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

Proceeding	91219888
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Attachments	FINAL 4Life (Renuvo) v. Senuvo -- Reply in Support of Motion to Dismiss Counterclaim.pdf(43380 bytes) Exhibit 1.pdf(359741 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

4Life Trademarks, LLC

Opposer,

v.

Senuvo, LLC

Applicant.

Opposition No. 91219888

Serial No. 86127647

For the mark: SENUVO

Published for Opposition:
June 24, 2014

**Opposer's Reply in Support of Opposer's Motion to Dismiss and
Response in Opposition to Applicant's Cross-Motion to Amend Answer and Counterclaim**

Opposer 4Life Trademarks, LLC ("Opposer") submits this reply in support of Opposer's Motion to Dismiss the Counterclaim of Applicant Senuvo, LLC ("Applicant") and Opposers' response in opposition to Applicant's Cross-Motion to amend Applicant's answer and counterclaim.

Applicant's most recent filing is unsupported by any citation to supporting case law, and it also lacks both reason and logic. Opposer has searched in vain for any case law, and indeed is unaware of any instance, where an applicant, having been opposed, actually tries (much less successfully tries) to amend both the opposer's registration and the applicant's application to add a restriction limiting both *to the exact same channel of trade*, and thereafter the applicant claims that this amendment refutes, rather than supports, a likelihood of confusion. The requested amendment has the opposite effect to the one claimed by Applicant. By admitting that the parties' goods are marketed and sold via the very same channel of trade, namely network marketing, Applicant has confirmed within the goods description one of the many factors that makes confusion likely here. Such an amendment to Applicant's defective pleading would be futile.

A simple hypothetical demonstrates how misguided Applicant's attempt is. Suppose a retailer who sells its products through its own retail stores files an opposition against an application by another retailer who sells similar products under the same or a confusingly similar mark through the applicant's own retail stores. In defense, the applicant then claims that all that is necessary to avoid a likelihood of confusion is to amend the applicant's application and the opposer's registration to add the phrase "as sold in one's own retail stores." Obviously, with

consumers moving from store to store, such a restriction would not avoid a likelihood of confusion, and the Board would easily reject it.

Here, Applicant is making the same argument by attempting to add the phrase “marketed via network marketing” to the end of the identification of goods in both Applicant’s application and Opposer’s registration. Applicant’s faulty argument is that there is “no chance” for confusion because the parties each have certain policies restricting the circumstances in which each party’s distributors may market and sell the products of others.¹ Dkt. 8, p. 3-4. Applicant ignores one of the key reasons why the USPTO does not register marks that are likely to cause confusion with each other—namely, to protect consumers from confusion.² Regardless of restrictions on distributors, consumers familiar with Opposer’s mark who then encounter Applicant’s mark (via a distributor, online, etc.) are still likely to be confused. Distributors who sell certain products today, may handle different products tomorrow. Thus, Applicant’s odd argument is transparently and fatally flawed.

While Applicant’s argument is odd, it is not unprecedented. Others have raised basically the same argument unsuccessfully. The Board already has rejected the argument that Applicant is making. In the case of *In re AgriGuardian Marketing, LLC*, Ser. No. 85428371 (TTAB May 9, 2014) (not precedential),³ the applicant argued that the parties had “totally different distribution networks” because the registrant’s goods were sold through “a multilevel distribution network” and the applicant’s goods also were sold through its own independently contracted distributors. *Id.* at *11-12. The applicant argued that this meant there was “no overlap” in the sales channels. *Id.* at *12. The Board quickly rejected the applicant’s argument and found it “not persuasive.” *Id.* The Board reasoned that “circumstances may change when a dealer finds that it is commercially

¹ Even if the proper focus was on the restrictions imposed on the parties’ respective distributors (rather than consumer confusion), Applicant’s argument is still misguided. Even assuming the policies that Applicant cites could be considered at the pleading stage (they cannot), such policies place only certain restrictions on the parties’ distributors, such as requiring distributors to display products separately, not offering competitors’ products at company events, and not offering products “in conjunction with” the products of others. [See Dkt. 8, p. 3-4.] These are hardly restrictions that would prevent a distributor of one party’s products from also selling the other party’s products.

² See 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 2:9 (4th ed.) (“Today, the keystone of [trademark law] is the avoidance of a likelihood of confusion in the minds of the buying public.”); 1-1 GILSON ON TRADEMARKS § 1.03 (“Trademark law protects the public from confusion and deception and makes it easier for consumers to choose the products and services they want.”).

³ Under the Board’s rules, non-precedential decisions “may be cited for whatever persuasive weight to which they may be entitled.” TBMP § 101.03. Pursuant to the same rule, Opposer is attaching any copies of any non-precedential decisions cited herein as Exhibit 1 hereto.

expedient to handle both types of goods, or as a result of terminated contracts or shifting loyalties.” *Id.* The Board ultimately affirmed the examining attorney’s finding of a likelihood of confusion.

The same reasoning also applies in this case. Just because parties use their own distribution networks does not mean that a distributor will not offer or sell both parties’ products or later become a distributor of the other party’s products. More importantly, such a restriction does nothing to prevent consumers who encounter the marks in the marketplace from being confused or mistaken as to the source of the parties’ goods. Again, a consumer already familiar with Opposer’s RENUVO product, upon being approached to buy Applicant’s SENUVO product, is likely to associate the two incorrectly. This is especially true in this case where the Applicant literally has set up its headquarters and is building its “independent distribution network” right down the street from Opposer. *See* Dkt. 1, p. 2 (showing the short distance between the parties’ locations).

Applicant’s argument also is legally flawed based on clear precedent from the Federal Circuit, which has held that “[a]n opposer need not establish the sale of both parties’ [products or] services by the same vendor to show employment of the same trade channels.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877, 23 U.S.P.Q.2d 1698 (Fed. Cir. 1992) (reversing Board decision that found dissimilarity of trade channels where the opposer had not shown that the same insurance agents sold both parties’ insurance policies). The Federal Circuit held that this likelihood-of-confusion factor “does not limit channels of trade to identical stores or agents.” *Id.* “Rather, a channel of trade includes the *same type* of distribution channel.” *Id.* (emphasis added). To establish overlap of the channels of trade, all that is necessary is to show the marketing or sale of the products “in *similar* trade channels.” *Id.* (emphasis added). Here, Applicant has admitted that its products and Opposer’s products are marketed and sold in the *very same type* of distribution channel, namely network marketing.

Applicant’s argument also is undermined by specific decisions of the Board, which have found that both parties’ use of their respective marks in network marketing *increases* (rather than decreases) the likelihood of confusion. *See, e.g., Longevity Network, Ltd. v. Wallach*, Canc. No. 92030340 (TTAB Mar. 23, 2004) (not precedential) (finding likelihood of confusion and holding that “the fact that petitioner’s and respondent’s products are actually distributed in the same channel of trade (multi-level marketing) emphasizes that the overlapping channels of trade are not theoretical in this case”), *aff’d* 2005 U.S. Dist. LEXIS 45937, 2005 WL 5958092 (C.D. Cal. Nov. 29, 2005) (finding likelihood of confusion in light of overlapping channels of trade based on the

fact that both parties were engaged in “network marketing,” also known as “multilevel marketing”); *see also Kroeger Herb Prods. Co., Inc. v. Shaperite Concepts, Ltd.*, Canc. No. 28,369 (TTAB Sep. 5, 2001) (not precedential) (finding a likelihood of confusion based in part on the fact that both parties utilized multilevel marketing).⁴ Thus, Applicant’s admission that both parties utilize network marketing strongly supports a finding of likely confusion.

Applicant had one theory when Applicant filed its counterclaim, namely that adding a restriction to Opposer’s registration to identify certain characteristics of Opposer’s RENUVO product allegedly would avoid a likelihood of confusion. When Opposer’s Motion to Dismiss exposed Applicant’s first theory as meritless, Opposer abandoned its first theory.⁵ Then, in the manner of Maxwell Smart (“Would you believe . . . ?”),⁶ Opposer posited another equally unconvincing theory in support of Opposer’s counterclaim for partial cancellation, namely that identically restricting both parties’ marks to cover goods that are “marketed via network marketing” would somehow avoid a likelihood of confusion. The Board should reject both of Applicant’s misguided theories, just as it has done in other cases where such claims were raised and rejected.

Finally the attempted amendment to add the “marketed via network marketing” is also factually incomplete, as both parties market their goods over the internet in a high profile manner, in addition to network marketing and other means of distribution. It would be manifestly unfair and futile to add restrictions that are inconsistent with what the parties are actually openly doing.

It is now clear that any amendment to Applicant’s pleading would be futile. *See* TBMP § 503.03 (“[I]n appropriate cases, that is, where justice does not require that leave to amend be given, the Board, in its discretion, may refuse to allow an opportunity, or a further opportunity, for amendment.”); *Pure Gold, Inc. v. Syntex (U.S.A.) Inc.*, 221 USPQ 151, 154 (TTAB 1983) (“[I]n the instant case leave to amend the pleading would serve no useful purpose.”), *aff’d*, 739

⁴ *Cf. Malaleuca, Inc. v. Foulds, Inc.*, Opposition No. 91177455 (TTAB May 4, 2014) (rejecting applicant’s attempt to restrict applicant’s own goods to exclude “multi-level marketing” from the channels of trade where both opposer and applicant marketed their goods to consumers over the Internet). Here, confusion is even more likely because Applicant and Opposer market their products over the Internet.

⁵ Applicant’s weakly attempts to hold onto its original theory merely by arguing that, “[a]s originally pled, [Applicant’s] counterclaim is sufficient to withstand a motion to dismiss. Dkt. 8, p. 2. However, by moving to amend its original answer and counterclaim, Applicant has effectively abandoned its prior theory. *See* TBMP § 507.02 (“[A]n amended pleading, if allowed, will supersede any prior pleadings . . .”).

⁶ *See* https://www.youtube.com/watch?v=0Hd2e_tRBIY for the first known instance of Maxwell Smart’s use of “Would You Believe . . .”; and <http://www.wouldyoubelieve.com/phrases.html> for a website named after the Would You Believe phenomenon and regarding the Get Smart show.

Certificate of Mailing or Transmission Pursuant to 37 C.F.R. § 2.119

Application No.: 86127647
Mark: SENUVO
Opposer: 4Life Trademarks, LLC
Type of Filing: Reply in Support of Motion to Dismiss Counterclaim

I hereby certify that a copy of the foregoing is being filed electronically with the United States Trademark Trial and Appeal Board and sent via email, as agreed between the parties, to:

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 /s/ Glenn Spencer Bacal
Signature

 April 28, 2015
Date

EXHIBIT 1

Persuasive Cases Attached Pursuant to TBMP § 101.03

1. *In re AgriGuardian Marketing, LLC*, Ser. No. 85428371 (TTAB May 9, 2014)
2. *Longevity Network, Ltd. v. Wallach*, Canc. No. 92030340 (TTAB Mar. 23, 2004)
3. *Wallach v. Longevity Network, Ltd.*, 2005 U.S. Dist. LEXIS 45937, 2005 WL 5958092 (C.D. Cal. Nov. 29, 2005)
4. *Kroeger Herb Prods. Co., Inc. v. Shaperite Concepts, Ltd.*, Canc. No. 28,369 (TTAB Sep. 5, 2001)

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
May 9, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re AgriGuardian Marketing, LLC

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Serial No. 85428371

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AgriGuardian Marketing, LLC, *pro se* by David N. Sasseville, Ph.D.

Kimberly Frye, Trademark Examining Attorney, Law Office 113 (Odette Bonnet,
Managing Attorney).

—
Before Quinn, Wolfson, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

AgriGuardian Marketing, LLC (“applicant”) filed an application to register on
the Principal Register the mark shown below for “Fertilizers for agricultural use,”
in International Class 1.¹



¹ Application Serial No. 85428371, filed on September 21, 2011 under Trademark Act § 1(a), 15 U.S.C. § 1051(a). Applicant amended the statutory basis of the application on June 7, 2012 to Section 1(b), 15 U.S.C. § 1051(b) (intent to use).

The application includes the following description of the mark: “The mark consists of a vertical three leafed plant that separates the word AgriGuardian. The plant extends below the text to look similar to the horizon.” Color is not a feature of the mark.

The trademark examining attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant’s mark, as used in connection with applicant’s goods, so resembles the registered mark GUARDIAN as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered in typed form for “Slow release water soluble nitrogen fertilizer for use as an additive to improve the utilization of nitrogen in fluid fertilizer for agricultural use,” in International Class 1.² When the refusal was made final, applicant filed a request for reconsideration, which the examining attorney denied. This appeal ensued. Applicant and the examining attorney have filed briefs and applicant has filed a reply brief.

1. Evidentiary matters.

As an initial matter, we note that applicant has submitted evidence with its reply brief. Such evidence is untimely and we have not considered it. “The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed.”

² Reg. No. 1593699, issued on May 1, 1990; Section 15 affidavit acknowledged; renewed. Prior to November 2, 2003, “standard character” drawings were known as “typed” drawings. A typed mark is the legal equivalent of a standard character mark. TMEP § 807.03(i) (April 2014).

37 C.F.R. § 2.142(d). *See also* TBMP § 1207.01 (3rd ed., June, 2013). The prohibition on additional evidence “is especially true with respect to evidence submitted for the first time with a reply brief, to which the examining attorney may not respond.” *In re City of Houston*, 101 USPQ2d 1534, 1537 (TTAB 2012), *aff’d*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013).

Appendix B of applicant’s appeal brief refers to the internet addresses, or “URLs,” of eight websites. Reference to a URL, unaccompanied by any copy of the matter located at the URL, is insufficient to make internet materials of record in a Board proceeding. The content available on the internet is constantly in flux and, if an applicant wishes to have such content considered by the Board, it must capture and submit, in a timely manner and together with the date accessed and the location at which the matter is found, a copy of the specific matter to be considered. In any event, for the reasons set forth in the preceding paragraph, any such matter submitted for the first time with applicant’s appeal brief would have been untimely.

2. Refusal under Section 2(d).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion, as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services at issue. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976). In this case,

applicant and the examining attorney have also submitted evidence and arguments regarding trade channels, customers and conditions under which sales are made, coexistence of the marks at issue without actual confusion, and a number of other considerations. We will address each factor in turn.

(a) The marks.

We consider the similarity or dissimilarity of the marks at issue in terms of their appearance, sound, meaning, and overall commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). We must base our determination on a comparison of the marks in their entireties. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 23, 234 (CCPA 1981). However, an analysis of individual aspects of the marks is a permissible part of our determination. *Price Candy Company v. Gold Medal Candy Corporation*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). 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 a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751. “The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs., Inc. v.*

Triumph Learning LLC, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted).

We note first that applicant's mark includes within it the entirety of the cited registered mark GUARDIAN. In such cases, confusing similarity has often been found. See *The Wella Corp. v. California Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT (with surfer design) likely to cause confusion with CONCEPT); *Coca-Cola Bottling Co. of Memphis, Tennessee, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (BENGAL LANCER and BENGAL); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL (with griffin design) and WEST POINT); *Johnson Publishing Co. v. International Development Ltd.*, 221 USPQ 155, 156 (TTAB 1982) (EBONY DRUM and EBONY); *In re Cosvetic Laboratories, Inc.*, 202 USPQ 842 (TTAB 1979) (HEAD START COSVETIC and HEAD START); *S. Gumpert Co., Inc. v. ITT Continental Baking Company*, 191 USPQ 409 (TTAB 1976) (FLAV-O-BAKE and FLAVO).

Applicant's mark differs in appearance from the registered mark by virtue of its initial literal element AGRI and its "three leafed plant" design. However, in the context of goods for agricultural use, the designation AGRI is not particularly distinctive. AGRI is suggestive of the word "agriculture" and, as the examining attorney has shown, "agri-" is a prefix "that usually refer[s] to agriculture."³ The plant design is also suggestive of agriculture and, for that reason, is not highly

³ Entry for "Agro " from <wikipedia.org>, final Office action of February 10, 2013 at 12-13.

distinctive as a source indicator for goods that are for agricultural use. Moreover, in the case of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the products. *In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999); *In re Appetito Provisions Co.*, 2 USPQ2d 1553, 1554 (TTAB 1987). *See also Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983).

In sound, applicant's mark resembles the cited mark in that both include the designation GUARDIAN, which would be pronounced the same in each mark. However, applicant's mark is phonetically distinguished from the cited mark by virtue of its prefix AGRI.

With respect to suggestive meaning or connotation, applicant argues that its mark "was selected to mean 'protector of agriculture' and/or 'protector of land.'"⁴ Applicant also argues that its mark, taken as a whole, "suggests a direct relationship to plants and plant growth, which is well understood by farmers and growers who are the sole consumers for these products."⁵ We see little distinction between the respective meanings or connotations of applicant's mark and the cited mark. We agree with applicant that customers are likely to understand the word

⁴ Applicant's brief at 6.

⁵ *Id.* at 7.

“guardian” to mean “protector,” as this is one of its commonly accepted meanings.⁶ We also agree that the addition of AGRI and the plant design are likely to cause the mark to suggest the idea of a protector of the land or of agriculture. However, these same meanings are very likely to be perceived in the cited mark as well. There is no reason to believe that the word “guardian” in the cited mark would be understood to have a meaning different from “protector.” Further, as the cited mark is for use in the field of agriculture, it will suggest to customers the idea of a “protector” having something to do with agriculture. Overall, we find that the marks are quite similar in meaning and connotation.

Considering the marks in their entireties, we find that their similarities in appearance, sound and meaning outweigh their differences, and that they create similar overall commercial impressions. Accordingly, the *du Pont* factor relating to the similarity or dissimilarity of the marks weighs in favor of a finding of likelihood of confusion.

(b) The goods.

We next consider the similarity or dissimilarity of the goods at issue. The goods of both applicant and registrant are identified as being “for agricultural use”; however, applicant argues that they are otherwise extremely different in nature, pointing out that applicant’s goods are “fertilizers” and registrant’s goods are

⁶ This significance of the word “guardian” is confirmed by WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1007 (1993), which defines it to mean, as a noun, “one that guards or secures : one to whom a person or thing is committed for protection, security or preservation”; and, as an adjective, “performing or appropriate to the office of a protector.” The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

fertilizer additives (as identified in the registration, they are "... fertilizer for use as an additive...").

Applicant describes its goods as "fertilizers, primarily foliar applied micronutrients."⁷ By contrast, applicant contends that registrant's goods are not a fertilizer and cannot be used as a fertilizer:

[Registrant's product] improves the performance of nitrogen fertilizers, and [it] is always added to and used with nitrogen fertilizer.... [N]o one would consider using [it] to replace urea, anhydrous ammonia, urea ammonium nitrate (UAN), or other commonly used nitrogen fertilizer.

...

The only labeled and acceptable use of the goods represented by the Registered mark for the intended consumers is as a nitrification inhibitor.

...

A nitrification inhibitor tries to suppress or kill the microorganisms that cause this transformation [of ammonium to nitrate] in the soil. Because nitrate is the end product of nitrification and it readily leaches from the soil with rainfall or irrigation resulting in a loss of the applied nitrogen fertilizers, growers may want to use a nitrification inhibitor such as [registrant's product] to slow down nitrogen loss.⁸

Applicant also points out that "EPA (or anyone else) does not classify nitrification inhibitors as fertilizers."⁹

Applicant's contentions regarding the nature of registrant's product is largely consistent with the identification of goods in the cited registration ("slow release water soluble nitrogen fertilizer for use as an additive to improve the utilization of

⁷ Applicant's brief at 10.

⁸ *Id.* at 9-11.

⁹ *Id.* at 15.

nitrogen in fluid fertilizer for agricultural use”). However, we must point out that applicant has not made any evidence of record to demonstrate his contentions that all goods of the type identified in the registration are necessarily “nitrification inhibitors,” or to show that such goods are not, in fact, considered in the trade to be “fertilizers” (despite the fact that the goods are identified as “fertilizers” in the registration). As we noted above, references in applicant’s brief to websites, unnamed “soils textbooks,” and “University Extension publications” do not make these materials of record. Accordingly, we have no more to rely upon than the statements set forth in applicant’s brief, which constitute argument, not evidence. In any event, even if we take all of applicant’s contentions as true, we still perceive a substantial commercial relationship between the goods of applicant and registrant.

Most obviously, the goods of both applicant and registrant are for use in agricultural applications; this is explicit in the respective identifications of goods. In addition, both types of goods have similar purposes, inasmuch as both are used to improve soil conditions in order to promote better agricultural results.¹⁰ Applicant argues that the goods do *not* have a common purpose: “[Registrant’s product] has a total different purpose (it kills or suppresses selected soil microorganisms) compared to [applicant’s] products... (provides essential plant micronutrients), there is no comparison, and thus no confusion, in the real world.”¹¹ Although the

¹⁰ See, e.g., advertisement for applicant’s AGRI-GRO ULTRA (“increases yields and crop performance...”), submitted as specimen of use with application filed September 21, 2011.

¹¹ Reply brief at 3.

two types of products, being different chemical substances, have different specific purposes, nonetheless they have the same general purpose to improve plant growth, and this similarity is likely to lead customers to believe that such goods could emanate from the same producer. Applicant's argument that "growers who would use these products will clearly know the difference"¹² is unavailing. The question is not whether customers would mistake one product for the other, but rather whether there is a likelihood of confusion as to the source of the products. *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

It is also significant that the goods of applicant and registrant are types of goods that would be used together. Applicant's goods are agricultural fertilizers and, as applicant explains, registrant's product "is always added to and used with nitrogen fertilizer."¹³ If goods are complementary in nature, or used together, this relatedness can support a finding of likelihood of confusion. *See, e.g., In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984); *In re Cook Medical Technologies LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012). In connection with this point, it bears noting that applicant's identification of goods is broad and would include nitrogen fertilizer within its scope. Even if applicant does not in fact sell nitrogen fertilizer, it is the identification of goods in its application which governs, because it defines the scope of the registration that applicant seeks. *See Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("the question of registrability of an applicant's mark

¹² *Id.*

¹³ Applicant's brief at 9.

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...").

For the reasons discussed, we find that the goods of applicant and registrant are related in such a manner that customers could mistakenly believe that they emanate from the same source. Accordingly, the *du Pont* factor of the similarity or dissimilarity of the goods favors a finding of likelihood of confusion.

(c) Trade channels.

We next consider the similarity or dissimilarity of established, likely-to-continue trade channels for the goods. Applicant states that its goods "are rarely, if ever, sold in stores";¹⁴ rather, they are sold directly to end-user growers and crop producers through knowledgeable distributors and dealers who are under contract to applicant.¹⁵ Applicant continues:

It is correct that both [registrant] and [applicant] sell products through independent distributors and dealers. However, the chances of them being purchased from the same source of supply (the independent dealer or distributor) is virtually nil since the companies have totally different distribution networks. To [applicant's] knowledge, no AGRIGUARDIAN distributor or dealer has ever marketed [registrant's] products along with AGRIGUARDIAN products, and again AGRIGUARDIAN has no comparable products to the Guardian line of products. Part of the reason for independent distribution networks, is because of the high degree of technical knowledge needed to sell agricultural inputs (whether fertilizers, seeds, chemicals, etc.). Distributors and

¹⁴ *Id.* at 18.

¹⁵ *Id.* at 7.

dealers tend to stay with one line of products that they can learn and promote.¹⁶

[Registrant] is a multilevel distribution network, similar to AMWAY, in which sales are only made through contracted “Independent Business Owners”.... AGRIGUARDIAN is [sic] also sell products through contracted distributors, but there is no overlap among these two groups of distributors. As part of the AGRIGUARDIAN contract with its distributors, an AGRIGUARDIAN distributor must obtain written permission to sell products produced and marketed by other companies. No AGRIGUARDIAN distributor has ever filed a request to also sell [registrant’s] products.¹⁷

Applicant’s contentions that no dealer has ever handled goods of both applicant and registrant together and that exclusivity contracts will guarantee that their goods will not be handled by the same distributor or dealer are not persuasive. These circumstances may change when a dealer finds that it is commercially expedient to handle both types of goods, or as a result of terminated contracts or shifting loyalties. Neither applicant’s identification of goods nor that in the cited registration includes any limitation providing that the goods will be handled only by exclusive distributors and dealers. Accordingly, we must presume that the goods will move in all channels of trade normal for such goods. *See Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973); *Kalart Co. v. Camera-Mart, Inc.*, 258 F.2d 956, 119 USPQ 139 (CCPA 1958). The examining attorney has presented evidence of several agricultural suppliers that offer both

¹⁶ *Id.* at 16-17.

¹⁷ Reply brief at 3.

“fertilizer additives” and various forms of dry and liquid fertilizer.¹⁸ There is no countervailing evidence to indicate that such goods would not be handled by a single distributor. Accordingly, we find that this *du Pont* factor favors a finding of likelihood of confusion.

(d) Customers and conditions of sale.

Applicant states that the customers of applicant and registrant are “crop producers, growers and farmers,”¹⁹ and characterizes them as “intelligent, sophisticated, careful and motivated” and not subject to impulse purchasing.²⁰ They use large amounts of product and routinely make purchases of “thousands of dollars at a time.”²¹ Applicant continues:

The consumers will not spend this kind of money without understanding what the products do, the benefits of the products to their crops and what the return is on their investment into these products. In other words, the goods are thoroughly investigated and understood before purchasing since they are essential to producing a profitable crop. Also as a result of this investigation, growers know the manufactures [*sic*] and suppliers of the products they buy from. Failure to thoroughly know the products could result in severe economic losses to the consumers, because the goods influence both the yield and quality of the crops harvested, which in turn influences their profitability. The consumers are actually business people making business decisions that impact their livelihood.... These consumers read product literature

¹⁸ Website located at <jay-mar.com>; *see also* website at <nutrientstewardship.com>, offering a “urease inhibitor [that] stabilizes nitrogen...” as well as “nitrogen fertilizers”; both submitted with the final Office action of February 10, 2013 at 29-33 and 20-21, respectively.

¹⁹ Applicant’s brief at 7, 10.

²⁰ *Id.* at 18.

²¹ *Id.* at 19.

and labels, and seek advice from distributors, university extension personnel, private consultants, and other growers who have use [*sic*] the products.²²

It behooves the distributor to educate the grower on what the products are, what they do, and their proper use.... Education and marketing to growers on products are provided by one-on-one sales contacts, sales literature, grower meetings, university extension/consultant recommendations, and internet searches.²³

The examining attorney argues that “the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.”²⁴

A number of factors – *i.e.*, that the relevant customers are business people making business-related decisions,²⁵ that the cost of the goods is potentially high, and that sales may be made in a one-on-one setting – indicate that customers may use an elevated degree of care in making their product selections. Of course, even in such settings, the question of whether two offered brands are related to each other is not necessarily an issue of prime importance to the customer. Nonetheless, on balance, we find that this *du Pont* factor weighs against a finding of likelihood of confusion.

²² *Id.*

²³ Reply brief at 3.

²⁴ Examining attorney’s brief at 9.

²⁵ One may question whether the limiting language “for agricultural use” necessarily limits the goods of applicant and registrant to goods used in the business of farming, to the exclusion of goods used by consumers in cultivating personal gardens. However, for purposes of considering applicant’s argument we will assume that the goods are for use in the *business* of agriculture.

(e) Absence of actual confusion.

Applicant contends that it has been in business since 2005 and that since then applicant and registrant have coexisted, with both having warehouses and offices in Minnesota. “In fact, [registrant’s product] has been recommended to [applicant’s] customers by [registrant’s] distributors, dealers, employees and owners whenever a nitrification inhibitor... is needed or desired.”²⁶ Applicant contends that during that time registrant has not expressed any concern about such co-existence,²⁷ and there has been no confusion involving the goods of applicant and registrant.²⁸

Although the statements in applicant’s brief suggest that there has been a meaningful opportunity for confusion to occur, applicant has submitted no evidence to prove these allegations. In an *ex parte* proceeding in which registrant has no opportunity to be heard, we simply cannot accept applicant’s unsupported statements as to the conditions of co-existence and applicant’s own lack of awareness of any instances of confusion. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist).

²⁶ Applicant’s brief at 8.

²⁷ *Id.*

²⁸ *Id.* at 20.

Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

(f) Other considerations.

Applicant seeks to distinguish its mark from the cited mark by explaining that AGRIGUARDIAN is used as a company name, while registrant's GUARDIAN mark is used as a product name.²⁹ This distinction is not germane. Applicant has applied to register its mark as a trademark and, accordingly, we must consider its market impact when used as a trademark, not as a company name. Moreover, nothing in the cited registration requires registrant to use its mark only as a product trademark, as opposed to a house mark for all its goods, a mark identifying a line of goods, or any other type of commercial source indicator.

Applicant frequently characterizes the registrant's mark as "Conklin Guardian," suggesting that the registered mark is typically displayed together with the house mark Conklin. However, the terms of Section 2(d) require us to compare applicant's mark to the mark that is registered, not the mark as it appears in the marketplace. 15 U.S.C. § 1052(d).

Applicant further argues as follows:

ALL agricultural inputs are required by law to contain the name and address of the source of the product being sold. This must be included on the label of every package sold, and if sold in bulk, then on the invoice and bill of lading. Every Guardian® package will contain the name and address of Conklin, while every AGRIGUARDIAN

²⁹ *Id.* at 8.

product will have the name and address of AGRIGUARDIAN.³⁰

Applicant's contentions regarding legal requirements applicable to labeling are not supported by any citations to law or by any evidence of record.³¹ In any event, we are not persuaded that this aspect of the marketing of the goods would necessarily dispel confusion. Customers who rely on a trademark as the symbol of the source of the goods may have no knowledge of the corporate name or address of the producer; or they may have no recollection of the name and address that appeared on one product when they encounter another product that bears a similar trademark. Moreover, many businesses consist of groups of entities (such as a parent and its subsidiaries, a group of sister corporations, or a company and its licensed franchisees). Customers may readily believe that there is a connection between goods bearing similar trademarks even though they bear, elsewhere on the label, different corporate names and addresses. We do not discount the possibility that, in cases involving very careful customers, the presence of a trade name on the goods would reduce the likelihood of confusion. However, in the absence of probative evidence of this market practice, we give little weight to this factor.

(g) Balancing the factors.

Having considered the evidence of record and all relevant *du Pont* factors, including those not specifically discussed herein, we find that applicant's mark, as

³⁰ Applicant's brief at 16. *See also* reply brief at 2.

³¹ Applicant's reply brief at 2 does refer to a publication of the Association of American Plant Food Control Officials (apparently a trade association); but no copy of the publication was made of record and it is not the type of matter of which we would take judicial notice.

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applied to applicant's goods, so closely resembles the cited registered mark as to be likely to cause confusion, mistake or deception as to the source of applicant's goods.

Decision: The refusal to register under Section 2(d) is affirmed.

THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB

Hearing:
12 NOV 2003

Mailed: 23 MAR 2004
Paper No. 46
AD

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Longevity Network, Ltd.
v.
Joel D. Wallach

Cancellation No. 92030340

Michael F. Maschio of Cowan, Liebowitz & Latman, P.C. for
Longevity Network, Ltd.

Michael A. Painter of Isaacman, Kaufman & Painter for Joel
D. Wallach.

Before Simms, Bottorff, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 21, 1998, the Patent and Trademark Office
issued Registration No. 2,152,309 to respondent, Joel D.
Wallach, for the mark AMERICAN LONGEVITY (typed) for goods
identified as "nutritional supplements for people" in
International Class 5. The registration contains an
allegation of a date of first use and a date of first use in
commerce of April 1997 and a disclaimer of the word
AMERICAN.

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On December 11, 2000, petitioner (Longevity Network, Ltd.) filed a petition to cancel respondent's registration on the ground that "since as early as March 1994 and since long prior to any first use date upon which Registrant can rely, [petitioner] adopted and continuously used the mark LONGEVITY for nutritional supplements, health and beauty aids and video and audio cassettes in the field of health." Petition at 2. Petitioner alleges that respondent's registration "will cloud Petitioner's title in and to the LONGEVITY mark." Id. Respondent denied the salient allegations of the petition to cancel.¹

The Record

The record consists of the following items: the file of the involved registration; the trial testimony deposition of petitioner's Chief Executive Officer, James Song, with accompanying exhibits; the trial testimony deposition of an independent distributor of petitioner, Len Clemens, with accompanying exhibits; the trial testimony deposition of respondent's "Chief Executive Officer,"² Stephan Rhodes Wallach, with accompanying exhibits; the trial testimony deposition of respondent, with accompanying exhibits; the discovery deposition of James Song, with accompanying

¹ An oral hearing was held on November 12, 2003.

² The witness described his position as: "I don't have an official title because this is a family-owned company, but essentially I would be like the CEO of the company." S. Wallach dep. at 10.

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exhibits, submitted by respondent under a notice of reliance; and copies of responses to interrogatories, requests for admissions, and respondent's third-party registrations submitted by the parties under notices of reliance.

Priority

A party petitioning to cancel a federally registered trademark must plead and prove that it has standing and that there is a valid ground for the cancellation of the registration. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998) ("Section 14 has been interpreted as requiring a cancellation petitioner to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration") (internal quotation marks omitted).

For standing, petitioner asserts its ownership of common law trademarks and trade names.

Under the rule of Otto Roth, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through "whatever other type of use may have developed a trade identity." Otto Roth & Co. v. Universal Foods Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). The Otto Roth rule is applicable to trademark registration cancellation proceedings as well.

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Towers v. Advent Software Inc., 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (full citation added).

While we find that there is evidence that petitioner's mark or trade name LONGEVITY has a suggestive connotation in relation to dietary supplements, the evidence does not support a finding that the mark is merely descriptive. Therefore, petitioner has shown that it has standing and it has set out a valid ground for cancellation, i.e., likelihood of confusion. Therefore, we proceed to the discussion of priority.

Petitioner relies on its common law rights in the mark and trade name LONGEVITY for nutritional supplements, health and beauty aids and video and audio cassettes in the field of health. Respondent's registration is presumed valid, and a petitioner seeking to cancel a registration must rebut this presumption by a preponderance of the evidence.

Cerveceria Centroamericana S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[I]n a [trademark registration] cancellation for abandonment, as for any other ground, the petitioner bears the burden of proof. Moreover, the petitioner's burden is to establish the case for cancellation by a preponderance of the evidence"); Martahus v. Video Duplication Services Inc., 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993).

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The application that matured into respondent's registration was filed on April 2, 1997. That date is significant because respondent can rely on this date for his priority, and in order to prevail on priority, petitioner would have to establish an earlier date. 15 U.S.C. § 1057(c). Intersat Corp. v. International Telecommunications Satellite Organization, 226 USPQ 154, 156 n. 5 (TTAB 1985) ("The earliest date of first use upon which Intelsat can rely in the absence of testimony or evidence is the filing date of its application").

Initially, petitioner submitted evidence of its use of the mark and trade name LONGEVITY NETWORK. See LONGEVITY NETWORK'S COTURA™ COLLECTION Skin, Body & Hair Care Catalog" with a copyright date of 1994. Song Ex. 3, Song dep. at 29-31. Other 1994 brochures (Song. Ex. 4, Song dep. at 36; Song Ex. 5 and Song dep. at 39) contain the heading "LONGEVITY NETWORK Making Positive Changes in People's Lives" and "People helping each other succeed - that's Longevity Network." Opposer has also included a copy of its 1994 "Longevity Network's Nutritional Products Catalog." Song Ex. 8, Song dep. at 43.

The evidence clearly establishes that petitioner was using its mark LONGEVITY NETWORK prior to respondent's priority date of April 2, 1997.

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However, in this case, petitioner seeks to cancel respondent's registration based on its claim that it has used the mark LONGEVITY alone prior to respondent's priority date. In the petition to cancel (p. 2), petitioner alleges that it has used its LONGEVITY mark since at least as early as March 1994. Petitioner has submitted the following evidence to show its use of the mark LONGEVITY. On page 4 of its brochure (Song Ex. 6), in a testimonial about petitioner, a person is quoted as saying: "You look and pray a lifetime for a company with the qualities that Longevity has. Longevity compares to most other companies the way a Mercedes compares to a Hyundai." Song dep. at 40 (Brochure distributed in 1994). In a 1995 edition of its "Longevity Network News" (Song Ex. 10 at 106), a caption refers to "Longevity CEO Jim Song") and (120) an ad refers to "Longevity's Enhanced Compensation Plan: The Power to Strive in '95." The October/November 1995 edition of *MLM Insider Magazine* (Song Ex. 14 at 4) lists petitioner as "Longevity" in a list of "The Best Companies in Network Marketing for 1995."

There is other evidence of the use of the term "Longevity" alone to refer to petitioner. For example, an advertising brochure prepared by Len Clemens, a distributor of Longevity Network with its approval (Clemens dep. at 96) reads: "The *FreeStyles Network* and *Longevity* have combined

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forces to create one of the most dynamic and lucrative opportunities in years." Clemens Ex. 41 (emphasis in original). The brochure also contains the following statements: "Longevity delivers many of the most popular products...", "Each product was designed and formulated exclusively by Longevity," and "The friendly, professional team at LONGEVITY (headquartered in Henderson and Las Vegas, Nevada) stands ready to assist you." Clemens Ex. 41. This brochure was created in 1995. Clemens dep. at 96. Clemens dep. at 96.

Another exhibit from 1995 was an advertisement of petitioner "Introducing Longevity's VoiceLink™ Communication Center" which is "Longevity's quickest channel of communication" and it requested interested parties to "fill in the subscription form below and send it to Longevity via Fax..." Clemens dep. at 99 and Ex. 42. Additionally in 1995, an advertising newspaper entitled *Millionaires in the Making* contained the following headline and statements: "Longevity unveils 'Devastating' Multi-Match(SM) system," "Through Longevity, a generous slice of it can be yours," "Fill out section 'A' of the Longevity Quick Start Application Form," and "Longevity Product Line." Clemens dep. at 101 and Ex. 43). Another *Millionaires in the Making* from 1996 contains such statements as "Yes the Longevity Business Opportunity sounds excellent," "Impressive Longevity Product Line,"

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"recorded message from Longevity CEO & President," and "For more detailed information on the Longevity compensation plan..." Clemens dep. at 103 and Ex. 44.

Petitioner also submitted evidence that it marketed dietary supplements products under the mark LONGEVITY'S. Song dep. at 87 and Ex. 19; See also Song Ex. 23. However, we are not persuaded by this evidence. These products were named VITAMIN PLUS, CARDIOGEVITY, RAINFOREST DUET, and COLLODIAL VERA. Id. While Exhibit 19 indicates that the brochures of record were "Rev. 9/97," Mr. Song testified "that was the way the products were labeled" and that "was the way it was sold during that period." Song dep. at 87. See also dep. at 97. The period that Mr. Song referred to was the introduction of Vitamin Plus in 1995, Cardiogevity in 1994, Rainforest Duet in 1995, and Colloidal Vera in 1994 or 1996. Id. Mr. Song testified that its products were sold in the United States and Korea (dep. at 87 and 97). While this testimony during direct examination was straightforward, on cross-examination, the witness was less certain. Referring to Exhibit 23, the witness was asked: "Q. When did you start using that style. A. I believe in '96. Q. '96? A. Or '97. I'm not sure." Song dep. at 157.

Also, on cross-examination, the witness was asked:

Q. Can you identify any exhibit that you produced today which shows use of that trademark that is Longevity, the possessive form of it, prior to 1997?

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- A. I think we've seen "longevity" in its various forms used throughout the exhibits that we showed since we launched the company in '94. That's basically what we did this morning.

Song dep. at 158.

When the witness was asked if there was "anything that you produced today which shows a package which bears the Longevity's trademark and used prior to 1997," his response was very general ("I believe throughout the exhibits, we've shown use of 'Longevity' in its various forms"). Song Dep. at 159.

"[O]ral testimony, if sufficiently probative, is normally satisfactory to establish priority of use in a trademark proceeding." Powermatics, Inc. v. Globe Roofing Products Co., 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965). However, such testimony should "not be characterized by contradictions, inconsistencies and indefiniteness but should carry with it conviction of its accuracy and applicability." B.R. Baker Co. v. Lebow Bros., 150 F.2d 580, 66 USPQ 232, 236 (CCPA 1945). In this case, the testimony regarding the use of the mark on its goods prior to 1997 is too equivocal to meet this test.

Therefore, the final question concerning priority is whether petitioner has demonstrated trade name use or use analogous to trademark use prior to respondent's priority date. At this point, we consider evidence of petitioner's use of the term "Longevity" to refer to itself and whether

others use the term to refer to petitioner. See National Cable Television Association Inc. v. American Cinema Editors Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1428 (Fed. Cir. 1991) (“The evidence is profuse that Editors has publicly been known as ACE since prior to 1979, as attested to by members of Editors, as well as shown by newspaper articles and third party correspondence where the name American Cinema Editors has routinely been shortened to ACE”). Furthermore, we can consider that “abbreviations and nicknames of trademarks or names used *only* by the public [can] give rise to protectable rights in the owners of the trade name or mark which the public modified.” Id. (emphasis in original).

The evidence of the use of the term “Longevity” in petitioner’s advertising, in promotional literature by its distributor, and in testimonials discussed above convinces us that it has established priority of use of the word LONGEVITY in relation to its business involving dietary supplements and related products prior to 1997.

Likelihood of Confusion

The next question is whether there is a likelihood of confusion. In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563,

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567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

The first factor we consider is the similarities or dissimilarities in the marks. We have already determined that petitioner has shown that it has priority regarding its trade name LONGEVITY. Respondent's registration is for the mark AMERICAN LONGEVITY. Respondent has disclaimed the word AMERICAN. The addition of a geographic term to another term does not normally avoid a likelihood of confusion. Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products); Surf Line Hawaii Ltd. v. Ahakuelo, 13 USPQ2d 1975, 1979 (D. Haw. 1989) (JAMS and HAWAIIAN JAMS, both for T-shirts, held to be confusingly similar); Harry Siegal Co. v. M & R International Mfg. Co., 4 USPQ2d 1154, 1161 (TTAB 1987) (Despite finding that "the term 'CHIC' is commonly used as a descriptive term... 'L.A. CHIC' does not so differ from the mark 'CHIC' as to preclude likelihood of confusion").

In another case, the board was faced with a similar issue of whether the marks GUARDIAN and SCOTT GUARDIAN were confusingly similar for various, medical, hospital and sickroom supplies. Guardian Products Company v. Scott Paper Company, 200 USPQ 738 (TTAB 1978). The board found that "'Guardian' is no doubt a laudatory and hence a suggestive

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term that is or may border on the category of 'weak' marks."

200 USPQ at 740.

Applicant has incorporated within its mark the entire mark of opposer, namely, "GUARDIAN" and merely added the name "SCOTT" which is nothing more than a house mark of applicant. While such house mark cannot be ignored in evaluating applicant's mark, we cannot lose sight of the fact that marks generally identify an anonymous source, and the resemblance between "SCOTT GUARDIAN" and "GUARDIAN" is such that to those who notice the term "SCOTT," the association may carry over to opposer's mark as well as that of applicant. Thus, we conclude that applicant's mark "SCOTT GUARDIAN" is confusingly similar to opposer's mark "GUARDIAN."

200 USPQ at 740.

In this case, the term "longevity" is not without meaning in the field of dietary supplements. See Petitioner's brief at 33 ("Longevity's name and mark is 'suggestive' when used in connection with supplements and beauty products"); Song Ex. 22, p262 (*Prescription for Longevity: Eating right for a long life*), Song Ex. 25, P437 ("Because Longevity is about all the right things and because you decide the long-term success of your business and your family. We invite you to contact us to start your longevity in health, family, and business") (emphasis omitted); Clemens dep. at 122 ("Q. Does the word [Longevity] have any relevance to a feature or characteristic of nutritional supplements? A. Yes. They help you live a long, healthy life"); and S. Wallach Ex. 7 at 1 ("American Longevity ... These are the products of the 21st century - The

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products that will help you achieve your potential for maximum longevity").

Although we agree with respondent that the word "longevity" is hardly a unique or arbitrary term when used with nutritional supplements, we do not find that the term is without any trademark significance. As the cases above indicate, while a mark may not be strong, a junior party normally cannot appropriate another party's mark, add disclaimed matter to it, and avoid a finding that the marks are similar. Therefore, we conclude that the marks are similar.

Next, we consider whether the goods of the parties are related. The goods in respondent's registration are identified as simply "nutritional supplements for people." Petitioner also markets nutritional supplements for people in association with its trade name. Song Dep. at 17 ("[W]e launched out products in early 1994 ... approximately 40 to 50 products, nutritional supplements ...). We, therefore, consider that both petitioner and respondent are in the nutritional supplement business.

While the similarity of the marks and the relatedness of the goods are important factors, we now consider other factors that the parties have raised regarding the question of likelihood of confusion. Here, respondent argues that "Petitioner's trademark is a weak mark which is entitled to

only limited protection." Respondent's Brief at 38.

Respondent supports his argument by relying on copies of third-party registrations that contain the word "longevity" and evidence of other nutritional supplements or health-related products that respondent's witness purchased that use the word "longevity." Respondent points to several products distributed by a company called Soaring Eagle Ventures. Respondent's witness, S. Wallach, identified himself as a former distributor for this company.³ The advertising brochure promoted a product called LONGEVITY RICH - The Missing Link to Beautiful Hair & Skin.⁴ The brochure was apparently distributed at least by 1995.

S. Wallach Ex. 2.⁵ Another brochure distributed "preventive health & personal care products" under the mark OXYRICH with the slogan "The Missing Longevity Link." S. Wallach, Ex. 3. A third product distributed by Soaring Eagle Ventures was marketed under the slogan "The Missing Longevity Link" at least as early as 1995 for a product called RAINFOREST TODDY, a dietary mineral supplement. S. Wallach dep. at 20, Ex. 4. This product also contained the slogan "Achieving your genetic potential for Good Health & Longevity." Yet

³ The witness also testified that "now I'm a board member of them, I guess." S. Wallach dep. at 95.

⁴ Soaring Eagle Ventures apparently owns Registration No. 2,111,266 for LONGEVITY RICH and design for mineral-based natural cosmetics. Respondent's Notice of Reliance, Paper No. 28.

⁵ The witness arrived at this date because the brochure listed the witness's business with an Oregon address. The witness

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another product, SPORTS TODDY, a dietary mineral supplement, was marketed with a brochure that contained the slogans "The Missing Sports Longevity Link" and "The Ultimate Longevity Fuel." S. Wallach Ex. 5. See also S. Wallach Exhibits 38 and 39 (Longevity Rich conditioner and hand and body lotion).⁶

In its Reply Brief (page 1), petitioner argues that the "Soaring Eagle Company's use of the term Longevity is distinguishable as the term is not used as a source identifier." We cannot agree that none of the Soaring Eagle uses are source identifiers. Even if they were not source identifiers, the fact that other parties use the term to describe nutritional supplements and other products that petitioner claims it markets is relevant in assessing whether petitioner's mark is a strong and distinctive term.

Respondent has also submitted status and title copies of numerous registrations for various marks containing the word "Longevity." See Registration No. 1,985,718 (EVERY MAN II FACTORS FOR LONGEVITY for dietary supplements); No. 1,986,810 (E'OLA SMART LONGEVITY and design for health food supplement); No. 2,091,072 (MEN'S LONGEVITY for dietary and nutritional supplements); No. 2,102,291 (LONGEVITY SCIENCE for dietary supplements); No. 2,172,909 (WOMEN'S LONGEVITY

operated his business in Oregon until he moved by 1996.
S. Wallach dep. at 18.

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for dietary and nutritional supplements); No. 2,197,549 (SECRET OF LONGEVITY for dietary supplements); No. 2,198,858 (LONGEVITY CRYSTAL for herbal extract dietary supplements); No. 2,242,040 (BODYONICS LONGEVITY for dietary and nutritional supplements); No. 2,258,810 (LONGEVITY SPA for vitamins and nutritional food supplements); and Nos. 2,341,135 and 2,341,136 (LIQUID LONGEVITY and LIQUID LONGEVITY PLUS for nutritional supplements). While we agree that third-party registrations cannot be used to prove that a mark is weak and to justify the registration of another confusingly similar mark, third-party registrations can be used as a form of dictionary to illustrate how the term is perceived in the trade or industry. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, ‘third party registrations are similar to dictionaries showing how language is generally used.’ 1 McCarthy, *Trademarks and Unfair Competition*, § 11:26 at p. 516 (2d ed. 1984)”).

Respondent also included numerous exhibits of various dietary or nutritional supplements and other products that

⁶ These products are still being sold. See S. Wallach dep. at

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use the word "longevity" on the label. See S. Wallach Exhibits 25 and 27 (Oasis Longevity Signal A.M. and Oasis Longevity Signal P.M. dietary supplements); Exhibits 28, 29, 30, and 31 (Longevity 4 dietary supplement); Ex. 32 (Super Nutrition Longevity Easy to Swallow Multi-Vitamin); Ex. 33 (Longevity 2000 nutrition program⁷); Ex. 34 (Voyager Imperial Q1 Longevity Elixir); and Exhibits 35 and 36 (MDR Longevity Antioxidants⁸).

The witness, Stephan Wallach, purchased these products after searching "longevity and nutrition" or "longevity and minerals and vitamins" on the Internet. S. Wallach dep. at 72. Finally, petitioner acknowledges that "there are other companies in the nutritional field that use the word Longevity on their product labels." Reply Brief at 1, n.1.

Petitioner argues that its mark is strong because it has 50,000 distributors⁹ and it "has achieved substantial success and received substantial attention in the industry publications." Petitioner's Brief at 28. We cannot agree that petitioner's mark is a particularly strong mark or name. First, most of the evidence of record relates to the mark LONGEVITY NETWORK. Petitioner has not pleaded this

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⁷ This product contained, inter alia, a liquid mineral dietary supplement. S. Wallach dep. at 74.

⁸ This product formulation included, inter alia, antioxidants, vitamins, and minerals. S. Wallach dep. at 77.

⁹ Petitioner sells its products "through the industry of network market[ing]. And network marketing is a form of distribution

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mark in its petition to cancel. However, when we balance petitioner's evidence of strength and respondent's evidence of weakness, we conclude that it is not entitled to a presumption that it is either a particularly strong or weak mark. While we have evidence that products using the term "Longevity" are sold on the Internet, we have no evidence of the nature and volume of these sales. The mere fact that there are other uses of a mark does not per se make the mark under consideration a weak mark. Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995) ("[T]he pictures of these restaurants tend to indicate that the operations are small and local in nature").

Petitioner also argues that both petitioner and respondent use their marks on nutritional supplements that are distributed through network marketing. Reply Brief at 4. Certainly, respondent's identification of goods, nutritional supplements for people, would include "nutritional supplements for people distributed through network marketing." Obviously, we must consider the goods as they are identified in the registration. In re Dixie Restaurants, Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (punctuation in original), quoting, Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) ("Likelihood of

that uses word-of-mouth advertising to get out information about

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confusion must be determined based on an analysis of the mark applied to the ... services recited in applicant's application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be'"); Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). We also consider that the goods are sold in all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"). Here, petitioner and respondent do distribute their products by means of independent distributors. Song dep. at 13 ("Longevity sells through the industry of network market[ing]"); S. Wallach Ex. 8, p. 29 (Building your own American Longevity Business should be fun ... Our distributors are referred to as 'Team Members' or 'Associates'"). The mere fact that both petitioner and respondent distribute their products by means of network marketing does not make the other evidence of Longevity uses

our products." Song dep. at 13.

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irrelevant. Respondent's registration is not limited to distributing its goods by means of network marketing. However, the fact that petitioner's and respondent's products are actually distributed in the same channel of trade (multi-level marketing) emphasizes that the overlapping channels of trade are not theoretical in this case.

Petitioner also argues that respondent's "bad faith disregard of Petitioner's prior rights and attempt to trade on the good [will] associated with Petitioner's LONGEVITY mark compels a finding of likelihood of confusion." Reply Brief at 8. We note that when petitioner's counsel sent a "cease and desist" letter on May 12, 1997, it did not refer to a "Longevity" mark. The letter referred only to Longevity Network. Song Ex. 28. Petitioner's argument that respondent is guilty of bad faith by using his mark AMERICAN LONGEVITY is undercut by the fact that petitioner only informed respondent of its mark LONGEVITY NETWORK not LONGEVITY.

Petitioner also argues that there has been actual confusion between petitioner's and respondent's marks. It submitted evidence of a "survey" conducted by Mr. Clemens "with a total of 873 respondents through his network marketing company website, which found that there was great confusion as to whether Joel Wallach, the Registrant and

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owner of American Longevity, was associated with Longevity or American Longevity." Petitioner's Brief at 35.

Respondent objects to this testimony on numerous grounds including that Mr. Clemens is unqualified to render an expert opinion, the methodology of the survey is flawed, and the results are unreliable. We agree with respondent to the extent that we can give the survey little, if any, weight. Mr. Clemens "works almost exclusively as a distributor for Longevity Network." Clemens Ex. 33 at 3. He has "a two-year degree from what was called Heald Business College" and he has taken a course in Probability in Statistics. Clemens dep. at 127-28. The witness indicated that he had no training or background in developing consumer surveys in likelihood of confusion cases. Clemens dep. at 130-35; See, e.g., 135 ("Q. Do you have any understanding of the standards which are generally required to be met by a consumer survey in order to be considered as evidence on the issue of likelihood of confusion in trademarks? A. No").

The "survey" petitioner has submitted was really an Internet poll or "what I call a network marketing IQ test or MLM IQ test." Clemens dep. at 66. Participants were instructed that: "If you don't know an answer to a question you are better off just taking your best guess and quickly moving on." Clemens Ex. 35. Anyone who visited the witness's website could take the test and there was no

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attempt made to exclude participants who were not potential purchasers of nutritional supplements. Even more damaging to the survey's persuasiveness is a review of the critical question on which petitioner relies (#25):

Which of the following companies was founded by "Doc Wallach?"

- A. Youngevity
- B. American Longevity
- C. Biogevity
- D. Longevity Network
- E. None of the above

Clemens Ex. 40.

The results of the poll were A. 13.4%, B. 14.2%, C. 11.8%, D. 27.5%, and E. 4.1%. Id. The question simply asks what company an individual started. It does not use the trade name petitioner has pled "Longevity" and it does not compare the marks, but it simply tries to determine what company was founded by a particular individual. Almost equal percentages of respondents (13.4% and 11.8%) indicated that they thought Youngevity and Biogevity were founded by Doc Wallach as thought American Longevity (14.2%) was. Because of the lack of screening of participants and the vagueness of the question, among other things, this survey offers little support for petitioner.

Petitioner's other evidence of actual confusion consists of Mr. Clemens' summary of a statement by the owner of a radio station. Song. Ex. 30 and Clemens dep. at 48-52. The statement is hearsay and it does not meet the

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requirements of a business record. We add that, even if it were considered, it simply indicates that two callers, after hearing a radio advertisement that included a toll free number for one company, inexplicably called another number for a different company.

Mr. Clemens did testify that he spoke with one caller who thought that American Longevity products were available from Longevity Network. Clemens. dep. at 52-55. If it is otherwise reliable, employee testimony on the subject of misdirected calls can be admissible. Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 217 USPQ 145, 149 n. 10 (5th Cir. 1982) (Testimony of plaintiff's employees about purchasers attempting to reach defendant admissible because it was either not used "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) or was relevant under the state of mind exception (Fed. R. Evid. 803(3))); CCBN.com Inc. v. c-call.com Inc., 53 USPQ2d 1132, 1137 (D.C. Mass. 1999) ("[S]tatements of customer confusion in the trademark context fall under the 'state of mind exception' to the hearsay rule. See Fed. R. Evid. 803(3)"). Therefore, we will consider Mr. Clemens' testimony of a misdirected phone call that he received. However, we will not consider Mr. Clemens' vague testimony concerning general discussions

he had with people he was trying to recruit to be network marketers. Clemens dep. at 56-57.¹⁰

Regarding the sophistication of purchasers, petitioner, who had previously argued that its products are sold only through independent distributors in the much more limited network marketing area through its independent distributors,¹¹ now argues that the "average consumer would exercise as much care in purchasing the nutritional supplement goods as they would in selecting a snack food. Moreover, the low price would make it likely that consumers would buy Longevity's and registrant's goods on an impulse." Brief at 32. A review of petitioner's and registrant's catalogs (Song Exhibits 8 and 29) hardly supports a finding that potential purchasers make impulse purchases.¹² Respondent argues that the "ultimate consumers of products designated by AMERICAN LONGEVITY trademark include all members of the public who purchase nutritional supplements and personal care products at conventional retail outlets" (Respondent's Brief at 13). Respondent maintains that these

¹⁰ Song Ex. 31 consisting of letters in foreign characters (Korean distributors according to Song. Dep. at 144; Japanese according to the Reply Brief at 11) is simply irrelevant. Whether there is confusion of the marks in other countries is not relevant to this proceeding.

¹¹ Indeed, petitioner maintains that it "is not concerned with products sold through conventional retail channels, as those products do not compete with Longevity's products." Petitioner's Brief at 17.

¹² Normally, sales of items by catalog would seem to be a more thoughtful process than purchasing a snack item at a convenience store.

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consumers would be discriminating purchasers. Purchasers of dietary supplements would unlikely be impulse purchasers. Accord Stouffer Corp. v. Health Valley Natural Foods Inc., 1 USPQ2d 1900, 1902 ((TTAB 1986) (“[E]ven in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content”). While there is no direct evidence on the sophistication of the consumers, there is no basis to conclude that these purchasers would be unsophisticated or impulse purchasers.

We now must balance the facts on the issue of likelihood of confusion. We start with the mark and trade name, and, as we have previously noted, they are similar. They both contain the same word, *Longevity*, to which respondent has added the disclaimed word, *American*. Concerning the goods, respondent’s goods are nutritional supplements for people while petitioner’s trade name is also associated with similar and identical goods. Therefore, the goods and trade name use are related. We have also found that petitioner’s trade name is neither a particularly strong or weak mark. In addition, there have been only a

few isolated instances that might be considered actual confusion.¹³

When we consider all of the factors in this case, we conclude that petitioner has met its burden by a preponderance of the evidence. When terms as similar as LONGEVITY and AMERICAN LONGEVITY are used with or associated with nutritional supplements, confusion is likely.

Decision: The petition to cancel is granted.

¹³ While the parties have co-existed for several years, we cannot make any contrary assumption that this supports a finding that confusion is not likely because we do not have much evidence of the extent of respondent's presence in the market place. The excerpt (S. Wallach dep. at 147-48) from the testimony of respondent's "CEO" is illustrative.

Q. When American Longevity began its operations in 1997, how many associates did it have?

A. I don't know.

Q. How about in 1998, how many associates were there?

A. If you are talking about associates, specific, apart from preferred customers -

Q. Yes.

A. - I don't know.

Q. Do you know how many preferred customers it had in 1998?

A. No.

Q. How about in 1999?

A. I have no way of knowing.

Q. But you were able to give an estimate of how many associates there are today; is that correct?

A. Only an estimate of, an approximation of percentagewise.

[Wallach v. Longevity Network, Ltd.](#)

United States District Court for the Central District of California

November 27, 2005, Decided; November 29, 2005, Filed; November 30, 2005, Docketed

NO. CV 04-2404 SJO (RZx)

Reporter

2005 U.S. Dist. LEXIS 45937; 2005 WL 5958092

JOEL D. WALLACH, Plaintiff, v. LONGEVITY NETWORK, LTD., Defendant. AND RELATED CROSS ACTIONS.

Hills, CA; Ned A Ardagna, Haskins and Associates, Bonita, CA.

Subsequent History: Motion denied by [Wallach v. Longevity Network, Ltd., 2006 U.S. Dist. LEXIS 98787 \(C.D. Cal., Feb. 15, 2006\)](#)

For Stephan R Wallach, American Longevity Inc, ThirdParty Defendants: Michael A Painter, Isaacman Kaufman and Painter, Beverly Hills, CA; Ned A Ardagna, Haskins and Associates, Bonita, CA.

Prior History: [Wallach v. Longevity Network, Ltd., 2004 U.S. Dist. LEXIS 31218 \(C.D. Cal., Aug. 3, 2004\)](#)

For Longevity Network Ltd, a Nevada limited liability company, ThirdParty [*2] Plaintiff: Karin G Pagnanelli, Russell J Frackman, LEAD ATTORNEYS, Mitchell Silberberg & Knupp, Los Angeles, CA; Meichelle R MacGregor, Michael F Maschio, LEAD ATTORNEYS, Cowan Liebowitz and Latman, New York, NY.

Core Terms

secondary meaning, marketing, likelihood of confusion, network, trademark, Reconsideration, summary judgment, immaterial, factors, reconsideration motion, nutritional, supplements, products, distributors, marks, registration, final decision, local rule, incontestible, deposition, similarity, cancel, trade name, proximity, channels

Judges: S. JAMES OTERO, UNITED STATES DISTRICT JUDGE.

Opinion by: S. JAMES OTERO

Counsel: [*1] For Joel D Wallach, an individual, Plaintiff: Michael A Painter, LEAD ATTORNEY, Isaacman Kaufman and Painter, Beverly Hills, CA; Ned A Ardagna, LEAD ATTORNEY, Haskins and Associates, Bonita, CA.

Opinion

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

For Longevity Network Ltd, a Nevada limited liability company, Defendant: Catriona M Collins, Meichelle R MacGregor, Michael F Maschio, LEAD ATTORNEYS, Cowan Liebowitz and Latman, New York, NY; Karin G Pagnanelli, Russell J Frackman, LEAD ATTORNEYS, Mitchell Silberberg & Knupp, Los Angeles, CA.

This matter is before the Court on Plaintiff Joel D. Wallach's ("Plaintiff Wallach") Motion for Reconsideration of this Court's Order issued on September 2, 2005 granting Defendant Longevity Network, Ltd.'s ("Defendant LN") Motion for Summary Judgment, and denying Plaintiff's Motion for Partial Summary Judgment. The Court deemed this matter appropriate for decision without oral argument. *See Fed. R. Civ. P. 78; Local Rule 7-15.* Having carefully considered all argument and admissible documentation submitted, Plaintiff Wallach's Motion for Reconsideration is DENIED.

For Longevity Network Ltd, a Nevada limited liability company, Counter Claimant: Karin G Pagnanelli, Russell J Frackman, LEAD ATTORNEYS, Mitchell Silberberg & Knupp, Los Angeles, CA; Meichelle R MacGregor, Michael F Maschio, LEAD ATTORNEYS, Cowan Liebowitz and Latman, New York, NY.

For Joel D Wallach, an individual, Counter Defendant: Michael A Painter, Isaacman Kaufman and Painter, Beverly

I. PROCEDURAL BACKGROUND

Defendant LN and Plaintiff Wallach both sell nutritional supplements. Defendant LN owns the LONGEVITY trademark and Plaintiff Wallach obtained a registration for the [*3] AMERICAN LONGEVITY trademark from the Trademark Trial and Appeal Board ("TTAB") on April 21, 1998. Pl.'s App. of Evid., Ex. 1, TTAB Decision at 1.

On December 11, 2000, Defendant LN filed a petition with the TTAB to cancel Plaintiff Wallach's AMERICAN LONGEVITY mark on the ground that "since as early as March 1994 and since long prior to any first use date upon which Registrant can rely, Petitioner LN adopted and continuously used the mark LONGEVITY for nutritional supplements, health and beauty aids and video and audio cassettes in the field of health." *Id.* at 2.

On March 23, 2004, the TTAB cancelled Plaintiff Wallach's trademark registration for the mark AMERICAN LONGEVITY for "nutritional supplements for people." *Id.* at 26. In its decision to cancel Plaintiff Wallach's registration, the TTAB made two significant findings in favor of Defendant LN: (1) Defendant LN had priority of use of its trade name and mark LONGEVITY, *id.* at 16; and (2) there was a likelihood of confusion between Defendant LN's LONGEVITY name and mark and Plaintiff Wallach's registration, AMERICAN LONGEVITY. *Id.* at 26.

On April 6, 2004, Plaintiff Wallach filed a complaint against Defendant LN with this Court to appeal [*4] the TTAB's decision cancelling Plaintiff Wallach's registration. Plaintiff Wallach filed its Motion for Partial Summary Judgment on March 4, 2005. In Plaintiff's Motion, Plaintiff did not contest priority of use but contested three TTAB findings relating to the issue of likelihood of confusion. Plaintiff Wallach contested the following TTAB findings: (1) the LONGEVITY trade name is neither a particularly strong or weak mark; (2) the absence of probative evidence of actual confusion does not mean that there is no likelihood of confusion; and (3) the AMERICAN LONGEVITY trademark is likely to be confused with the LONGEVITY trademark. Pl.'s Mot. at 2.

The new evidence not before the TTAB that Plaintiff brought forth in the Motion for Partial Summary Judgment consisted of the following: (1) surveys of Plaintiff Wallach's expert witness, Dr. Gerald Ford ("Ford"), concerning the likelihood of confusion and secondary meaning; (2) testimony of Defendant LN's expert rebuttal witness, Mr. Ossip, who explained why Dr. Ford's surveys were unreliable; (3) testimony of Defendant LN's expert, Mr. Blake, regarding the unique nature of the network marketing industry and actual and likely confusion; (4) [*5] testimony

by Defendant LN's expert, Mr. Clements, regarding the unique nature of the network marketing industry and the likelihood of confusion; and (5) testimony of third parties who were deposed by Plaintiff Wallach concerning their use of the term "Longevity."

On March 21, 2005, Defendant LN filed a Cross Motion for Summary Judgment to dismiss Wallach's appeal of the TTAB's decision. Defendant LN argued that the TTAB decision should be affirmed on summary judgment because Plaintiff Wallach had not shown that the TTAB's decision was unsupported by the evidentiary record.

On September 2, 2005, this Court issued an Order granting Defendant's Motion for Summary Judgment and denying Plaintiff's Motion for Partial Summary Judgment. In its Order, this Court found that the TTAB's decision was supported by substantial evidence and thus affirmed the TTAB's decision to cancel Plaintiff Wallach's Registration for the mark AMERICAN LONGEVITY.

On September 30, 2005, Plaintiff Wallach filed a Motion for Reconsideration of this Court's September 2, 2005 decision. On October 7, 2005, Defendant LN filed an Opposition to Plaintiff Wallach's Motion for Reconsideration.

II. FACTUAL BACKGROUND

A. Network [*6] Marketing

Defendant LN sells nutritional supplements, food products and skin, body and hair care products. Michael F. Maschio Decl. ("Maschio Decl."), Ex. D, 17:9-20. Defendant LN began using the name and mark LONGEVITY in connection with nutritional supplements and related goods in Spring of 1994. *Id.*, 17:9-20. Defendant LN's products are sold by network marketing, the contemporary term for multilevel marketing ("MLM"). *Id.*, 13:11-13. Network marketing is the business of marketing and selling of products primarily by word of mouth through multiple independent distributors who recruit other independent distributors to sell products through their distribution line. *Id.*, 13:22-25, 14:1-23. Network marketing relies heavily on word-of-mouth marketing. *Id.* In network marketing, the visual branding of products is not as significant as verbal use of trademarks and trade names. Brett Blake Decl., 11:3-26. Defendant LN does not sell its products directly to consumers. Maschio Decl., Ex. D., 34:12-25; *Id.*, 112:1-25; Leonard W. Clements Decl., Ex. A, 4:4-8. Products sold through conventional retail channels, are not competitive with products sold by network marketing. *Id.*

B. The LONGEVITY Mark

Defendant [*7] LN's sales of nutritional supplements under the LONGEVITY name and mark approached 9 million by 1997. Def.'s App. of Evid., Ex. 11. LONGEVITY maintains a website that features the LONGEVITY name and mark and promotes Defendant LN's products and services. Maschio Decl., Ex. D., 56:6-25. Bruce Jenner, the United States 1976 Olympic decathlon champion, was a spokesperson for Defendant LN and was featured on Defendant LN's website. *Id.*, 57:2-25. The LONGEVITY name and mark has been featured in several publications directed toward the network marketing industry. *Id.*, 60-74, 93-110; Song Trial Exs. 14, 15, 22, 24-26. Defendant LN was listed as one of *MLM Insider's* "Best Companies in Network Marketing" each year from 1995 to 2001, and as "*Profit Now's* 1997 Company of the Year." *Id.*, 70-74; Song Trial Exs. 15, 22. Defendant LN received *MLM Insider's* "Distributor's Choice Award" in 1997. *Id.*, 74:6-25, 75:1-20.

C. The AMERICAN LONGEVITY Mark

Plaintiff Wallach also distributes its nutritional supplements by network marketing and does not sell directly to consumers. Wallach Dep., Feb. 21, 2002, 31:7-18. Plaintiff Wallach promotes the products sold under the AMERICAN LONGEVITY mark on his website [*8] at www.americanlongevity.org. *Id.*, 56:13-17. Plaintiff Wallach and Defendant's products are directly competitive. Clements Decl., Ex. A., 4:8-12. Plaintiff Wallach was the owner of U.S. Trademark Reg. No. 2,152,309 for the mark "AMERICAN LONGEVITY" for "nutritional supplements for people." Reg. No. 2,152,309. The registration disclaimed the term "AMERICAN" and recited the first use date of April 1997. *Id.* Plaintiff Wallach did not conduct a trademark search or other investigation prior to adopting the AMERICAN LONGEVITY mark. Wallach Dep., Feb. 21, 2002, 17:5-12. Plaintiff Wallach was familiar with the network marketing industry prior to adopting the AMERICAN LONGEVITY trade name and mark. *Id.*, 41:13-16, 42:11-19. On May 12, 1997, one month after Plaintiff Wallach's first use of the AMERICAN LONGEVITY mark, Defendant LN gave Plaintiff Wallach written notice of Defendant LN's prior rights in and to the LONGEVITY NETWORK name and mark and demanded that Plaintiff Wallach stop using the AMERICAN LONGEVITY mark. Maschio Decl., Ex. D, 115-117. In this letter, Defendant LN referred to the LONGEVITY NETWORK mark but not the LONGEVITY mark. Song Tri. Ex. 28.

D. Dr. [*9] Ford's Secondary Meaning Survey

Dr. Ford is a "partner in the marketing research and consulting firm of Ford Bubala & Associates, located in

Huntington Beach, California, where [he has] been engaged in commercial marketing research and consulting for the past twenty-nine years." Pl.'s App. of Evid., Ex. 3 ("Ford Decl."), p. 1 P 1. Nearly one-half of the consultancies in which Dr. Ford has participated have involved the design and execution of marketing research surveys. *Id.*, p. 19 P 25. Dr. Ford is also an emeritus faculty member of the School of Business Administration, California State University, Long Beach, where he held a full-time teaching position for twenty-five years prior to retiring in 1994. *Id.*, p. 1, P 1. Dr. Ford taught both graduate and undergraduate level courses in marketing and management. *Id.*, p. 19, P 23. Dr. Ford holds a Bachelor's Degree in Advertising from San Jose State University, a Master's Degree in Business Administration from the University of Southern California, and a Doctoral Degree in Business Administration from the University of Southern California. *Id.*, p. 19, P 22. He is a member of the American Marketing Association, the American Academy of Advertising, [*10] the American Association of Public Opinion Research, the Council of American Survey Research Organizations, and the International Trademark Association. *Id.*, p. 19, P 24.

Dr. Ford conducted a secondary meaning survey "designed to measure the level of degree, if any, to which the name or term LONGEVITY is associated with nutritional supplements or skin and hair care products emanating from Longevity Network or a sole, yet anonymous, source." *Id.*, p. 2, n.1. Dr. Ford concluded, "that the results of the two likelihood of confusion surveys are corroborated by the results of the secondary meaning pilot survey with respect to the name LONGEVITY. *Id.*, p.19, P 21. Specifically, Dr. Ford alleges the secondary meaning survey results clearly support a finding that the name LONGEVITY is not associated with nutritional supplements or skin and hair care products emanating from Longevity Network or a sole, yet anonymous, source." *Id.*

III. LEGAL STANDARD

A. Motion for Reconsideration

"A motion for reconsideration of the decision on any motion may be made only on the grounds of... (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration [*11] shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." [Local Rule 7-18](#).

B. The Ninth Circuit Test for Likelihood of Confusion in Trademark Infringement

The Ninth Circuit applies an eight-factor test to the analysis of likelihood of confusion between two marks: (1) strength of the mark; (2) proximity of goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product line. [*AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 \(9th Cir. 1979\)](#).

This is a highly pliant test¹ and some factors are more important than others. See [*Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036, 1054 \(9th Cir. 1993\)](#). The Court is to determine whether and how specific factors are used on a case-by-case basis. *Id.* In some cases, the Ninth Circuit relies heavily on the following three factors: similarity of the marks, the proximity of the goods, and the marketing channels used. [*GoTo.com, Inc. v. The Walt Disney Company*, 202 F.3d 1199, 1205 \(9th Cir. 2002\)](#).
[*12]

IV. DISCUSSION

Plaintiff Wallach's Motion for Reconsideration is brought on the grounds that the Court: (1) failed to consider evidence that indicated that the TTAB Decision was based in part on intentional misrepresentations of fact presented in testimony by Defendant LN's president, James Song; (2) erroneously concludes that Defendant LN's mark was registered and accorded it with incontestable status; and (3) failed to consider evidence offered in opposition to Defendant LN's Motion for Summary Judgment of the appeal of the decision of the TTAB. See Mot. Reconsideration at 4. Having considered each of Plaintiff Wallach's grounds and assertions thereon, this Court
[*13] hereby DENIES Plaintiff's Motion for Reconsideration.

A. Plaintiff's First Assertion That the TTAB's Decision Was Based in Part on False Testimony Is Unpersuasive Because James Song's Testimony Is Immaterial to Both the TTAB's and this Court's Final Decision and Thus this Court Needs Not Opine Further on its Veracity.

In order to convince the Court to reconsider its earlier decision, Plaintiff Wallach first asserts that Mr. Song's representation that Defendant LN had a figure of 50,000 distributors in 2002 was false² and materially relied upon in the TTAB's evaluation of the LONGEVITY mark's strength and the TTAB's Decision to cancel Plaintiff's mark. See Mot. Reconsideration at 6. This Court finds Plaintiff's first assertion to be unpersuasive because neither the TTAB nor this Court materially relied upon the strength of the mark analysis in reaching its final decision.

In the Ninth Circuit, where the marks and the goods provided are almost identical, "the strength of the mark is of diminished importance in the likelihood of confusion analysis." See [*Brookfield Comm., Inc. v. West Coast Entm't Corp.*, 174 F. 3d 1036, 1058 \(9th Cir. 1999\)](#); see also [*GoTo.com, Inc. v. Walt Disney Co.*, 202 F. 3d 1199, 1208 \(9th Cir. 2000\)](#) (underlining the conclusion reached in *Brookfield.*) (citations omitted).

In its decision, the TTAB clearly relied on the similarity of the marks and the proximity of the goods as the primary factors, not the strength of the mark. See Pl.'s App. of Evid., Ex. 1, TTAB Decision at 25 (stating "[w]e start with the mark and trade name, and ... they are similar.") (emphasis added). Moreover, even after considering the allegedly false 50,000 distributor figure in the strength of the mark analysis as though it were true, the TTAB still came to the conclusion that "[w]e [*15] cannot agree that [Defendant LN's] mark is a particularly strong mark or name." Pl.'s App. of Evid., Ex. 1, TTAB Decision at 17. In light of substantial evidence favoring the primary factors on which the TTAB had relied in lieu of relying on the strength of the mark, and in light of the TTAB's unwillingness to find Defendant's mark to be a strong one, this Court finds that questions over the strength of Defendant's mark were immaterial to the TTAB's decision.

Moreover, in its September 2, 2005 Order, this Court also found the strength of the mark immaterial to the Court's decision. This Court stated that "[s]ince four factors weigh in favor of a likelihood of confusion and three of those

¹ "A word of caution: this eight-factor test for likelihood of confusion is pliant. Some factors are much more important than others, and the relative importance of each individual factor will be case-specific. Although some factors - such as the similarity of the marks and whether the two companies are direct competitors - will always be important, it is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the factors." [*Brookfield*, 174 F.3d 1036, 1054 \(9th Cir. 1993\)](#).

² In support of this assertion, Plaintiff cited: (1) Pl.'s Suppl. App. of Evid., Song Depo 10/12/01 at 6-7; (2) Song Test 7/9/02 at 9-10; and (3) Pl. App. of Evid., Ex. 8 at 5, for the allegation that Defendant grossly over-estimated the number of its distributors by either falsely testifying, imprecisely classifying [*14] (and thus including) distributors in South Korea, or both. As such, Plaintiff contends that Defendant's mark was not as strong as Defendant asserted because Defendant in actuality "had only 1,919 distributors in 1998 and only 334 distributors in 2002." See Mot. Reconsideration at 6.

factors [i.e., similarity of the marks, the proximity of the goods, and the marketing channels used] hold greater weight, the Court finds that Defendant LN has met its burden establishing that there is a likelihood of confusion." See Order at 24. As such Mr. Song's testimony relating to the strength of Defendant LN's mark was immaterial and this Court needs not opine further on its veracity.

B. Plaintiff's Second Assertion That this Court Erroneously Accorded Defendant LN's Unregistered Mark with Incontestible [*16] Status Is Accurate but Imprecisely Taken as the Reason Behind this Court's Decision to Accord Dr. Ford's Secondary Meaning Survey with Minimal Weight.

Plaintiff next asserts that this Court wrongly concluded that Defendant LN's mark was registered and incontestible as a matter of law and that this mistake "materially distorted a proper analysis of the strength of defendant's LONGEVITY mark." See Mot. Reconsideration at 14 Specifically, Plaintiff Wallach believes that Dr. Gerald Ford's secondary meaning survey was accorded minimal weight toward the strength of the mark because of this Court's erroneous finding of incontestible status. *Id.* at 11. This Court disagrees with this assertion as an imprecise reason for this Court's decision. In other words, while this Court agrees that Defendant LN's mark is unregistered and thus not incontestible (*see* Opp'n Mot. Reconsideration at 2), this Court's mis-statement was ultimately immaterial to its final decision to accord Dr. Ford's secondary meaning survey with little weight in both the Court's (1) strength of the mark analysis; and also (2) overall likelihood of confusion analysis.

In the strength of the mark analysis, secondary meaning has minimal [*17] probative value because secondary meaning and strength of the mark are two distinct legal concepts under substantive trademark law. The former refers to the "distinctiveness" of a mark, whereas the latter refers to the "commercial strength."³ See McCarthy on Trademarks and Unfair Competition, section 11:82 at 11-160; *see also GoTo.com, 202 F.3d at 1207*. Thus, having evaluated Dr. Ford's secondary meaning survey both in form and in content,⁴ this Court has found that the survey is, *at the very most*, probative of the degree of distinctiveness of the LONGEVITY mark and not of its commercial strength. In other words, in the strength of the mark analysis, Dr. Ford's secondary meaning survey was given little weight in this

Court's decision because the survey was not sufficiently probative toward the question of the mark's strength.

In the overall likelihood of confusion analysis, Dr. Ford's secondary meaning survey also played no significant role in this Court's decision. First, even assuming, *arguendo*, that Dr. Ford's secondary meaning survey had significant probative value toward the mark's strength, any potentially favorable finding on this factor would have been rendered immaterial in light of this Court's placement of heavyweight on the other three *Sleekcraft* factors, namely, the similarity of the marks; the proximity of the goods; and the marketing channels used, all of which pointed toward a finding of likelihood of confusion. See Order at 24.

Moreover, in the overall likelihood of confusion analysis, the *Sleekcraft* eight-factor test does not utilize the existence of a mark's secondary meaning as a relevant factor. Even assuming, *arguendo*, that secondary meaning were a relevant factor, in this case there is no clear showing that secondary meaning would have been required for suggestive marks, which are "[i]rrebuttably [*19] presumed to have achieved customer recognition and association immediately upon adoption and use." See McCarthy section 15:1, 15-5; 11:62 at 11-126.1; *see also In re Gyulay, 820 F.2d 1216, 1217 (Fed. Cir. 1987)*. Because the TTAB and this Court both recognize Defendant LN's mark as suggestive, thus irrebuttably presumed to be distinctive, neither Dr. Ford's survey findings suggesting a lack of secondary meaning nor Plaintiff Wallach's offer of evidence based on Model Jury Instruction 18.16 (*see* Mot. Reconsideration at 13) to support a finding of no secondary meaning is material to this Court's evaluation of likelihood of confusion.

For the foregoing reasons, *each being sufficient on its own*, Dr. Ford's secondary meaning survey was thus accorded minimal weight, and the mis-statement regarding the LONGEVITY mark's incontestible status was immaterial to this Court's decision.

C. Plaintiff's Third Assertion That Plaintiff's Non-Compliance with this Court's Standing Order Being the Result of Time Constraint and Lack of Access to the Transcript of the Deposition of Brett Blake Was Immaterial to this Court's Decision.

On page 2 of this Court's September 2, 2005 Order, this

³ In Plaintiff's Reply at 5, Plaintiff accurately stated that secondary meaning is relevant in the evaluation of whether a term is a trademark. However, on the separate and more precise question of a mark's commercial strength, secondary meaning has minimal probative value. See McCarthy, section 11:82 at 11-160.

⁴ Dr. Ford interpreted the data from the secondary meaning [*18] survey to produce (and thus assert) a finding of lack of secondary meaning. In other words, the LONGEVITY mark was found to be not associated with Defendant LN. Pl.'s App. of Evid., Ex. 3 at 19.

Court made note of [*20] the fact that Plaintiff Wallach did not cite evidence to support material facts. See Order at 2. In response, Plaintiff Wallach states that "any perceived variance with the Court's Standing Order was the result of time constraints" (see Mot. Reconsideration at 16) and lack of access to the transcript of the deposition of Brett Blake, allegedly caused by Defendant LN's delays thereon. See Mot. Reconsideration at 15.

On the question of "perceived variance," this Court looks to its September 2, 2002 Order for guidance. On page 4 of the Order, this Court stated:

[T]he Ninth Circuit has made it clear that "a nonmoving party's failure to comply with local rules does not excuse the moving party's affirmative duty under *Rule 56* to demonstrate its entitlement to judgment as a matter of law. Short of that, [courts] turn the summary judgment rule into a mere sanction for noncompliance with local rules." [Martinez v. Stanford, 323 F.3d 1178, 1182 \(9th Cir. 2003\)](#).

Accordingly, based on *Martinez*, regardless of Plaintiff Wallach's non-compliance with [Local Rule 56-1](#), [Local Rule 56-2](#), and the Court's Initial Standing Order, this Court cannot grant summary judgment unless Defendant LN succeeds in showing [*21] that "there is no genuine issue as to any material fact and it was entitled to a judgment as a matter of law." See *Fed. R. Civ. P. 56(c)*. As discussed below, Defendant LN affirmatively met this burden.

It should be clear from the above passage, then, that Plaintiff's non-compliance with this Court's Standing Order played no material role in this Court's decision.

Moreover, Plaintiff contends that this Court placed "great reliance on the Declaration of Mr. Blake" in its Order.⁵ See Mot. Reconsideration at 15. This Court disagrees with this assertion. Mr. Blake's declaration was relevant to the analysis of actual confusion. However, on page 21 of the Order, this Court dismissed the few instances of actual confusion; and on page 24, this Court held actual confusion to be inconsequential or at most weighs lightly toward likelihood of confusion. Because the [Sleekcraft](#) factor toward which Mr. Brett's deposition might have had probative value was inconsequential to this Court's overall decision, Mr. Brett's deposition was immaterial to this Court's final decision.⁶

V. RULING

Because Plaintiff Wallach has not made a manifest showing of a failure to consider material facts presented to the Court, Plaintiff's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

Dated this 27 day of November, 2005.

/s/ S. James Otero

S. JAMES OTERO

UNITED STATES DISTRICT JUDGE

⁵ Specifically, Plaintiff contends that a conversation mentioned in Blake's deposition was not a telephone call but rather was [*22] in person. See Mot. Reconsideration at 16.

⁶ The remainder of Plaintiff Wallach's argument regarding this Court's alleged failure to consider Plaintiff's submitted evidence (see Mot. Reconsideration at 16-18) is substantially similar to each of Plaintiff's foregoing arguments this Court has considered. For example, Plaintiff's assertion that the deposition of Michael Zwerling to rebut actual confusion was not considered is immaterial to this Court's final decision (see Mot. Reconsideration at 18) for the same reason why Mr. Blake's declaration was deemed immaterial to this Court's final decision.

9/5/01

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT
OF THE TTAB**

Paper No. 15
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Kroeger Herb Products Co., Inc.

v.

Shaperite Concepts, Ltd.

Cancellation No. 28,369

David Mastbaum of Law Offices of David Mastbaum for Kroeger Herb Products Co., Inc.

Michael D. McCully of Halliburton Company for Shaperite Concepts, Ltd.

Before Hanak, Chapman and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Kroeger Herb Products Co., Inc. (petitioner) has filed a petition to cancel Registration No. 2,139,757 owned by Shaperite Concepts, Ltd. (respondent) for the mark META-LEAN for "vitamins and nutritional dietary supplements" in International Class 5.¹

As grounds for cancellation, petitioner alleges that since prior to respondent's first use petitioner has continuously used the mark METALINE for natural dietary

supplements; petitioner asserts priority and likelihood of confusion under Section 2(d) of the Trademark Act, contending that respondent's mark, when applied to respondent's goods, so resembles petitioner's previously used mark METALINE for dietary supplements as to be likely to cause confusion; that on February 28, 1997 petitioner filed an application for the mark METALINE for dietary supplements (Serial No. 75/249,358²), and that its application was refused registration under Section 2(d) of the Act on the basis of respondent's registration; and that respondent's registration has caused damage to petitioner.

Respondent, in its answer, denied the salient allegations of the petition to cancel.

The record consists of the pleadings; the file of the involved registration; the testimony, with exhibits, of Michelle Filoia and Thomas Brown; and a number of documents, including respondent's answers to interrogatories, all made of record by way of petitioner's notice of reliance. Respondent did not take any testimony or offer any evidence. Only petitioner filed a brief. An oral hearing was not requested by either party.

¹ Registration No. 2,139,757 issued February 24, 1998, from an application filed on September 16, 1996. The claimed dates of first use and first use in commerce are September 18, 1996.

According to Thomas Brown, petitioner's president, petitioner manufactures and distributes dietary supplements. Petitioner has continuously used since 1978 the mark METALINE to identify a dietary supplement for metal detoxification. Between 1978 and 1997, the sale of METALINE products in forty-seven states produced \$390,000 in revenues for petitioner. The product is marketed to health food stores, pharmacies and licensed health practitioners, through petitioner's website, through distributors including multilevel marketers, and at trade shows.

We turn first to the question of priority of use. The testimony of Thomas Brown supports petitioner's continuous use of the METALINE mark since November 1978. In this case, respondent may rely on the filing date of its intent-to-use application, which became its constructive use date upon the issuance of its registration. That date, September 16, 1996, is clearly subsequent to petitioner's first use date of November 1978. Accordingly, in this dispute, priority belongs with petitioner.

This brings us to the issue of likelihood of confusion. Our determination is based upon an analysis of all of the probative facts in evidence that are relevant to the factors

² Action on petitioner's application has been suspended by the Trademark Examining Attorney in Law Office 115 handling the application.

regarding likelihood of confusion. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

Turning first to the parties' goods, both are described as dietary supplements. Both are manufactured primarily with herbal substances. While respondent sells its supplement as a weight-loss product and petitioner touts its product as a cleansing formula designed for those concerned about metal poisoning, for purposes of our likelihood of confusion analysis, these two dietary supplements must be deemed to be closely related goods.

We turn next to the parties' respective marks. There are several obvious similarities between METALINE and META-LEAN. They have a similar appearance as each has the same number of letters, with the first five being identical. Each consists of three syllables. When spoken, any minor differences in sound between LINE and LEAN may go undetected since they are quite similar in terms of their pronunciation.

Inasmuch as the word METALINE appears in the dictionary as a mixture including metallic oxides,³ one might argue this is in some way suggestive for a dietary supplement designed for metal detoxification, while as applied to a weight-loss product, the final syllable of META-LEAN creates a different,

suggestive connotation. However, in spite of these somewhat different suggestions, we find that the similarities in appearance and sound outweigh this slight difference in meaning. Accordingly, we conclude that these respective marks are quite similar in overall commercial impressions.

As to the du Pont factor dealing with channels of trade, neither party has restricted itself to any particular channels of trade. While there is no restriction in its identification of goods, the record shows that respondent relies primarily upon a multilevel marketing system. In any case, the record shows that petitioner also relies upon such distributors. Furthermore, both parties offer their products through catalogues and newsletters, and both maintain an active presence on the Internet. Again, while the record shows that respondent's procedural guidelines for its distributors would seem to prevent the appearance of respondent's goods on retail shelves, the record also demonstrates that this proscription is not enforced in a proactive manner.

Finally, as to the du Pont factor dealing with the conditions under which and buyers to whom sales are made, there is nothing in the record to suggest that dietary supplements are so expensive or that the purchasers are so

³ "Metaline, *n.* [*metal* and *-ine*] a lubricating mixture of metallic oxides, grease and other substances." Webster's Deluxe

sophisticated that our decision should be different because of this consideration.⁴

Accordingly, given that these are quite similar marks used on closely related goods moving through some of the same channels of trade to be purchased by the same class of ordinary purchasers, we find a likelihood of confusion.

Decision: The petition to cancel is granted, and Registration No. 2,139,757 will be cancelled in due course.

Unabridged Dictionary, (2nd Ed.).

⁴ While registrant did not file a brief or submit testimony during the trial portion of this case, respondent had argued in opposition to an earlier motion by petitioner for summary judgment that its customers were sophisticated when it came to health care products.