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UNITED STATES PATENT AND TRADEMARK OFFICE

SERIAL NO: 77/519313

MARK: MINDPOWER

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GENERAL TRADEMARK INFORMATION:
http://www.uspto.gov/main/trademarks.htm

TTAB INFORMATION:
http://www.uspto.gov/web/offices/dcom/ttab/index.html

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EXAMINING ATTORNEY'S APPEAL BRIEF

I. ISSUE ON APPEAL

Applicant is appealing the Office's final refusal for likelihood of confusion between applicant's standard character mark, "MINDPOWER", for

Botanical extracts for use in the manufacture of nutraceuticals; plant extracts for use in the manufacture of pharmaceutical preparations in the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, tincture, suppositories and ampule for injection; botanical extracts for use in the manufacture of nutraceuticals and pharmaceuticals; botanical extracts for use in the manufacture of nutraceuticals and pharmaceuticals; chemical extracts and active principles extracted from medicinal plants for use in the manufacture of nutraceuticals and pharmaceuticals; chemical extracts and active principles extracted from medicinal plants for use in the pharmaceutical industry, namely, chemical agents made from botanical extracts or association of chemical extracts for use in the manufacture of pharmaceutical or nutraceutical products; botanical extracts used in preparations in the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, lozenges, inhalers, tincture, suppositories and ampule for injection; botanical extracts for use in the manufacture of preparations in the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, lozenges, inhalers, tincture, suppositories and ampule for injection; botanical extracts used in the manufacture of pharmaceutical preparations in the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, tincture, suppositories and ampule for injection; botanical extracts for use in the manufacture of pharmaceutical preparations in

the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, tincture, suppositories and ampule for injection; botanical extracts for use in making cosmetics; herbal extracts, botanical extracts, preparations, and blends, mushroom, fungus, or spore extracts or blends, for use in the manufacture of foods, functional foods, medicinal foods or beverages; herbal extracts and blends for use in the manufacture of medicinal foods or beverages; botanical extracts for use in the manufacture of pharmaceutical preparations in the form of lotions, creams, and topical analgesics and anesthetics, tablets, capsules, pills, tincture, suppositories and ampule for injection,

and the standard character mark in U.S. Registration No. 3372455, "MIND POWER RX", for "dietary and nutritional supplements", under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d).

II. RELEVANT PROCEDURAL HISTORY

In the first office action dated October 21, 2008, registration of applicant's mark was refused under Section 2(d) based on two registrations (U.S. Registration Nos. 3372455 and 2119897). In the second office action dated May 4, 2009, the refusal based on U.S. Registration No. 2119897 was withdrawn, and the refusal based on U.S. Registration No. 3372455 was made final. In the third office action dated November 17, 2009, applicant's request for reconsideration was denied. On April 25, 2010, after the case was appealed, the application was approved for publication in administrative error, and withdrawn from publication immediately thereafter.

Please note that the examining attorney objects to the evidence submitted with the applicant's brief and will address this issue in Section III of this brief.

III. APPLICANT'S MARK AND THE CITED MARK ARE HIGHLY SIMILAR IN OVERALL COMMERCIAL IMPRESSION AND THE GOODS ARE HIGHLY RELATED, SUCH THAT THERE EXISTS A LIKELIHOOD OF CONFUSION UNDER SECTION 2(d) OF THE TRADEMARK ACT.

Trademark Act Section 2(d) bars registration of an applied-for mark that so resembles a registered mark that it is likely that a potential consumer would be confused

or mistaken or deceived as to the source of the goods and/or services of the applicant and registrant. *See* 15 U.S.C. §1052(d). Any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); *see Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1025 (Fed. Cir. 1988).

A. THE MARKS ARE HIGHLY SIMILAR.

Here, applicant's mark, "MINDPOWER", and the cited mark, "MIND POWER RX", create highly similar commercial impressions, differing only in the space between "MIND" and "POWER" and the additional wording "RX" in the cited mark. Despite applicant's argument to the contrary, the extra space in the cited mark does not affect the overall commercial impression of the cited mark in meaning or sound, and barely in sight. *See* Appellant's Appeal Brief at p. 12. Applicant provided no details or evidence on how the two marks vary in meaning with MINDPOWER written as one word versus two words, and there appears to be none, in fact. There is no unique or hidden meaning whether MIND and POWER are combined or separated. Similarly, the difference in sound due to the additional space in the cited mark is a brief pause, at best, and might not even be noticeable. There is no correct pronunciation of a mark because it is impossible to predict how the public will pronounce a particular mark. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 484 (TTAB 1985); TMEP §1207.01(b)(iv); *see In re Energy Telecomm. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983). The MINDPOWER and MIND POWER wording in the respective marks in question could clearly be pronounced the same; such similarity in sound alone may be sufficient to support a finding of

likelihood of confusion. *See RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980); *Molenaar, Inc. v. Happy Toys Inc.*, 188 USPQ 469, 471 (TTAB 1975); TMEP §1207.01(b)(iv). Finally, the visual difference in a single embedded space is negligible; multiple spaces or an additional design would have been much more distinctive visually, for example.

As for the additional wording "RX" in the cited mark, it plays a very small role in indicating the source of the mark, because it is located at the end of the cited mark, disclaimed, and descriptive of a feature, use, purpose, and/or the nature of registrant's goods, "Dietary and nutritional supplements", i.e., registrant's supplements are remedies, cures, or solutions for the consumer's health disorders or problems. "RX" is defined as "A remedy, cure, or solution for a disorder or problem." Please see attached definition.[1] Despite applicant's claim, the whole of the proposed mark is still considered while applying the well-established rules that disclaimed matter tends to be less significant in a comparison of mark, *see In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060, 224 USPQ 749, 752 (Fed. Cir. 1985); TMEP §1207.01(b)(viii), (c)(ii)), and that consumers tend to focus on the first word, prefix or syllable in a mark, *see Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1372, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005); *see also Mattel Inc. v. Funline Merch. Co.*, 81 USPQ2d 1372, 1374-75 (TTAB 2006); *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). *See* Appellant's Appeal Brief at p. 10. When they are considered as whole marks, "MINDPOWER" and "MIND POWER RX" are highly similar when

[1] The examining attorney respectfully requests that the Board take judicial notice of the attached definition from *The American Heritage® Dictionary of the English Language*, also available in printed format. *See TBMP* §1208.04.

applied to the parties' goods, both of which purport to be solutions to health disorders or problems. Furthermore, the addition of the term "RX" creates no change in the overall commercial impression for the goods at hand.

Objection to Third Party Registration Evidence Attached to Brief

In a procedural error, applicant summarized and attached copies of third party registrations as evidence in its brief which had never been offered during examination. *See id.* at p. 12-15, 21-52. The examining attorney objects to such evidence for untimeliness, and respectfully asks the Board to not consider it. The evidentiary record in an application should be complete prior to the filing of an ex parte appeal to the Board. TBMP § 1207.01. Additional evidence filed after appeal normally will be given no consideration by the Board. *Id.* Applicant justified its new evidence as follows, "Since the Examining Attorney has raised the new issue of the probative value of the newly cited X-Search printouts and material obtained from the Internet, Applicant is compelled to respond with the relevant registrations set out below." *See* Appellant's Appeal Brief at p. 13. However, probative value of X-Search printouts and Internet evidence was not a new issue raised in the Request for Reconsideration Denied letter, to which applicant appeared to be referring. It had been raised in the Final Office Action issued on May 4, 2009. The examining attorney was simply supplementing the register to further the point that the goods at issue are related. The examining attorney has not broadened the scope of the reconsideration request by doing so. The same issue is still at bar. The applicant could have filed an official request for remand, but chose not to do so. TBMP § 1207.02. The applicant had ample opportunity to submit this evidence during the prosecution of this case, but chose not to do so. Good cause, therefore, does not exist.

Should the Trademark Trial and Appeal Board deny the objection stated above, the examining attorney will address applicant's third party registrations as follows: The co-existing third party registrations are distinguishable from this case. For instance, U.S. Registration Nos. 3683889 and 3329090 cover less related goods, nutritional goods for humans versus nutritional goods for plants, respectively; U.S. Registration Nos. 3138552 and 2851413 cover less related goods, micro organisms for water treatment versus chemicals for water treatment and plastic buoyant units for dispensing same, respectively. Quite clearly, the goods in most of the cited registrations are disparate and can co-exist in the marketplace.

B. THE GOODS ARE HIGHLY RELATED.

Applicant's extracts for nutritional supplements and related goods are highly related to registrant's nutritional supplements. The Trademark Trial and Appeal Board and its appeals court have applied a higher standard to likelihood of confusion cases involving medicinal and pharmaceutical products. Although physicians and pharmacists are no doubt carefully trained to recognize differences in the characteristics of pharmaceutical products, they are not trained to recognize the difference between similar trademarks used on such products. Any confusion involving such goods could give rise to serious and harmful consequences such as mistakenly choosing wrong medication. *See Glenwood Labs., Inc. v. Am. Home Prods. Corp.*, 455 F.2d 1384, 1386, 173 USPQ 19, 21 (C.C.P.A. 1972); *Alfacell Corp. v. Anticancer Inc.*, 71 USPQ2d 1301, 1305-06 (TTAB 2004); *Blansett Pharmacal Co. v. Camrick Labs., Inc.*, 25 USPQ2d 1473, 1477 (TTAB 1992). Thus, a lower threshold of proof is applied in assessing confusing

similarity with respect to drugs and medicinal products. Here, as applicant's goods are pharmaceutical products, a lower likelihood of confusion needs to be shown.

Applicant claimed that registrant's goods are sold in "drug stores, health food stores and the like" and unrelated to its own goods which are sold to "manufacturers of medicinal, pharmaceutical, herbal and food products"; yet, it provides no supporting evidence, even relating to its own customers. *See* Appellant's Appeal Brief at p. 15. Further, registrant's identification for "dietary and nutritional supplements" is *not* restricted as to channels of trade and, in turn, could be sold to the same herbal product manufacturers as are applicant's goods, for instance. A determination of whether there is a likelihood of confusion is made solely on the basis of the goods identified in the application and registration, without limitations or restrictions that are not reflected therein. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1595 (TTAB 1999); *see* TMEP §1207.01(a)(iii). If the cited registration describes the goods broadly and there are no limitations as to their nature, type, channels of trade or classes of purchasers, then it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all potential customers. *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981); TMEP §1207.01(a)(iii).

Again, any goods or services in the registrant's normal fields of expansion should be considered when determining whether the registrant's goods are related to the applicant's goods. TMEP §1207.01(a)(v); *see In re 1st USA Realty Prof'ls, Inc.*, 84 USPQ2d 1581, 1584 (TTAB 2007). Evidence that third parties offer the goods of both registrant and applicant, attached to earlier office actions in this case from X-Search and

the Internet, suggest that it is likely that registrant would expand their business to include applicant's goods. In that event, customers are likely to believe the goods at issue come from, or are in some way connected with, the same source. *In re 1st USA Realty Prof'ls*, 84 USPQ2d at 1584 n.4; *see* TMEP §1207.01(a)(v).

For examples of this, please see U.S. Registration Nos. 3431941, 3468585, 3417730, 3107453, 2883022, 3080354, 3004926, 3000807, 3330536, 3357139, 3562516, 3317654, 3578148, and 3599419 attached to the Final Office Action dated May 4, 2009. Also, please see the Internet evidence attached to same, including the webpages from www.wholefoodsmarket.com, www.swansonvitamins.com, www.nowfoods.com, and www.theorganicpages.com that show both dietary/nutritional supplements and extracts making the same.

Applicant went on to argue that its purchasers are "sophisticated individuals", and that registrant's purchasers are "more-or-less impulse purchasers". *See* Appellant's Appeal Brief at p. 17. Again, applicant failed to provide any evidence of either party's purchasers. Assuming applicant's characterization of the parties' purchasers is accurate, registrant's impulse purchases should serve as the basis for the comparison. When the relevant consumer includes both professionals and the general public, the standard of care for purchasing the goods is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). The risk of likelihood of confusion is increased for inexpensive products that are purchased on impulse. Therefore, in a likelihood of confusion determination, purchasers of such products are held to a lesser standard of purchasing care. *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000); *Specialty Brands, Inc. v. Coffee Bean*

Distribs., Inc., 748 F.2d 669, 672, 223 USPQ 1281, 1282 (Fed. Cir. 1984). In this case, the bar for the purchasing care of the parties' purchasers is low, like the bar for proof of the likelihood of confusion, thus leading to the easy conclusion that confusion of the subject marks is likely.

IV. CONCLUSION

Accordingly, the refusal for likelihood of confusion between applicant's mark and the mark in U.S. Registration No. 3372455, under Trademark Act Section 2(d), 15 U.S.C. Section 1052(d), should be affirmed.

Respectfully submitted,

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