta. These chains together accounted for roughly 50% of supermarket sales in Southern California. Coast entered the market after Fresh Start had been on the market for over half a year.

As noted above, the issue underlying this legal action is trademark infringement. CP feels that the package used by Coast for their concentrated detergent (legally, the package includes the container itself, labels, and any visible contents) has been made too similar to the package of Fresh Start detergent. Pictures of the containers are shown in Exhibit One (they are somewhat faded and battered; assume that the colors on the labels were roughly comparable – red, blue, and yellow. Also, both detergents were light blue in color; the blue color was not functional in the sense that the function of the detergent was not dependent upon any ingredient giving it the blue color). CP believes that consumers will be confused because of this similarity and that this confusion will result in damage to the Fresh Start brand and to CP. Therefore,

CP is considering going to court and asking Coast to remove these packages of detergent from the shelves and to develop a new container design.

To help examine the consumer learning (generalization vs. discrimination and confusion) issues involved in this situation, several other facts are potentially important. First, at the time this situation occurred, Fresh Start and Coast were the only two detergents with a clear plastic container and powdered detergent. Second, Fresh Start came in three sizes: 70 ounce, 42 ounce, and 28 ounce. Coast store brands came only in the 42 ounce size. The two most typical shelf arrangements (typically under the control of the supermarket chain, not Coast) were 1) FS 70, FS 42, Coast 42, FS 28 and 2) FS 70, FS 42, FS 28, Coast 42. Third, typical prices for the 42 ounce containers were \$3.99 for Fresh Start and \$2.35 for Coast. Fourth, Fresh Start's television advertising featured 30 second spots, of which roughly 8-10 seconds showed close-ups of the package. Neither Coast nor the supermarket chains advertised the store brands.

There was a good deal of dispute over one critical issue, the actual performance capabilities of the two products. At the time, CP felt that Fresh Start involved fairly advanced, new detergent technology (Fresh Start was the first concentrated powder detergent) and that the degree of concentration achieved was unique. They argued that because of this new technology, Fresh Start was much more effective than Coast. Coast, of course, disputed this. Since concentrated detergent was at the time a new category, CP was concerned about what consumers' might perceive about the efficacy of that category of detergents if there were indeed significant performance differences between

Fresh Start and Coast. Introduction of concentrated detergents in a variety of forms was an important part of CP's long run strategic plans for the category.

In order to take Coast to court, CP felt that they needed to build a strong case that the potential for or likelihood of consumer confusion existed (this is all one has to show; interestingly enough, you don't have to demonstrate actual confusion). The major issue they faced, therefore, was whether they could build a powerful argument for confusion based upon issues involving consumer behavior. Confusion is usually discussed in terms of the overall, total impression (the overall 'gestalt'); that is, differences in details might or might not be important depending upon how they fit into the overall impression of the product. Some of the important issues that CP felt needed to be addressed were the likelihood of confusion, the extent of confusion, and which types of customers might be confused. Some of their initial ideas about the relevant consumer behavior issues included how consumers were likely to shop for detergent, the degree of attention devoted to the package, what consumers were likely to remember from the advertising, and how consumers were likely to perceive the similarity/distinctiveness of the packages.

Thus, the major issue facing CP was whether or not to proceed with legal action. You should attempt to develop a strong, consumer behavior-based argument for consumer confusion as a way of helping with that assessment. The argument should address the issues noted above and any others you feel might be relevant. Another very important issue that must be addressed is what actions or remedies you might recommend to relieve any confusion that might

exist. For example, what changes would you have Coast make in their packaging to relieve confusion, and why would such changes be effective?

## Part Two

It is possible to build a fairly strong argument for consumer confusion in this case. Before going into the specific arguments based upon the packages and consumer behavior principles, however, we should first consider what types of confusion might occur and what types of consumers might be most confused. There are three main types of confusion that might occur, with different consequences for CP. First, consumers might not notice or be aware of the difference between the two products and pick up Coast thinking that it is Fresh Start. Second, consumers may assume that the two products are both made by CP, one as a private label and one as the branded version. Third, consumers may know that the two products are from different manufacturers, but assume that they perform similarly.

In types one and two, the damage to CP may come from lost sales to Coast, both now and in the future. The degree of damage depends upon such factors as whether or not the consumer notices that they bought Coast instead of Fresh Start when they get the product home. In all three cases, however, there is the potential for another type of potentially serious loss. If consumers buy Coast, either by mistake, because they think it is made by CP, or because they think it performs similarly, and if Coast does not perform as well as CP, then consumers may decide that the whole notion of concentrated detergents has little merit. This generalization would be disastrous to CP's long-range plans to introduce concentrated detergents in a variety of forms. Thus, in some ways this possibility is much more critical than the lost sales.

Addressing the issue of what type of consumer is most likely to be confused will provide a lead-in to the most critical consumer behavior issues involved in building an argument for confusion. In past consumer trademark cases, the courts have generally ruled that one cannot assume that consumers are always wary and process everything in detail. Indeed, we would argue that the type of consumer most likely to be confused is the consumer who, for whatever reason (e.g., lack of interest in the category, time pressure), does not process the package information in great detail.

An argument for the likelihood of confusion based upon consumer behavior principles might go as follows, therefore. In the case of detergents, as with any other product, there will be a segment of consumers who have low involvement with the product category. In addition, consumers are faced with an almost overwhelming variety of choices in the supermarket and are often rushed for time. Therefore, many consumers will not spend a great deal of time examining packages in the supermarket. In fact, many observational studies show that consumers spend at most 1-2 seconds making a choice in a typical category. Therefore, many consumers will process the package information with low attention, passively, and in a limited fashion (note that we do not have to assert that all consumers do this, but simply that there is the likelihood that some non-trivial number of consumers do this). In particular, because the Fresh Start advertising spent almost 1/3 of the time in the ad portraying the general visual appearance of the package, many consumers may choose a brand based upon visual recognition of the package rather than the brand name.

Using visual recognition to select a brand is likely to lead to confusion. The overall visual gestalt of the packages is exceptionally similar. The bottles have essentially the identical overall shape, the caps are the same color, the same colors are used for the labels, there is a swirl motif on the front label for both bottles, and the rear labels are exceedingly similar. In addition, one crucial factor is that these were the only two detergent packages that were clear and contained a powdered detergent, which in both cases was blue. The Fresh Start and Coast bottles were also shelved next to one another. Thus, in comparison to the remainder of the packages, either opaque bottles of liquid detergent or opaque cardboard containers of powdered detergent, the Fresh Start and Coast bottles appear perceptually even more similar by contrast. It is such overall visual similarity that is critical, not differences that might be seen upon closer examination (e.g., differences in the texture of the two detergents).

Therefore, the likelihood of visual confusion is high. Confusion of type one (picking up Coast and thinking one has picked up Fresh Start) is probably most likely under the shelf arrangement where Coast is in the midst of the Fresh Start containers. Confusion of types two and three may be equally likely for both shelf arrangements.

The inferences consumers might make based upon the difference in price are not as straightforward to consider. Consumers might infer that CP made both, but priced the store brand and Fresh Start differently, for example. Consumers might also take price as an indicator of quality, which might vitiate some of CP's concerns regarding performance inferences about the entire

category. However, these arguments again depend upon the consumer's noticing the price and elaborating upon it. Not all consumers will do this, so we are still left with a segment that is likely to be confused.

In response to the major issue of whether or not to proceed with legal action, therefore, it seems clear that a strong argument for confusion can be made and that CP should proceed. In terms of a remedy, we have argued above that one of the most distinctive features of the Fresh Start container is that it is clear. Also, the shape of the bottle and rear label are clear points of visual similarity. To reduce visual similarity, CP should ask that Coast make their package opaque, make it a different shape, and change the rear label.

[PS – The case was settled out of court. The new Coast package is shown in Exhibit Two. In my opinion, the changes made were not sufficient to address the most significant potential source of confusion, the fact that these were the only two powdered detergents in a clear plastic container.]