

**This Opinion is Not a
Precedent of the TTAB**

Hearing: July 17, 2014

Mailed: July 18, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Green Supreme, Inc.
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Serial No. 85502207
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John P. Corcoran, Jr. of Jones, Gregg, Creehan & Geraci, LLP,
for Green Supreme, Inc.

Katina S. Mister, Trademark Examining Attorney, Law Office 104,
Chris Doninger, Managing Attorney.

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Before Quinn, Bergsman and Hightower,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Green Supreme, Inc. (“Applicant”) seeks registration on the Principal Register of the mark BARLEY POWER GREEN SUPREME and design, shown below,



for “dietary supplements also containing organically grown barley plants,” in Class 5. Applicant disclaimed the exclusive right to use the word “Barley.”

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, when applied to Applicant’s goods, is likely to cause confusion with the mark GREEN SUPREME, in typed drawing form, for “vitamin and mineral supplements, dietary supplements with herbs and natural ingredients,” in Class 5.¹

At the outset, we note that Applicant claimed ownership of Registration No. 2142028 for the same mark and same goods as the mark and goods covered by Applicant’s current application. The prior registration was cancelled by operation of law under Section 8 of the Trademark Act, 15 U.S.C. § 1058, because Applicant failed to file a declaration of continued use. For whatever reason, Applicant’s prior registration issued over the GREEN SUPREME registration now cited as a bar to Applicant’s current application. However, Applicant is not automatically entitled to a return to the *status quo*. As the Board stated in *In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1480 (TTAB 2007):

Nor does applicant's cancelled registration justify registration of its current application. A cancelled registration is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act. See, e.g., *In re Hunter Publishing Company*, 204 USPQ 957, 963 (TTAB 1979) (cancellation “destroys the Section [7(b)] presumptions and makes the question of registrability ‘a

¹ Registration No. 1956535, issued February 13, 1996; renewed.

new ball game' which must be predicated on current thought.”).

See also In re Davey Products Pty Ltd., 92 USPQ2d 1198, 1206 (TTAB 2009); *In re Perez*, 21 USPQ2d 1075, 1077 (TTAB 1991) (Section 2(d) refusal affirmed even though the cited registration had not been cited against applicant's previous registration, now expired, of the same mark for the same goods; “[W]e are, of course, not bound by an Examining Attorney's prior determination as to registrability.”). *See generally In re Omega SA*, 404 F.3d 1362, 83 USPQ2d 1541 (Fed. Cir. 2007); *In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564 (Fed. Cir. 2001).

In short, the fact that Applicant’s mark was previously registered does not automatically justify re-registration of Applicant’s mark, if the evidence as a whole in the current application establishes that a likelihood of confusion exists. In a similar case, the Board noted:

We can only speculate as to why the cited registration issued over applicant's predecessor's now-cancelled registration. In any event, even when one registration issues over the other and both exist side-by-side for some period of time (in this case about six years), that is one element “which is placed in the hopper with other matters which ordinarily are considered in resolving the question of likelihood of confusion, but which is not in the least determinative of said issue.” *In re Trelleborgs Gummifabriks Aktiebolag*, 189 USPQ 106, at 107 (TTAB 1975). In this case, we find that the factors of the identical goods and highly similar marks far outweigh this point in our consideration of likelihood of confusion as a whole.

In re Kent-Gambore Corp., 59 USPQ2d 1373, 1377 (TTAB 2001).

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. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks”). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

A. The similarity or dissimilarity and nature of the goods, the established, likely-to-continue channels of trade and classes of consumers.

Applicant is seeking to register its mark for “dietary supplements also containing organically grown barley plants.” The goods in the cited registration are identified as “vitamin and mineral supplements, dietary supplements with herbs and natural ingredients.” Because Registrant’s “dietary supplements with herbs and natural ingredients” encompass Applicant’s “dietary supplements also containing organically grown barley plants” (*i.e.*, a natural ingredient), the goods are in part identical.²

Because the goods described in the application and the cited registration are in part identical, we must presume that the channels of trade and classes of

² Applicant did not argue that the goods are not related.

purchasers are the same. *See In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011). *See also In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion).

In its Brief, Applicant titled one section of its argument as follows:

The composite mark of word and design using both words “Barley Power” and “Green Supreme” for products sold in Pennsylvania is not confusingly similar because the overall commercial impression is not confusingly similar with products named Green Supreme and sold in California.³

Also, in its Reply Brief, Applicant identified “[t]he central issue in this adjudication is the concurrent use of the words Green Supreme on a composite mark by a Pennsylvania company when these words are trademarked by a California company.”⁴

To the extent that Applicant may be arguing that there is no likelihood of confusion because Applicant and Registrant are selling their products in different geographic trading areas, that is not an argument we may consider. Neither the application nor the cited registration is geographically restricted. The owner of a

³ Applicant’s Brief, p. 4.

⁴ Reply Brief, p. 2.

geographically unrestricted registration enjoys the presumption of exclusive nationwide use pursuant to Section 7(b) of the Trademark Act, 15 U.S.C. § 1057, regardless of the extent of its actual use. *See Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 393 (Fed. Cir. 1983). Thus, we are constrained to evaluate similarities in terms of potentially nationwide markets when Applicant is seeking a geographically unrestricted registration. *In re Integrity Mutual Insurance Company, Inc.*, 216 USPQ 895, 896 (TTAB 1982).

B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.

We now turn to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, any one of these means of comparison may be critical in finding the marks to be similar. *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988); *In re Lamson Oil Co.*, 6 USPQ2d 1041, 1042 (TTAB 1987). In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enterprises Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007); *Schering-Plough HealthCare Products Inc. v. Ing-Jing Huang*, 84 USPQ2d 1323, 1325 (TTAB 2007).

“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*, 101 USPQ2d at 1721 (citation omitted). *See also San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff’d mem.*, 972 F.2d 1353 (Fed. Cir. June 5, 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The marks are similar because they both contain the term “Green Supreme.” In fact, Applicant’s mark encompasses Registrant’s entire mark. Where, as here, the goods are in part identical, the fact that the mark in the cited registration is subsumed by Applicant’s mark increases the similarity between the two. *See, e.g., In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (applicant’s mark ML is similar to registrant’s mark ML MARK LEES); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN confusingly similar to TITAN for medical diagnostic apparatus); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (finding MACHO COMBOS confusingly similar to MACHO for restaurant entrees); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (CAREER IMAGE for women’s clothing stores and

women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing); *In re Riddle*, 225 USPQ 630, 632 (TTAB 1985) (RICHARD PETTY'S ACCU TUNE for automotive service centers confusingly similar to ACCU-TUNE for automotive testing equipment). In *United States Shoe*, the Board observed that "Applicant's mark would appear to prospective purchasers to be a shortened form of registrant's mark." 229 USPQ at 709. In a similar manner, Applicant's mark BARLEY POWER GREEN SUPREME and design may appear to prospective purchasers to be a barley-based line of GREEN SUPREME dietary supplements.

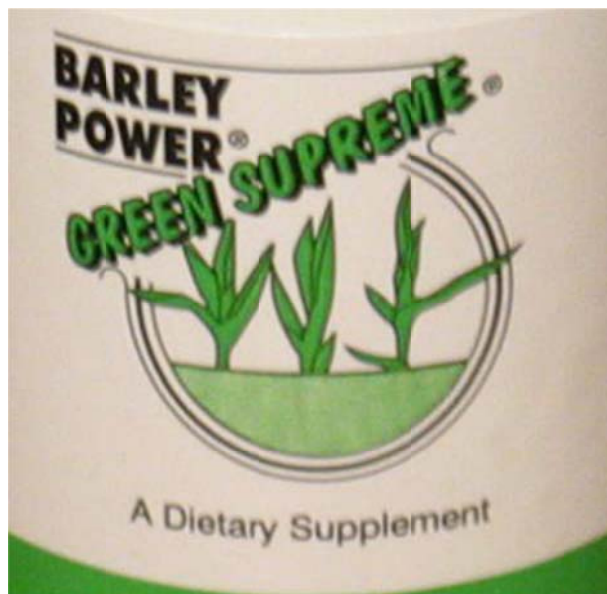
Applicant argues that the marks must be considered in their entirety and not by their component parts.⁵ On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). As noted above, we focus on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012).

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*

⁵ Applicant's Reply Brief, pp. 2-3.

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). With respect to Applicant's mark, the design of the barley plants could be perceived as merely emphasizing that the products are the barley-based line of Registrant's GREEN SUPREME dietary supplements. Likewise, the term "Barley Power" highlights the fact that the dietary supplements are derived from barley.

Even if the term "Barley Power" and the design of the barley plants constituted the dominant elements of Applicant's mark, Applicant's use of GREEN SUPREME in connection with identical dietary supplements will lead to the mistaken belief that the products emanate from the same source. In this regard, when we look at the label submitted by Applicant as a specimen, shown below, the term "Green Supreme" forms a separate and distinct commercial impression which highlights the similarity of the two marks.



We may look to the trade dress to determine the commercial impression engendered by Applicant's mark.

[T]he trade dress may nevertheless provide evidence of whether the word mark projects a confusingly similar commercial impression. Applicant's labels support rather than negate that of which opposer complains: that SPICE VALLEY inherently creates a commercial impression which is confusingly similar to that of SPICE ISLANDS.

Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1284 (Fed. Cir. 1984). *See also American Rice, Inc. v. H.I.T. Corp.*, 231 USPQ 793, 796 (TTAB 1986) (“we may take into account whether the trade dress of packages or labels in the application file as specimens, or otherwise in evidence, may demonstrate that the trademark projects a confusingly similar commercial impression.”); *Northwestern Golf Co. v. Acushnet Co.*, 226 USPQ 240, 244 (TTAB 1985) (“Evidence of the context in which a particular mark is used on labels, packaging, etc., or in advertising is probative of the significance which the mark is likely to project to purchasers.”).


We also note that on Applicant's website submitted as a specimen, shown below, Applicant advertises its product by emphasizing the term “Green Supreme” and, thus, teaching consumers to look to GREEN SUPREME as the primary source indicator.⁶

⁶ *See also* Applicant's October 2, 2012 response to Office action, Exhibits C and D.



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Green Supreme™ Green Barley

The product that gets the blessing of a growing number of satisfied customers across the country and worldwide because of its' perfectly balanced concentration of nutrients found in nature. Containing a broad spectrum of vitamins to help the body operate at peak efficiency, fight disease, and maintain good health, Green Supreme's Green Barley is an excellent food supplement to provide nature's most complete concentration of natural Vitamins.

At the oral hearing, Applicant referenced *In re Farm Fresh Catfish Co.*, 231 USPQ 495 (TTAB 1986), where the Board found that applicant's mark CATFISH BOBBER for "fish" engendered a different commercial impression than the mark BOBBERS for "restaurant services." In that case, the Board found that "CATFISH BOBBER,' clearly suggests the dictionary meaning of the word 'bobber,' as a fishing bob or float," whereas BOBBER used in connection with restaurant services "is not likely to conjure up this dictionary meaning." *Id.* at 495-96. In this case, however, GREEN SUPREME for products that are in part identical engenders the same commercial impression.

In view of the foregoing, we find that the marks are similar in terms of appearance, sound, connotation and commercial impression.

C. Balancing the factors.

In view of the facts that the marks are similar, the goods are identical and there is a presumption that the goods move in the same channels of trade and are sold to the same classes of consumers, we find that Applicant's mark BARLEY POWER GREEN SUPREME and design for "dietary supplements also containing organically grown barley plants" is likely to cause confusion with the previously registered mark GREEN SUPREME for "vitamin and mineral supplements, dietary supplements with herbs and natural ingredients."

Decision: The refusal to register Applicant's mark is affirmed.