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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vega

Serial No. 77279955

Liliana Pineyro Vega, pro sé.¹

Leigh A. Lowry, Trademark Examining Attorney, Law Office
115 (Thomas V. Vlcek, Managing Attorney).

Before Cataldo, Taylor and Bergsman, Administrative
Trademark Judges.

Opinion by Taylor, Administrative Trademark Judge:

Liliana Pineyro Vega has filed an application to
register on the Principal Register the mark shown below



¹ Andrew D. Glasgow of Atlas Advocate International Law Firm, P.C. prosecuted the application on applicant's behalf. However applicant, herself, filed the notice of appeal and appeal brief.

for "natural food supplements" in International Class 5.² The words "Health," "Quality" and "Technology" have been disclaimed.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark is likely to be confused with the mark in U.S. Registration No. 0932491, NATURADE (in typed format), 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" in International Class 5.³

When the refusal was made final, applicant appealed. Both applicant and the examining attorney filed briefs. We affirm the refusal to register.

Before we begin our likelihood of confusion analysis, we must discuss an evidentiary matter. The examining attorney has objected to the submission by applicant of "information"⁴ regarding third-party usage of the mark

² Serial No. 77279955, filed September 14, 2007, and alleging a bona fide intention to use the mark in commerce.

³ Issued April 18, 1972; second renewal June 7, 2002.

⁴ The submission consisted of the URL address for a purported third-party use of the mark "NATURE'S AIDE" for supplements and

"NATURE'S AIDE" for the first time in her brief. Inasmuch as "[t]he record in the application should be complete prior to the filing of an appeal," we find the submission untimely. 37 C.F.R. § 2.142(d). We add that even if the submission had been timely, it would be of little probative value because applicant did not submit the actual web pages. Accordingly, the examining attorney's objection is sustained and this new evidence, and related arguments, have not been considered in this decision.⁵

Turning now to the merits of the appeal, our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co.*,

vitamins, as well as an explanation that the mark is advertised as a registered trademark of N.M.N. Vitamins, Inc., a Connecticut corporation.

⁵ Also, consideration of this evidence and argument would not have altered our decision herein. Applicant argues that although it did not locate the NATURE'S AIDE trademark in the Trademark Electronic Search System, if it is indeed a registered trademark, then it was allowed to register despite being identical in sound, connotation and commercial impression to the cited mark. Thus, applicant contends, "it would be fair to allow Applicant's Mark to register." Applicant's brief p. 8. Although applicant's argument is merely hypothetical, we nonetheless point out that even if the Office had registered such a similar registration, the Board is not bound by such registration as each case must be determined on its own merits. *In re Nett Designs Inc.*, 235 F.3d 1339, 57 USPQ 1564, 1566 (Fed. Cir. 2001).

Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn first to a consideration of the goods. Since the examining attorney focused her discussion on nutritional supplements in the cited registration, we will do the same. It is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods recited in applicant's application vis-à-vis the goods recited in the registration. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, it is a general rule that applicant's goods and registrant's goods do not have to be identical or directly competitive to support a finding that there is a likelihood of confusion. It is sufficient if the respective products are related in some manner and/or that the conditions surrounding their marketing are such that they would be

encountered by the same persons under circumstances that could, because of the similarity of the marks used in connection therewith, give rise to the mistaken belief that they emanate from or are associated with a single source. In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785 (TTAB 1993); In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

The examining attorney argues that applicant's "natural food supplements" are closely related to registrant's "nutritional supplements," both being dietary health supplements. The examining attorney attached to her brief definitions of the terms "supplement," and "dietary supplement" from Merriam Webster Online, of which we take judicial notice.⁶ "Supplement" is defined in pertinent part as "b: DIETARY SUPPLEMENT" and "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."

The examining attorney additionally submitted definitions of "diet supplement" from online sources which

⁶ From the website www.merriam-webster.com and retrieved on May 2, 2009. The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format. See In re CyberFinancial.Net Inc., 65 USPQ2d 1789 (TTAB 2002). See also University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

discuss natural food and/or nutritional supplements. For example, a definition taken from the website Wikipedia, [www.wikipedia.org/Nutritional supplement](http://www.wikipedia.org/Nutritional%20supplement) - retrieved July 16, 2008, states that "[a] dietary supplement, also known as food supplement or nutritional supplement, is a preparation intended to supply 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." An article entitled *Nutritional Supplements* from the Holistic Pediatric Association website, retrieved from a search of the Google search engine for the terms "nutritional supplements natural food supplements" on July 16, 2008, indicates that nutritional supplements come in the form of synthetic and "natural food supplements."⁷

The examining attorney also made of record copies of eight use-based, third-party registrations to show that

⁷ The examining attorney also submitted the definition of "nutritional supplement" from the website Answerbag (www.answerbag.com - retrieved July 16, 2008) retrieved as a result of the query, "What are nutritional supplements?." The definition reads in part:

Nutritional supplements include vitamins, minerals, herbs, meal supplements, sports nutrition products, natural food supplements and other related products used to boost the nutritional content of the diet.

The article, however, indicates that: "Answerbag cannot guarantee the accuracy of answers submitted by members, and we recommend that you use common sense when following any advice found here." Accordingly, we have considered the definition as merely corroborating the other definitions of record.

various trademark owners have adopted a single mark for goods of the kind that are identified in both applicant's application and the cited registration, namely natural food supplements and nutritional supplements. These third-party registrations may serve to suggest that the types of goods involved herein are related. See *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (although third-party registrations are "not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source"). See also *In re Albert Trostel & Sons Co.*, 29 USPQ2d at 1785.

These registrations are as follows:

Registration No. 2573983 for the mark THE RIGHT FAT DIET for, *inter alia*, food supplements for humans, namely, nutritional supplements and natural food supplements;

Registration No. 2257021 for the mark MASTER NUTRIENT FORMULA for, *inter alia*, food supplements for humans, namely, nutritional supplements and natural food supplements;

Registration No. 2617578 for the mark HOLLYWOOD METAMIRACLE for, *inter alia*, nutritional supplements and natural food supplements;

Registration No. 2860665 for the mark NP NATURAL POWER and design for, *inter alia*, nutritional supplements and natural food supplements;

Registration No. 3335728 for the mark VITALGLO for, *inter alia*, nutritional supplements for humans, namely, nutritional supplements and natural food supplements;

Registration No. 3411062 for the mark D8-INSINOL BLEND for, *inter alia*, nutritional supplements for humans, namely, nutritional supplements and natural food supplements;

Registration No. 2824002, for the mark JUDY SINGER, for, *inter alia*, nutritional supplements for humans, namely, nutritional supplements and natural food supplements; and

Registration No. 3451186, for the mark PLUSEPA for, *inter alia*, food supplements, namely whole natural food supplements and nutritional supplements, namely, nutritional supplements containing extracts of plants and herbs.⁸

We find the definitions and third-party registrations are sufficient to demonstrate that applicant's and registrant's goods are closely related, both being dietary supplements intended for the same purpose, i.e., to supplement to the user's diet.

Applicant argues that her products are "very different" from those of the registrant. Registrant's goods being weight gain/loss powders, protein powders, sports nutrition products, herbal cough and cold products, and other similar products, i.e., nutritional supplements,

⁸ The examining attorney also submitted seven third-party registrations (Registration Nos. 3168270, 3393223, 3306929, 3445275, 3407254, 3458118 and 3469767) for marks that include both food supplements (which, as so identified, is broad enough to encompass natural food supplements) and nutritional supplements.

while applicant's products are natural food supplements.

Citing to a URL address for the website Wikipedia⁹,

applicant contends:

In other words, NATURADE products are nutritional supplements, while 'NATURE-AID' products are natural food supplements. While nutritional supplements deal with nutrients, natural foods are minimally processed and, based on this distinction, there is no likelihood of confusion between the products.

Applicant's brief p. 7. This argument is not well taken.

First, applicant did not provide a copy of the definition taken from the Wikipedia website and applicant's unsupported contention has no evidentiary value. Moreover, even if the definition was of record and it is true that natural foods are minimally processed, such a fact is not persuasive on the issue of likelihood of confusion in this case. As stated, our determination of the relatedness of the applicant's and registrant's goods is based on a comparison of the goods as identified in applicant's involved application and the cited registration, and not on what any evidence (or argument) may reveal as to the actual nature of the respective goods. *Canadian Imperial Bank v. Wells Fargo Bank*, 1 USPQ2d at 1815; and *Octocom Systems*,

⁹ The referenced website is <http://en.wikipedia.org/>. This is the website from which applicant presumably retrieved a definition of the term natural foods and/or nutritional supplements.

Inc. v. Houston Computer Services, Inc., 918 F.2d 937, 942 (Fed. Cir. 1990). In this case, applicant's goods are identified as natural food *supplements*, not natural foods, and registrant's goods are identified as nutritional supplements, not weight gain/loss powders, protein powders, sports nutrition products, herbal cough and cold products, and other similar products. As indicated previously, food supplements are not food. In addition, applicant may not restrict the scope of registrant's goods by extrinsic evidence. In re Bercut-Vandervoort & Co., 229 USPQ 763, 764 (TTAB 1986).

Furthermore, in the absence of any limitations to the goods recited in applicant's application and the cited registration, we must presume that both applicant's and registrant's goods will be offered in the same channels of trade, e.g., drug stores, specialty nutrition stores and grocery stores, and to the same classes of purchasers seeking such supplements. See In re Elbaum, 211 USPQ 639, 640 (TTAB 1981). In view of the above, the *du Pont* factors of the relatedness of the goods, channels of trade and classes of purchasers strongly favor a finding of likelihood of confusion.

We now consider applicant's mark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and design with the registered mark

NATURADE. In determining the similarity or dissimilarity of the marks, we must consider them in their entirety in terms of sound, appearance, meaning and commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entirety that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general, rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

The examining attorney argues that "applicant's mark is identical in dominant portion and highly similar in appearance, meaning, connotation and commercial impression to the registered mark." Examining attorney's brief (unnumbered) p. 2. Opposer, on the other hand, maintains that the "Trademark Examining Attorney never analyzed the design feature of Applicant's mark. Instead, [the] Trademark Examining Attorney insisted on giving greater weight to the dominant word feature in determining likelihood of confusion." Applicant's brief p. 6.

Although we must compare the marks in their entireties, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985) ("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."). For instance, "that a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark..." *Id.*, 224 USPQ at 751.

We find that the dominant and distinguishing portion of applicant's mark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and design is the word "NATURE-AID." The words HEALTH, QUALITY AND TECHNOLOGY, as evidenced by the disclaimer and the definitions submitted by the examining attorney with her first Office action, are merely descriptive of qualities and/or features of applicant's goods. In particular, these terms describe that applicant's goods are "good for people" (health), are of the "highest or finest

standard" (quality), and "appl[y] technical knowledge."¹⁰ As such, these terms would not be looked to as source-identifying elements. Further, the font style of the words in applicant's mark is not a distinguishing feature because registrant's mark is registered in typed format and, as such, registrant's rights therein encompass the word NATURADE and are not limited to the depiction thereof in any special form. See *Phillips Petroleum Co. v. C. J. Webb, Inc.* 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Instead, when a registration for a word mark is in typed form, "then the Board must consider all reasonable manners in which ... [the word] could be depicted." *INB National Bank v. Metrohost Inc.*, 22 USPQ 1585, 1588 (TTAB 1992). Therefore, registrant's mark must be regarded as including the display thereof in the same lettering style used by applicant, since such would be a reasonable manner of display and there is no showing by applicant that the lettering format is unusual or otherwise unique.

Nor do we find the design sufficient to distinguish applicant's mark from the registrant's mark. It is settled that with a composite mark comprising a design and words,

¹⁰ The definitions (in pertinent part) were taken from the msn encarta dictionary (<http://encarta.msn.com/encnet/features/Dictionary>) and retrieved on December 19, 2007.

the word portion of the mark is usually the one most likely to indicate the origin of the goods to which it is affixed. *CBS, Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983); and *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593 (TTAB 2001) ("words are normally accorded greater weight because they would be used by purchasers to request the goods"). The concentric circles, even though displayed in the colors yellow and grey, have minimal visual impact, merely serving to frame the wording NATURE-AIDE and the leaf design. Similarly, the green banner, located at the bottom of the circles and upon which the words HEALTH, QUALITY, TECHNOLOGY are displayed, simply acts as a carrier for those words and, while noticeable, has little visual impact. We find this especially so given the larger font size of the wording NATURE-AID, as compared to the font size in which the wording HEALTH, QUALITY, TECHNOLOGY are displayed, and the placement of the banner. Further, the green-colored leaf design simply enhances the meaning of the wording NATURE-AIDE. In other words, we find that the dominant part of applicant's mark, and the part of applicant's mark that consumers are likely to recall, is the name "Nature-aide."

The dominant portion of applicant's mark is substantially similar to the cited mark. This is so

because, as the examining attorney points out, NATURE-AIDE and NATURADE are phonetic equivalents, which will be pronounced identically. See *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980) (similarity in sound alone may be sufficient to support a finding of likelihood of confusion). See also, for example, *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469 (TTAB 1975); and *In re Cresco Mfg. Co.*, 138 USPQ 401 (TTAB 1963). We find that neither the fanciful spellings of both marks, nor the addition of the hyphen in applicant's mark or the deletion of the space between the terms "natur[e]" and "ade" in applicant's mark, are sufficient to distinguish the marks as to appearance. In addition, due to the similarity in sound and appearance of the shared term NATURADE/NATURE-AID, we find the marks similar in meaning and commercial impression. For this reason, purchasers of nutritional supplements who are familiar with registrant's NATURADE mark may view applicant's NATURE-AIDE HEALTH, QUALITY, TECHNOLOGY and design as a variant thereof, and that such mark identifies a line of natural food supplements sponsored by or approved by registrant.

Applicant, distinguishing *In re Dixie Restaurants Inc.*, 105 F.3d 1405 (Fed. Cir. 1997), contends that the design portion of her mark was not accorded the appropriate

weight because her design is more "complex" than a geometric carrier. As the examining attorney aptly explains, "[a]lthough *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." Brief (unnumbered p. 4). Indeed, it is settled that the word portion of a mark carries more weight than the design portion and is more likely to be impressed upon a purchaser's memory and to be utilized in calling for and identifying the goods and services, even when such mark includes a more "complex," non-carrier design. See e.g., *Amoco Oil Co. v. Amerco*, 192 USPQ 729 (TTAB 1976) (AMERCO and wheel design found likely to cause confusion with AMOCO). Notably applicant did not challenge this underlying legal proposition.

In sum, while differences admittedly exist between the marks when viewed on the basis of a side-by side comparison, for the reasons discussed above, we find that, when viewed as a whole, applicant's mark and the cited registered mark are substantially similar in sound, appearance and connotation and convey the same overall commercial impression. See *Palm Bay Imports Inc. v. Veuve*

Clicuot Ponsardin, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). Accordingly, the factor of similarity of the marks favors a finding of likelihood of confusion.

Last, we find unavailing applicant's claim that a likelihood of confusion does not exist between its mark and the cited mark, because "NATURE-AID products are manufactured in Mexico, while NATURADE products originate in California, U.S. ... [and, t]hus, it is clear that NATURE-AID products target customers who look for Mexican natural foods, while NATURADE products target customers who look for domestic nutritional supplements." Applicant's brief p. 7. It is common knowledge that many products available in the United States marketplace are manufactured outside of the United States, and there is nothing in the record to suggest that the place of manufacture of either applicant's or registrant's supplements influences consumers' purchasing decisions.

After careful consideration of the arguments and the evidence of record, we conclude that purchasers familiar with registrant's nutritional supplements sold under the NATURADE mark would be likely to believe, upon encountering applicant's mark NATURE-AID HEALTH, QUALITY, TECHNOLOGY and design for natural food supplements, that such goods

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emanate from or are sponsored by or affiliated with the same source.

Decision: The refusal to register under Section 2(d) of the Trademark Act is affirmed.