

UNITED STATES PATENT & TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Appln. Serial No. 76/715,478

Filed: December 2, 2013

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Mark: NUTRITIONAL CONCEPTS

Applicant: Nutritional Concepts, Inc.

November 25, 2014

Commissioner for Trademarks  
P O Box 1451  
Alexandria, VA 22313-1451**REPLY BRIEF**

Applicant hereby replies to the Examining Attorney's Appeal Brief mailed November 20, 2014.

Argument

While obviously the Board must consider all of the relevant *DuPont* factors, it is clear that in this case far and away the most important one is the absence of actual confusion. Just as with the Final Rejection, the Examining Attorney's Appeal Brief (hereafter "EAAB") fails to properly consider the relevant evidence, and makes picayune and immaterial distinctions between this case and the cited law. The EAAB also argues an irrelevant issue, and one not even presented by Applicant.

The determination of "likelihood of confusion" is an academic exercise taking into account the various legal factors that have been demonstrated over the years to provide relevance. However, it still remains an academic exercise, and it is respectfully submitted that when the real world has spoken what the real world has to say should be the controlling, factor. This is the approach that enlightened decisions, such as *In re General Motors*, 23 USPQ 1465,



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1468-9 (TTAB 1992), discussed extensively in Applicants Main Brief (but pooh-pooed in the EAAB simply because there is no court decision that “Nutrition Concepts” is suggestive) take.

In actuality, the reviewing Court for TTAB decisions has been even more definitive in finding that absence of actual confusion is the determining factor than this Board was in *In re General Motors*. In its decision in the case of *Application of Myers*, 201 F.2d 379, 384 (CCPA 1953), the Court found that absence of actual confusion over a period of “at least twenty years” (here the period is twenty nine years) “creates a strong presumption against likelihood of confusion.” That is the Court held:

“The facts appearing respecting this controversy, as developed in the cancellation case, are that the goods of Polk Miller Products Corporation and the goods of Myers were sold in the same territory with the respectively described marks applied thereto during a period of at least twenty years, and that not one single incident of confusion as to the goods *per se* or as to their origins was shown.

We think the failure or inability to show even one instance of the kind in the past creates a strong presumption against likelihood of confusion in the future.” (emphasis added)

To the same effect, with slightly different language, is *Hubbard Foods v Animal Feed Supplement*, 182 F.3d 598,602-603 (8th Cir. 1999):

“Although evidence of actual confusion is not necessary for a finding that a likelihood of confusion exists, it is perhaps the most effective way to prove a likelihood of confusion. See *Stuart Hall Co. v. Ampad Corp.*, 51 F.3d 780, 790-91 (8th Cir. 1995); *Woodsmith Pub. Co. v. Meredith Corp.*, 904 F.2d 1244, 1249 (8th Cir. 1990); *SquirtCo*, 628 F.2d at 1091. Considering that AFS has persisted in using the half-barrel container for over two decades, and has done so with Hubbard's knowledge since 1988, Hubbard's failure to present evidence of consumer confusion owing to AFS's allegedly infringing conduct is telling.” (emphasis added)

All of the cases discussed on page 11 of Applicant’s Main Brief are to the same effect.

The picayune distinctions alleged in the EEAB do nothing to blunt the main thrust of all of those decisions – if a likelihood of confusion analysis is made primarily by looking to the real world, rather than performing a rote academic exercise, the absence of actual confusion over a twenty

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nine year period provides such an overwhelming presumption of no likelihood of confusion that it is almost impossible to overcome. The presumption certainly has NOT been overcome here.

In this case the evidence is uncontroverted – as demonstrated by the declarations of both Bonnie C. Minsky (with attachment and reference to the nutritionalconcepts.com website) and Steven A. Minsky – that applicant’s mark has been used very extensively and consistently over the twenty nine year co-existence with the Aramark mark. It is inconceivable that a popular website could be running for sixteen years (since 1998), hundreds of presentations and seminars could be made or attended, and books published, all proudly featuring the NUTRITIONAL CONCEPTS service mark without anyone even drawing the Aramark mark to Applicant’s attention, let alone no instance of actual confusion, unless there is no likelihood of confusion.

Here, the absence of actual confusion is even more persuasive than in any of the cases cited in this reply or in the Main Brief, however, because of established facts that both the Final Rejection and the EEAB fail<sup>1</sup> to even attempt to address (because there is no response that leads to a rational likelihood of confusion conclusion). The relevant facts in this regard are set forth in paragraph 4 of the Steven A. Minsky Declaration.

As ¶4 of Steven’s Declaration indicates, with respect to a junior user’s” Nutritional Concepts” mark there have literally been dozens, if not hundreds, of instances of actual confusion with Applicant’s mark. There is no rational explanation as to how there could be so much actual confusion between Applicant’s and a junior user’s use of “Nutritional Concepts” for

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<sup>1</sup> Instead, the EEAB references an issue not even argued by Applicant by pointing to paragraph 5 of the Steven A. Minsky Declaration and the Carolyn Martinelli Declaration. The evidence presented there was solely for the purposes of full disclosure and to confirm that Aramark does not sell nutritional supplements. Applicant has NEVER suggested that what is in those paragraphs should be interpreted here to mean that Aramark is not extensively using its registered mark for nutritional counseling services.

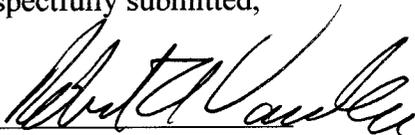
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just a few years, and NO actual confusion between “Nutritional Concepts” and “Nutrition Concepts” for twenty nine years, except that the real world marketplace clearly recognizes the distinctions between the marks, and therefore there is no likelihood of confusion.

The EEAB also fails to address the fact that in actuality Applicant’s use of its mark in interstate commerce is nine months earlier than Aramark’s first use of its mark in interstate commerce, making Applicant the senior user who should be given any benefit of doubt.

In conclusion, Applicant is clearly entitled to prevail, and the mark should forthwith be published for opposition.

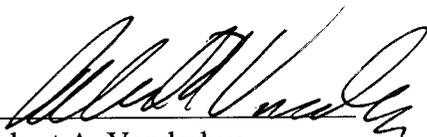
Respectfully submitted,



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Certificate of Mailing

I hereby certify that I mailed the foregoing Reply Brief, first class, postage prepaid, addressed to Commissioner of Trademarks, P O Box 1451, Alexandria, VA 22313-1451 the 25th day of November, 2014.



Robert A. Vanderhye