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HEALTH, Q - N/A

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**UNITED STATES PATENT AND TRADEMARK OFFICE**

**SERIAL NO:** 77/279955

**MARK:** NATURE-AID HEALTH, Q



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**APPLICANT:** Pineyro Vega, Liliana

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	Liliana Pineyro Vega	:	BEFORE THE
Trademark:	<b>NATURE-AID HEALTH, QUALITY, TECHNOLOGY and Design</b>	:	TRADEMARK TRIAL
Serial No:	77279955	:	AND
Attorney:	Andrew D. Glasgow	:	APPEAL BOARD
Address:	Atlas Advocate International Law Firm, P.C. 239 Fourth Avenue Investment Building, Suite 1207 Pittsburgh, PA 15222	:	ON APPEAL

**EXAMINING ATTORNEY'S APPEAL BRIEF**

Applicant has appealed the Trademark Examining Attorney's final refusal to register the trademark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and

Design on the ground that the mark, under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), is likely to be confused with U.S. Registration No. 0932491.

## I. FACTS

Applicant, Liliana Pineyro Vega, applied for registration on the Principal Register of the trademark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and Design for “natural food supplements” in International Class 5 and disclaimed the wording HEALTH, QUALITY, TECHNOLOGY apart from the mark. The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act based on the word mark NATURADE for “medicinal preparations; namely, chlorophyll compositions, vitamins and vitamin formulations, minerals and mineral formulations, nutritional supplements, amino acid tablets; cold aids; energy tonics; laxatives; digestive enzymes; constipation aids; expectorants; and diuretics.” This appeal now follows the Trademark Examining Attorney’s final refusal under Section 2(d) of the Trademark Act.

## II. THE MARKS OF APPLICANT AND REGISTRANT ARE IDENTICAL IN DOMINANT PORTION AND THE GOODS ARE CLOSELY RELATED SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION, MISTAKE, OR DECEPTION UNDER SECTION 2(d) OF THE TRADEMARK ACT

The Court in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (CCPA 1973), listed the principal factors to be considered in determining whether there is a likelihood of confusion under Section 2(d) of the Trademark Act. Any one of the factors listed may be dominant in any given case, depending upon the evidence of record. In this case, the following factors are the most relevant: similarity of the marks, similarity of the goods, and similarity of trade channels of the goods.

Any doubt as to the issue of likelihood of confusion must be resolved in favor of the registrant and against the applicant who has a legal duty to select a mark that is dissimilar to trademarks already being used. *See In re Hyper Shoppes (OHIO), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

**A. The marks are identical in dominant portion and confusingly similar.**

The marks must be compared for similarities in sound, appearance, meaning, or connotation. *E.I. du Pont de Nemours*, 476 F.2d 1357. Similarity in any one of these elements is sufficient to find a likelihood of confusion. *In re Mack*, 197 USPQ 755 (TTAB 1977). The test of likelihood of confusion is not whether the marks can be distinguished when subjected to a side-by-side comparison. Instead, the issue is whether the marks create the same overall impression. *Visual Information Institute, Inc. v. Vicon Industries Inc.*, 209 USPQ 179 (TTAB 1980). Thus, the primary focus is on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks. *Chemetron Corp. v. Morris Coupling and Clamp Co.*, 203 USPQ 537 (TTAB 1979). When an applicant's mark is compared to the registered mark, "the points of similarity are of greater importance than the points of difference." *Esso Standard Oil Co. v. Sun Oil Co.*, 229 F.2d 37 (D.C. Cir.), *cert. denied*, 351 U.S. 973 (1956).

The applicant seeks to register the mark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and Design. The registered mark is NATURADE (typed). The applicant's mark is identical in dominant portion and highly similar in appearance, meaning, connotation and commercial impression to the registered mark.

The registrant's mark is in typed form, which means that the mark may be displayed in any lettering style. 37 C.F.R. §2.52(a). The rights associated with a mark in typed or standard character form reside in the wording itself, and the registrant is free to adopt any style of lettering, including lettering identical to that used by the applicant. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991). Thus, the applicant's presentation of her mark in special form does not obviate confusion.

**1. The Dominant Portion of the Applicant's Mark Is the Wording NATURE-AID Rendering it Confusingly Similar to the Registered Mark NATURADE**

The law is clear that marks may still be confusingly similar notwithstanding the addition, deletion or subtraction of letters or words. *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988). "It is not necessary for similarity to go only to the eye or the ear for there to be infringement. The use of a designation which causes confusion because it conveys the same idea, or stimulates the same mental reaction, or has the same meaning is enjoined on the same basis as where the similarity goes to the eye or the ear." *Standard Oil Co. v. Standard Oil Co.*, 116 USPQ 176 (10th Cir. 1958). The applied-for mark contains the wording NATURE-AID HEALTH, QUALITY, TECHNOLOGY, and the wording NATURE-AID is the dominant portion of the mark.

Although the marks are compared in their entireties under a Section 2(d) analysis, one feature of a mark may be recognized as more significant in creating a commercial impression. It is well established that "in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties." *In re National*

*Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). For instance, “[t]hat a particular feature is descriptive or generic with respect to the involved goods... is one commonly accepted rationale for giving less weight to a portion of a mark.” *Id.* Accordingly, there is nothing improper in giving less weight to the descriptive and disclaimed terms HEALTH, QUALITY, TECHNOLOGY and more weight to the term NATURE-AID as the dominant term in the applicant’s mark, when consideration is given to the similarity of the marks in their entireties.

In addition, NATURE-AID, a phonetic equivalent of the only word in the registered mark NATURADE, is “the first word” in the applicant’s mark, a factor that makes “the marks similar.” *See, e.g., Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (noting the presence of a distinctive term as the first word in both parties’ marks renders the marks similar, especially where an additional term does not have source-identifying significance). Moreover, it is the first and distinctive term NATURE-AID that is more likely to be impressed upon consumers. *Presto Prods, Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Indeed, the fact that two marks share the same first word is generally “a matter of some importance since it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered.” *Id.* The first word, and dominant portion, of both parties’ marks sounds the same when spoken.

Likewise, the design portion of the applicant’s mark is not given as much weight when comparing the marks. *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1596

(TTAB 1999). Here, the design portion of the applied-for mark features a basic circle carrier containing a plant and a border with the wording NATURE-AID in large, bolded font. A banner appears across the bottom with the comparatively diminutive wording HEALTH, QUALITY, TECHNOLOGY.

There is nothing about the design portion of the applicant's mark that appreciably slows notice or comprehension of the literal portion. Overall, the design is not especially intricate, and the plant serves only to reinforce that the goods are derived from nature. Even if a consumer were to see the plant first, one's eyes immediately move to the dominant, contrasting, red letters that surround the plant. Additionally, it is this literal portion NATURE-AID that customers would typically use when calling for or otherwise referring to the applicant's goods. *In re Appetito Provisions Co. Inc.*, 3 USPQ2d 1553 (TTAB 1987). This bold wording NATURE-AID, thus, constitutes the dominant portion of the applicant's mark. Consequently, there is nothing improper in giving less weight to the design portion of the applicant's mark in determining that the marks in their entirety are substantially similar.

Distinguishing *In re Dixie Restaurants Inc.*, 105 F.3d 1405 (Fed. Cir. 1997), the applicant argues that the design portion of the applied-for mark was not accorded proper weight because her design is more "complex" than a geometric carrier. Although *Dixie Restaurants* dealt with a mark featuring a diamond design, it in no way limits the analysis of giving less weight to the design portion to only those marks with carriers as designs as opposed to those marks that feature more "complex" designs. In fact, it has been long settled that the word portion of a mark is the dominant portion, even when such mark contains a more "complex," non-carrier design portion. *See Amoco Oil Co. v. Amerco*,

*Inc.*, 192 USPQ 729 (TTAB 1976) (AMERCO and wheel design found likely to cause confusion or mistake with AMOCO and AMERICAN).

In light of the foregoing, when taken as a whole, the marks are highly similar and, thus, likely to be confused. This weighs in favor of finding a likelihood of confusion.

**B. The goods are closely related.**

It is well settled that the issue of likelihood of confusion between marks must be determined on the basis of the goods as they are identified in the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Accordingly, without limitations or restrictions as to their channels of trade or classes of purchasers, the goods must be deemed to be promoted in the same channels of trade and directed to the same purchasers. *Interstate Brands Corp. v. McKee Foods Corp.*, 53 USPQ2d 1910 (TTAB 2000).

Here, the applicant's "natural food supplements" are closely related to the registrant's "medicinal preparations; namely, chlorophyll compositions, vitamins and vitamin formulations, minerals and mineral formulations, nutritional supplements, amino acid tablets; cold aids; energy tonics; laxatives; digestive enzymes; constipation aids; expectorants; and diuretics" and specifically to "nutritional supplements." Both the applicant's and the registrant's goods are health supplements. Neither identification limits the channels of trade or class of purchasers of the identified goods. Thus, it is presumed that these goods travel in the same channels of trade and are available to the same consumers.

Additionally, the evidence of record shows that the applicant's goods are closely related to the registrant's "nutritional supplements." For example, the record contains numerous third-party registrations showing the relatedness of the applied-for and cited goods, including,<sup>1</sup>

THE RIGHT FAT DIET, U.S. Registration No. 2573983 (p. 2), for, *inter alia*, "**food supplements for humans, namely**, dietary food supplements, herbal supplements, **nutritional supplements**, vitamin and mineral supplements, **natural food supplements**, natural vegetable oils for use as food supplements;"

MASTER NUTRIENT FORMULA, U.S. Registration No. 2257021 (p. 4), for "**Food supplements for humans, namely**, dietary food supplements, herbal supplements, **nutritional supplements**, vitamin and mineral supplements, **natural food supplements**, natural vegetable oils for use as food supplements;"

D8-INSINOL BLEND, U.S. Registration No. 3411062 (p. 14), for "**nutritional supplements for humans, namely**, dietary food supplements, herbal supplements, **nutritional supplements**, vitamin and mineral supplements, **natural food supplements**;"

JUDY SINGER, U.S. Registration No. 2824002 (p. 16), for "**nutritional supplements for humans, namely**, dietary food supplements, herbal supplements, **nutritional supplements**, vitamin and mineral supplements, **natural food supplements**;"

HOLLYWOOD METAMIRACLE, U.S. Registration No. 2617578 (p. 6), for, *inter alia*, **natural food supplements** and **nutritional supplements**; and

NP NATURAL POWER, U.S. Registration No. 2860665 (p. 9), for, *inter alia*, **nutritional supplements** and **natural food supplements**.

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<sup>1</sup> The specified page numbers pertain to the July 16, 2008, final Office action and to the page in the electronic record (TICRS or TDR) on which the reference can be found. The Office action, in its entirety, is page 1 and the supporting evidence begins with page 2.

Third-party registrations that individually cover a number of different goods and that are based on use in commerce serve to suggest that the listed goods therein are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Furthermore, the final Office action included online articles defining natural food supplements and relating them to nutritional supplements. For example, the Wikipedia article *Dietary supplement* (p. 50) explains that a dietary supplement is “also known as [a] food supplement or nutritional supplement.” These supplements are “intended to provide nutrients, such as vitamins, minerals, fatty acids or amino acids, that are missing or are not consumed in sufficient quantity in a person’s diet.” The article *Nutritional Supplements* from the Holistic Pediatric Association web site (p. 40) states that nutritional supplements come in the form of synthetic and “natural food supplements.” This is further supported by answerbag’s “Medical conditions and procedures” web page (p. 44), which defines nutritional supplements as encompassing natural food supplements (“Nutritional supplements include vitamins, minerals, herbs, meal supplements, sports nutrition products, natural food supplements...”). This market evidence tends to show that natural food supplements and nutritional supplements are closely related.

In her brief, the applicant argues that her goods (natural food supplements) are not related to the registered goods (*inter alia*, nutritional supplements) because natural foods are foods that are minimally processed. However true this may be, it is not at issue in this case. The application identifies the goods as “natural food *supplements*,” not as natural foods. There is a significant distinction between a food and a food supplement.

According to Merriam-Webster,<sup>2</sup> a supplement is defined as “something that completes or makes an addition; dietary supplement.” A dietary supplement is defined as “a product taken orally that contains one or more ingredients (as vitamins or amino acids) that are intended to supplement one’s diet and *are not considered food.*” (Emphasis added). “The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.” *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 942 (Fed. Cir. 1990) (citations omitted). The applicant’s identified goods are natural food *supplements*, which are products that supplement one’s diet; the identified goods are not foods themselves.

The applicant also provides examples of what the registrant’s identified goods actually are in the marketplace. The applicant argues that the products shown on the registrant’s web site, which is not of record, show that the registered mark is actually used on “weight gain/loss powders, protein powders, sports nutrition products, herbal cough and cold products, and other similar products.” Essentially, the applicant attempts to impermissibly restrict the scope of the goods covered in the cited registration by extrinsic argument and evidence where the identification of goods in the cited registration is not so restricted. *In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986). It is well settled that the issue of likelihood of confusion between marks must be

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<sup>2</sup> The Examining Attorney requests that the Board take judicial notice of the attached dictionary definitions for the words “supplement” and “dietary supplement” from Merriam-Webster’s Online Dictionary. The Board may take judicial notice of dictionary definitions. TBMP §1208.04.

determined on the basis of the goods as they are identified in both the application and the registration. *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, the applicant's attempt to restrict the registered goods further than the four corners of the registration is unavailing. A likelihood of confusion analysis is constrained to a comparison of the applicant's identified goods with those set out in the cited registration and without reference to any limitations which may exist in the marketplace.

Also with her brief, the applicant submitted information regarding purported third-party usage of the applied-for mark. This submission is untimely because the evidentiary record should be complete prior to the filing of an *ex parte* appeal to the Board. 37 C.F.R. §2.142(d). See TBMP §1207.01; *In re Trans Continental Records Inc.*, 62 USPQ2d 1541 (TTAB 2002). Even were it determined that the applicant's submission is timely, it is not probative because no printouts or other materials were submitted. Because there is no evidentiary basis on which to support this claim, this additional evidence cannot be considered. Finally, even if it were determined this third-party usage is both a registered mark and confusing, it is no defense to register yet another confusingly similar mark. *AMF Inc. v. American Leisure Products, Inc.*, 177 USPQ 268, 269 (C.C.P.A. 1973).

The evidence of record shows that the goods are closely related. Thus, the factor of the relatedness of the goods favors a finding of likelihood of confusion.

### **III. CONCLUSION**

Because the marks are identical in dominant portion and the goods are closely related, consumers encountering the applicant's mark and the registered mark in the marketplace are likely to mistakenly believe that the goods emanate from a common source. For the foregoing reasons, the refusal to register under Section 2(d) of the Trademark Act should, therefore, be affirmed.

Respectfully submitted,

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