

This Opinion is Not a
Precedent of the TTAB

Mailed: October 7, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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In re Simpson Industries, Inc.

—
Serial No. 87635385

—
Laura T. Geyer of Vorys, Sater, Seymour and Pease LLP
for Simpson Industries, Inc.

Louis Kolodner, Trademark Examining Attorney, Law Office 122,
John Lincoski, Managing Attorney.

—
Before Shaw, Adlin and English, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Simpson Industries, Inc. seeks registration of the mark RAINFOREST NUTRITION (standard characters, NUTRITION disclaimed) for “dietary and nutritional supplements” in International Class 5.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act on the ground that Applicant’s mark so resembles the registered mark RAINFOREST ANIMALZ, in standard

¹ Application Serial No. 87635385, filed October 5, 2017 under Section 1(b) of the Trademark Act, based on an alleged intent to use the mark in commerce.

characters, for “nutritional supplements,”² that use of Applicant’s mark in connection with Applicant’s goods is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration which was denied. Applicant and the Examining Attorney filed briefs.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 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.”).

A. The Goods, Channels of Trade and Classes of Consumers

The goods are in-part identical because both the involved application and cited registration identify “nutritional supplements.” Where, as here, the goods are in-part identical, we must presume that the channels of trade and classes of purchasers for those goods are also the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (even though there was no evidence regarding channels

² Registration No. 3729949, issued December 22, 2009; renewed.

of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *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); *Am. Lebanese Syrian Associated Charities Inc. v. Child Health Research Instit.*, 101 USPQ2d 1022, 1028 (TTAB 2011).

The identity (in part) of Applicant's and Registrant's goods and their overlapping channels of trade and classes of consumers weigh heavily in favor of a finding of likelihood of confusion. In addition, where, as here, the goods are in-part identical, the degree of similarity between the marks necessary to find a likelihood of confusion declines. *In re Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1248 (TTAB 2010).

B. The Marks and Strength of the Cited Mark

We must consider the marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). In this case, the marks are similar because they each consist of two words or terms and begin with RAINFOREST, but different because NUTRITION, the second word in Applicant's mark, is easily distinguishable from ANIMALZ, the second term in Registrant's mark. When we balance the similarities against the differences, we ultimately find that the marks would not be

confused, in large part because Applicant has established that the word the marks have in common – RAINFOREST – is conceptually and commercially weak for nutritional supplements and related goods.

1. Comparison of the Marks

At the outset, we agree with the Examining Attorney that the term RAINFOREST in Applicant's mark is its dominant feature, for two reasons. First, RAINFOREST appears and will be read and spoken first. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Second, the term NUTRITION is at best descriptive of Applicant's dietary and nutritional supplements, and disclaimed, so it is entitled to less weight in our analysis. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *see also In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ). Because the dominant portion of Applicant's mark is identical to the first term in the cited mark, the marks look and sound more similar than dissimilar, despite the obvious differences between NUTRITION and ANIMALZ.

On the other hand, the marks convey different meanings. Applicant's mark suggests that its supplements provide nutritional benefits derived from rainforests. Registrant's mark, by contrast, conveys that its RAINFOREST-related goods are animal-shaped, as illustrated by Registrant's specimen of use, which Applicant introduced into the record during prosecution:



June 25, 2019 Request for Reconsideration TSDR 74.

To determine whether these marks, considered in their entirety, are sufficiently similar in overall commercial impression for confusion to be likely, we must also consider the relative commercial and conceptual strength of Registrant's mark and the marks' shared term RAINFOREST.

2. Strength of the Cited Mark

Applicant has established that third parties widely use the marks' shared term RAINFOREST for nutritional supplements, including in food and beverage form, either as a trademark, or to describe the goods, as shown in the following examples

Serial No. 87635385

of products available in the United States:

Health & Personal Care Household Supplies Vitamins & Diet Supplements Baby & Child Care Health Care Sports Nutrition

Get up to \$20 off with FREE 2-hour delivery **prime now**
Restrictions apply

Back to search results for "rainforest supplement"

Acai Berry Supplement - 500mg X 100 Capules (Vegan) - Amazon Rainforest - Gluten-free - Non-GMO... Madre Natu **In Stock.** Sold by Madre

Price: **\$13.25** ~~\$13.95~~

4 customer reviews



Subscribe & Save \$13.25 Unlock 15% savings
[Learn more](#)

One-time Purchase \$13.95

Qty:

[Add to Cart](#)

[Learn more](#)

Other Sellers on Amazon

[Share](#)

About the product

- **HIGHEST ANTIOXIDANT BENEFITS:** Acai Berry's powerful antioxidant action protects cells, supports proper function of organs and supports immune system.
- **BOOSTS ENERGY AND LIBIDO:** Improves circulation, energy and stamina, and reduce fatigue, providing faster muscle recovery following exertion, and improving desire an performance/libido.
- **SUPPORTS REVERSAL OF AGING:** Blocks oxidative damage to cells, slows and reduce

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Health & Personal Care Household Supplies Vitamins & Diet Supplements Baby & Child Care Health Care Sports Nutrition

prime pantry Save \$10 & shop exclusive Prime Day deals

Back to search results for "rainforest supplement"

MAJESTIC EARTH HERBAL RAINFOREST - 32 FL OZ Youngevit **Price: \$38.45**

9 customer reviews **Only 3 left in stock - order soon**
Primes and Fulfilled



Want it Saturday, July 11? Saturday Delivery available

Deliver to Vincent

Qty:

[Add to Cart](#)

Other Sellers on Amazon

\$38.45
Sold by: supplement

\$38.45
Sold by: nutrition W

\$38.45

About the product

Google "RAINFOREST" "dietary supplement" 



Paradise Herbs Rainforest Ginger 60 Vegetarian Capsules, Red

\$8 online

★★★★★ 106 product reviews [Browse Vitamins & Supplements »](#)

Supplements - Capsule - Vegan - Herbal - Gluten Free

Rainforest ginger is naturally extracted using only the finest quality ginger rhizome in the world. Our ginger is naturally cultivated in the pristine environment of the **ecuadorian rainforest**. Our standardized true spectrum extraction ensures the most potent ginger extract ... [more »](#)

Rainforest Ginger - 60 Vegetarian Capsules - \$6 

Brazilian Green Bee Propolis and Rain Forest Honey Oral Spray, 2 bottle pack
by Brazilian Novomel

★★★★★  7 customer reviews



NOVO MEL
1 FL. OZ (30ML)

MINISTERIO DA AGRICULTURA
BRASIL
INSPECIONADO
1417
S.I.E.

Supplement Facts
Serving Size: 1 Sprayer
Amount per serving
Propolis extract 1.2g
Honey 1.2g
Water 1.2g

Ingredients: Honey, Propolis extract (standardized and neutralized) and water.

NOVO MEL
0314207
0314207

PhytoZon Phytoceutical Blend with Maca, Cat's Claw and Astragalus - Phyto-Nutrition From The...

American Dream

Be the first to review this item | 6 answered questions

Price: **\$58.83**

In stock on July
Industries and Fulfil



Deliver to

Qty: 1 ▼

Le

Other Sellers on /

\$58.83 (\$58.83 /

Sold by: Direct mark



About the product

- PhytoZon® Is A One-Of-A-Kind Exclusive Proprietary Synergistic blend of Nine Patented, Patent Pending and Proven Ingredients
- PhytoZon® is an Adaptogen. An Adaptogen can stimulate key beneficial effects in the human body on a broad range of metabolic and immunologic functions*
- PyhtoZon™ has created a category of its own. Containing Nine Patented, Patent Pending And Exclusive Proprietary Ingredients and **Extracts from the Rainforest** and Peru

July 11, 2018 Office Action response TSDR 13-19, 29; June 25, 2019 Request for Reconsideration TSDR 79-80.

Moreover, a number of retail stores offer nutritional supplements under “Rainforest” trade names, including “Rainforest Pharmacy,” “Rainforest Nutritionals,” “Organic Rainforest Company” and “Rainforest Foods”:

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Shop Rainforest Pharmacy

Recommended Rainforest Pharmacy Items For You



Rainforest Pharmacy Sangre De Drago 3oz Pure Sap

33

\$23.00



Rainforest Pharmacy Graviola Liquid Extract 4oz

41

\$35.98



Rainforest Pharmacy Sangre De Drago 1 Oz. by...

\$14.75



Rainforest Pharmacy Copaiba Oil 2 oz

\$23.00

Show results for 1-16 of 44 results for Rainforest Pharmacy Sort by Relevance

Health & Household

- Herbal Supplements
- Nutritional Supplements
- Baby Bathing Products

Grocery & Gourmet Food

- Baking Extracts & Flavoring
- Herbal Tea

Baby

- Baby Care Products

See All 5 Departments



Rainforest Pharmacy Sangre de Drago Peruvian Dragon Blood Liquid 4 fl oz

by Rainforest Pharmacy

\$30⁶⁰ (\$7.65/Fl Oz) 46

Only 15 left in stock - order soon.

More options available:
\$30.55 Other Sellers

Deliver to Vincent Washington 20009 Departments Your Pickup Location EN Hello, Vincent Account & Lists Orders Prime Cart

Shop Rainforest Nutritionals Inc.

Recommended Rainforest Nutritionals Inc. Items For You



Reparagen - Joint Health Supplement (60 capsules)

Rainforest Nutritionals Inc.

23

\$29.95



Reparagen Pro 60 Capsules Clinically Proven...

Rainforest Nutritionals Inc.

16

\$32.95



Reparagen Plus Glucosamine Clinically Proven...

Rainforest Nutritionals Inc.

14

\$34.95



Reparagen - Joint Health Supplement by...

Rainforest Nutritionals Inc.

\$56.19

Show results for 4 results for Rainforest Nutritionals Inc. Sort by Relevance

Health & Household

- Joint & Muscle Pain Relief
- Medications
- Chondroitin & Glucosamine
- Combination Nutritional Supplements

See All 2 Departments

Refine by



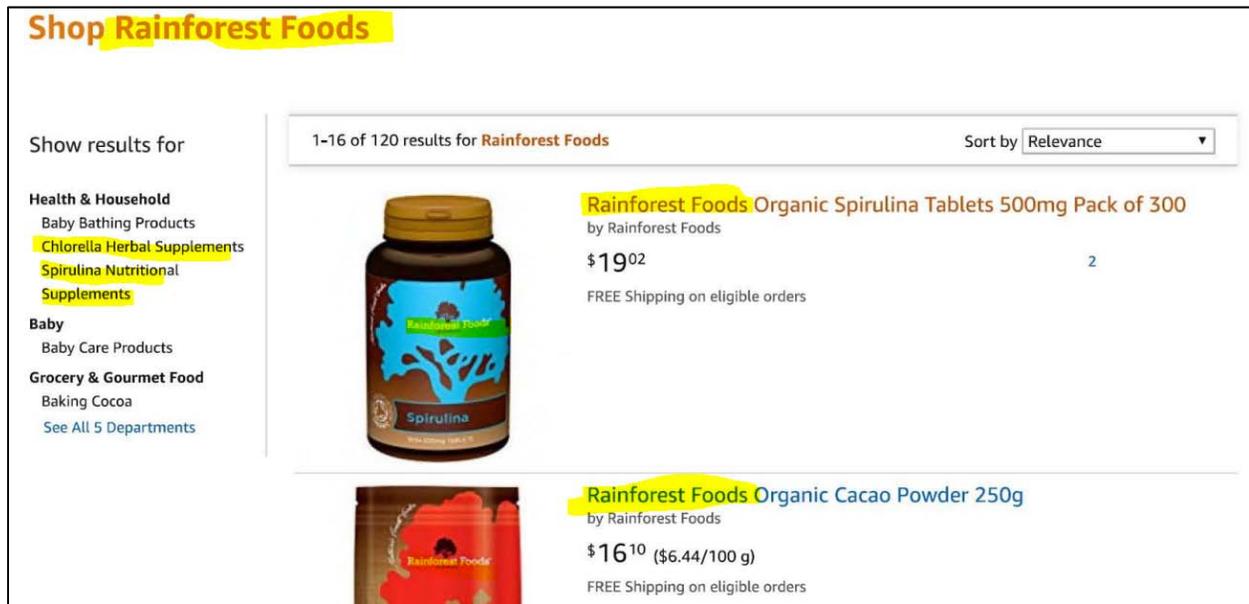
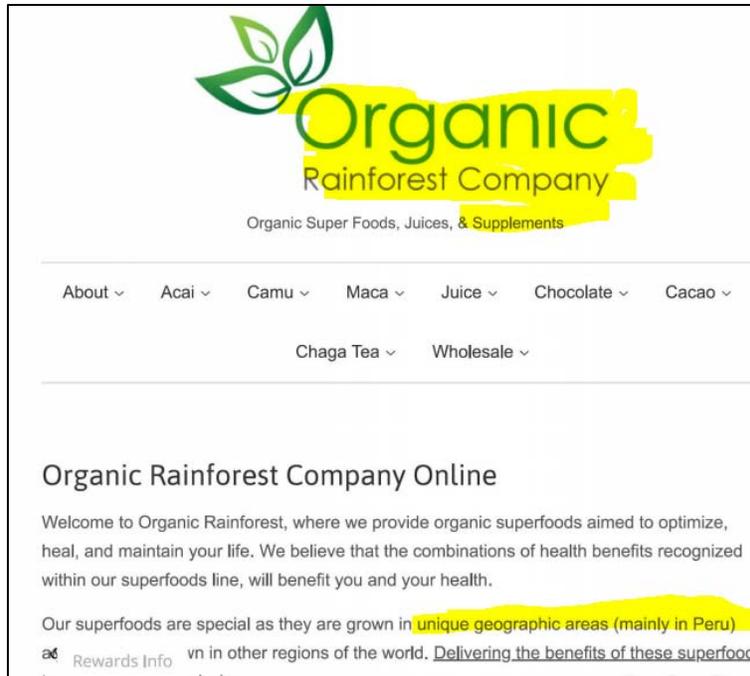
Reparagen - Joint Health Supplement (60 capsules)

by Rainforest Nutritionals Inc.

\$28⁴⁵

Subscribe & Save

More options available:
\$29.95



Id. at 21-28, 34-49.

Applicant also introduced evidence that RAINFOREST is used as a mark or descriptively for food or beverage products such as teas which purport to have health benefits. We find these products to be relevant here even though they are not in the more traditional pill/capsule form of other dietary or nutritional “supplements”:

◀ Back to search results for "rainforest supplement"

Numi Tea Rainforest Green Tea Supplement, Mate Lemon, 18 Count Numi

27 customer reviews



Was: ~~\$8.42~~
Price: **\$5.49**
members
You Save: \$2.93 (35%)

In Stock. Ships from available.

Want it tomorrow, **3** mins and choose One

Deliver to V

Qty: 1

Le

Other Sellers on A

\$7.95 (\$0.44 / Co
Sold by: QTCRxd4u

About the product

- This infusion of Yerba Mate with Australian rainforest's Lemon Myrtle and China's Chi Me green tea has a delightful lemon taste
- It is an energizing blend that uplifts the senses
- For hundreds of years, Yerba Mate has long been a ceremonial drink of friendship, hospitality, strength, and courage to the people of the South American rainforest

Octavia Tea Rainforest Mint (Organic Herbal Tea / Yerba Mate) Loose Tea, 1.17 Ounce Tin by 3M

13 customer reviews



Price: **\$9.50** (Details)

In Stock. Ships

2 Quantity options

1
\$10.00 (\$8.55 / Ounce)

Subscribe &
\$9.50 (\$8.12 deliveries. L
Get it Satur

One-time P
\$10.00 (\$8.55

Qty: 1

EXQUISITE TEAS & HERBS

Anima Mundi Apothecary - Organic/Vegan Rainforest Immunity/Daily Whole Body Defense (8 oz) by Anima Mundi Apothecary

Be the first to review this item



Price: \$26.50 & F
Only 9 left in stock and Fulfilled by Amazon

Want it Sunday, Jan. Two-Day Shipping at

Try Amazon Prime minimum order t

Deliver to Co

Qty: 1

Other Sellers on An

\$28.00 (\$28.00 / C orders. Details
Sold by: Deep Beauty

About the product

Maca Royale for Women by Rainforest Herbal Products

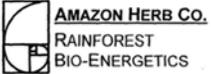
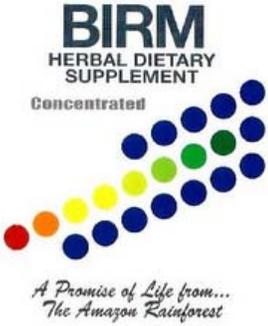
Be the first to review this item

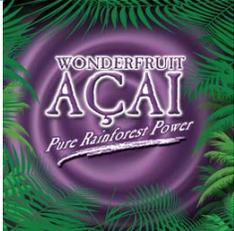


Rainforest ORGANICS
fairly traded - equitable
FOR WOMEN
MACA ROYALE
POUR FEMME
OPTIMAL BALANCE
EQUILIBRE OPTIMAL
Net Wt. 2.2 g (0.08 oz) Pouch net

Id. at 20; June 25, 2019 Request for Reconsideration TSDR 76-78.

Applicant introduced use-based registrations for RAINFOREST/RAIN FOREST marks for dietary or nutritional supplements, or food or beverage products, owned by different third-parties, including:

<u>Mark/Goods</u>	<u>Reg. No.</u>	<u>Mark/Goods</u>	<u>Reg. No.</u>
 <p>(AMAZON HERB CO., RAINFOREST and BIO-ENERGETICS disclaimed) (dietary and nutritional supplements)</p>	2871110	 <p>(dietary and nutritional supplements)</p>	4572582, 4572583
 <p>(RAINFOREST IMMUNE disclaimed) (sports drinks; energy drinks)</p>	4029089	RAINFOREST GRANOLA (granola)	2127376
RAINFOREST CRUNCH	5013686	BORNEO RAINFOREST TEA	2857065

<u>Mark/Goods</u>	<u>Reg. No.</u>	<u>Mark/Goods</u>	<u>Reg. No.</u>
(nut, fruit and seed snacks)		(RAINFOREST tea disclaimed) (organic tea for consumption)	
 (PURE RAINFOREST and ACAI disclaimed) (preparations for making fruit drinks)	3826458	BAI RAINFOREST VARIETY PACK (fruit based beverages)	5018123
RAIN FOREST (bottled drinking water) (RAIN FOREST disclaimed in design version)	4351720 (Supp. Reg.), 4720428 (design version) (Principal Reg.)	NEON RAINFOREST (candy)	4686052
 (RAIN FOREST PRODUCTS disclaimed) (on-line retail store services featuring a wide variety of consumer goods of others)	5506587		

July 11, 2018 Office Action response TSDR 57-62, 64-69, 71-76. These third-party registrations tend to “show the sense in which [the term RAINFOREST] is used in

ordinary parlance.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015) (quoting 2 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:90 (4th ed. 2015)) (“[a] real evidentiary value of third party registrations per se is to show the sense in which ... a mark is used in ordinary parlance’). “Third party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Id.*

As Applicant points out, this evidence of widespread third-party use and registration of the term RAINFOREST for dietary and nutritional supplements and certain other ingestible products should perhaps not be surprising. The record reveals that plants, chemicals and other materials derived from rainforests have medicinal or other health benefits. For example, an article entitled “Medicinal Treasures of the Rainforest” on the “adventure-life.com” website discusses the “abundant botanical resources” in rainforests, which “have already provided tangible medical advances.” July 11, 2018 Office Action response TSDR 78-79. The article goes on to state that “the blueprint for aspirin is derived from extracts of willow trees found in the rainforest,” and that “[f]or thousands of years, indigenous groups have made extensive use of the materials contained in the rainforest to meet their health needs.” *Id.* Similarly, the article “Owed to Nature: Medicines from Tropical Forests,” on the “rainforesttrust.org” website indicates that important medications for high blood

pressure and other conditions are derived from rainforests. *Id.* at 86-91; *see also id.* at 92-100 (“Tropical Forests In Our Daily Lives” from “rainforest-alliance.org”).

The evidence of record thus establishes that the term RAINFOREST is commercially and conceptually weak for nutritional and dietary supplements, as well as food and beverage products, especially those touting health benefits. Indeed, the record reveals at least nine third party uses of the term RAINFOREST (or, on occasion, RAIN FOREST) in connection with dietary or nutritional supplements (in pill/capsule form); and four additional uses of the term for products touted as “supplements” or as providing health benefits such as “immunity defense” or “metabolism boost”. This shows that the term is commercially weak in this field. Some of this evidence also reveals use of the term in a descriptive manner, which establishes conceptual in addition to commercial weakness.

The third party registration evidence corroborates the third party use evidence, to the extent it shows that RAINFOREST is conceptually weak for dietary or nutritional supplements, as well as food or beverage products, especially those touting health benefits. *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976); *Couch/Braunsdorf Affinity, Inc. v. 12 Interactive, LLC*, 110 USPQ2d 1458, 1471 (TTAB 2014).

3. Registrant Has Acknowledged that RAINFOREST Marks are Weak for Supplements

Before it filed the application which matured into the cited registration, Registrant prosecuted another application to register the same mark, RAINFOREST

ANIMALZ in typed form,³ for “nutritional supplements for children” (Application Serial No. 78260202). Obviously, the goods in that application are encompassed by the identification of goods in both the here-involved application and cited registration. That earlier application was refused based on a likelihood of confusion with the mark RAINFOREST NATURALS in typed form for “nutritional and dietary supplements” (Reg. No. 2978317).

Registrant argued during prosecution of its earlier application that confusion was unlikely between RAINFOREST ANIMALZ and RAINFOREST NATURALS, based on the dissimilarity of the marks. Specifically, Registrant argued that the marks create different commercial impressions because while RAINFOREST NATURALS conveys “nutritional supplements that contain all natural ingredients that are as pure as a rainforest,” RAINFOREST ANIMALZ conveys that Registrant’s “goods are nutritional supplements for children ... shaped liked (sic) various creatures found in the rainforest so as to make the supplements more attractive to children.” June 25, 2019 Request for Reconsideration TSDR 59.

Moreover, in response to a later Office Action, Registrant argued that RAINFOREST “is not a distinctive mark,” because it “has a varied and widespread use.” *Id.* at 66. Registrant concluded that “[t]he consumer would look to the other terms in the marks for identification of the source of the goods, which as discussed

³ There is no substantive difference between “standard character” marks and marks in “typed” form. *In re Viterra*, 101 USPQ2d at 1909 n.2 (“until 2003, ‘standard character’ marks formerly were known as ‘typed’ marks, but the preferred nomenclature was changed in 2003 to conform to the Madrid Protocol ... we do not see anything in the 2003 amendments that substantively alters our interpretation of the scope of such marks”).

earlier, makes the marks dissimilar.” *Id.* Registrant’s prosecution of its prior application to register an identical mark further supports a finding in this case that Applicant’s mark is unlikely to be confused with the cited mark. *See generally Juice Generation*, 115 USPQ2d at 1675 (“Although estoppel based on prosecution of an application has played a more limited role for trademarks than for patents ... we have recognized that such comments have significance as ‘facts “illuminative of shade and tone in the total picture confronting the decision maker.”’) (citations omitted).

4. Conclusion Regarding Strength and Similarity of the Marks

While Applicant’s and Registrant’s marks both begin with the term RAINFOREST, that term is simply too weak to result in a finding of confusing similarity here, even when the marks are used for identical goods. In fact, consumers are used to seeing the term RAINFOREST in connection with dietary and nutritional supplements, whether it is used as a trademark or descriptively/suggestively, and Applicant’s mark will thus be perceived as just one more of the many uses of RAINFOREST/RAIN FOREST for dietary or nutritional supplements or related goods. Given the established weakness of the shared term RAINFOREST, “the closer [Applicant’s] mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.” *Juice Generation*, 115 USPQ2d at 1674. *See also Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958); *Couch/Braunsdorf*, 110 USPQ2d at 1476-78 (finding, based on this principle, “that the mark PERKSPOT is sufficiently different from the marks PERKS and PERKSCARD to avoid a likelihood of confusion”

even though the marks were used for legally identical services); *Plus Prods. v. Natural Organics, Inc.*, 204 USPQ 773, 779-80 (TTAB 1979) (allowing registration of NATURE'S PLUS for vitamins despite prior registration of PLUS for vitamins given coexistence of a number of registrations containing PLUS for similar goods). As the Federal Circuit stated in analogous circumstances:

Jack Wolfskin's evidence demonstrates the ubiquitous use of paw prints on clothing as source identifiers. Given the volume of evidence in the record, consumers are conditioned to look for differences between paw designs and additional indicia of origin to determine the source of a given product. Jack Wolfskin's extensive evidence of third-party uses and registrations of paw prints indicates that consumers are not as likely confused by different, albeit similar looking, paw prints.

Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015). And as its predecessor court similarly stated:

It seems both logical and obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case.

Sure-Fit Prods., 117 USPQ at 297.

In short, given the weakness of the term RAINFOREST, the marks are unlikely to be confused. This factor weighs heavily against finding a likelihood of confusion.

C. Lack of Actual Confusion

Finally, Applicant has established that although it has been using its mark for supplements since before 2009, when Registrant first used its mark, there have been no known instances of actual confusion. June 25, 2019 Request for Reconsideration TSDR 14-53 (evidence of use and Affidavit of Richard Simpson, Applicant's CEO). The problem with this argument is that despite the concurrent use of Applicant's and Registrant's marks for a fairly long period of time, there is no evidence concerning the channels of trade or classes of consumers for Registrant's goods, and precious little about the channels of trade or classes of consumers for Applicant's goods. Therefore, we cannot gauge whether or the extent to which there has been an opportunity for confusion to occur if it were likely to occur. *See Cunningham*, 55 USPQ2d at 1847; *Nina Ricci S.A.R.L. v. E.T.F. Enters. Inc.*, 889 F.2d 1070, 12 USPQ2d 1901, 1903 (Fed. Cir. 1989) ("The absence of any showing of actual confusion is of very little, if any, probative value here because (1) no evidence was presented as to the extent of ETF's use of the VITTORIO RICCI mark on the merchandise in question in prior years"); *In re Kangaroos U.S.A.*, 223 USPQ 1025, 1026-27 (TTAB 1984). Moreover, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *Majestic Distilling*, 65 USPQ2d at 1205. This factor is neutral. *Cf. In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1163-64 (Fed. Cir. 2019) (remanding to Board because it failed to consider the lack of actual confusion, when the applicant "presented evidence of concurrent use of the two marks for a

particularly long period of time – over 40 years – in which the two businesses operated in the same geographic market”).

II. Conclusion

Although the goods, channels of trade and classes of consumers are identical, and there is therefore a lower threshold for establishing a likelihood of confusion, the term the marks share is too weak, and the marks thus too different in their entireties, for confusion to be likely. *See Kellogg Co. v. Pack'em Enters. Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (“We know of no reason why, in a particular case, a single *duPont* factor may not be dispositive.”).

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is reversed.