

TAB

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



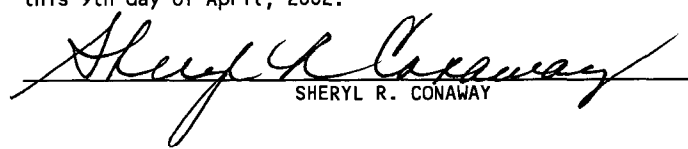
MAGNO-HUMPHRIES LABS, INC.,)
)
Opposer,)
)
vs.)
)
LEINER HEALTH PRODUCTS INC.,)
)
Applicant.)

04-09-2002
U.S. Patent & TMO/c/TM Mail Rcpt Dt. #58

Opposition No. 112,571

CERTIFICATE OF MAILING

The undersigned declares under the penalty of perjury the within **NOTICE OF APPEAL PURSUANT TO 37 C.F.R. §2.145(a)** was forwarded to the Assistant Commissioner of Trademarks, 2900 Crystal Drive, Arlington, Virginia 22202-3513, by depositing same with the United States Postal Service as Express Mail, Receipt No. EH450565085US, postage prepaid, this 9th day of April, 2002.


SHERYL R. CONAWAY

APR 16 9 16 AM '02

NOTICE OF APPEAL PURSUANT TO 37 C.F.R. §2.145(a)

Pursuant to 37 C.F.R. §2.145(a), LEINER HEALTH PRODUCTS INC. and LEINER HEALTH SERVICES CORP. hereby appeal the United States Court of Appeals for the Federal Circuit for review of the Decision of the Trademark Trial and Appeal Board in the above

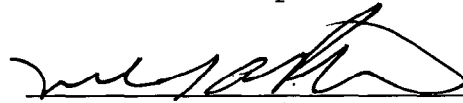


case dated February 12, 2002, a copy thereof being attached
hereto.

Respectfully submitted,

ISAACMAN, KAUFMAN & PAINTER
A Professional Corporation

By:



Michael A. Painter
Attorneys for Applicant

/src
Attachment
April 9, 2002
8484 Wilshire Boulevard, Suite 850
Beverly Hills, California 90211
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12 FEB 2002

Hearing:

November 6, 2001

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

Paper No. 29

BAC

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Magno-Humphries Laboratories, Inc.¹

v.

Leiner Health Products Inc., and Leiner
Health Services Corp., joined as party
defendant²

Opposition No. 112,571
to application Serial No. 75/402,580
filed on December 9, 1997

Nancy J. Moriarty of Chernoff, Vilhauer, McClung & Stenzel,
LLP for Magno-Humphries Laboratories, Inc.

Michael A. Painter of Isaacman, Kaufman & Painter for Leiner
Health Products Inc., and Leiner Health Services Corp.

Before Hohein, Chapman and Bottorff, Administrative
Trademark Judges.

Opinion by Chapman, Administrative Trademark Judge :

Leiner Health Services Corp., by assignment from Leiner
Health Products Inc., is the owner of an application to
register on the Principal Register the mark OPTIMUM SOURCE
for "vitamins and dietary food supplements" in International

¹ The caption of this proceeding has been corrected to reflect
opposer's name as set forth in the notice of opposition.

² The records of the Assignment Branch of this Office indicate
that application Serial No. 75/402,580 has been assigned to
Leiner Health Services Corp. (Reel 1919, Frame 0193).
Accordingly, Leiner Health Services Corp. is joined as applicant
and a party defendant.

Division

Class 5. The application is based on the assertion of a bona fide intention to use the mark in commerce.³

Magno-Humphries Laboratories, Inc. has opposed the application, alleging that it has adopted and is using the registered mark OPTIMUM for "dietary and nutritional supplements" (paragraph 3);⁴ that opposer's use has been continuous since at least as early as 1984, long prior to applicant's filing date of its application; and that applicant's mark, when used on its goods, so resembles opposer's previously used and registered mark OPTIMUM, as to be likely to cause confusion, mistake, or deception.

Applicant, in its answer, admits that "Opposer has adopted and used the registered trademark OPTIMUM, Registration No. 1,423,553 as a trademark for dietary and nutritional supplements in Class 5," but otherwise denies the salient allegations of the notice of opposition. Applicant also asserts as affirmative defenses that there is no likelihood of confusion because opposer "has long acquiesced in one or more third party's use and registration

³ In the application, ownership of Registration No. 1,881,149, issued February 28, 1995 for the mark OPTIMUM BALANCE for "vitamins and dietary supplements" is claimed. This registration was the subject of Cancellation No. 27,235 (Magno-Humphries Labs, Inc. v. Leiner Health Products, Inc.) in which the respondent filed a voluntary surrender of its Registration No. 1,881,149, and it was cancelled in May 2000 under Section 7 of the Trademark Act.

⁴ Registration No. 1,423,553, issued January 6, 1987, for "vitamins, vitamin supplements, and dietary supplements" in International Class 5; Section 8 affidavit accepted, Section 15 affidavit acknowledged.

of trademarks which include the word OPTIMUM for vitamins and dietary supplements or related goods"; and that opposer is estopped from obtaining the relief sought because opposer "has voluntarily elected to permit third parties to use and register trademarks which include the word OPTIMUM for vitamins and dietary supplements or related goods."

The record consists of the pleadings; the file of the opposed application; the testimony depositions, with exhibits, of (i) Thelma Magno-Humphries, opposer's president, and (ii) David W. Tallmon, Jr., opposer's vice president of sales and marketing, both taken in Cancellation No. 27,235;⁵ the declaration of Thelma Magno (formerly known as Thelma Magno-Humphries) submitted pursuant to Trademark Rule 2.123(b);⁶ applicant's notices of reliance on (i) opposer's answers to applicant's first set of interrogatories and (ii) six third-party registrations which include the word OPTIMUM; the testimony deposition, with exhibits, of Neil Hanson, applicant's director of the eastern division; the rebuttal testimony deposition, with exhibits, of Thelma Magno; and opposer's rebuttal notice of

⁵ Both depositions taken in Cancellation No. 27,235 were submitted in this opposition proceeding pursuant to opposer's consented motion to use testimony from another proceeding under Trademark Rule 2.122(f), which motion was granted by Board order dated March 16, 2000.

⁶ Informationally, the parties are advised that Trademark Rule 2.123(b) now requires the "written" agreement of the parties.

reliance on the file histories of four cancellation proceedings it brought against third-party registrations.

In addition, opposer requested in its reply brief that the Board take judicial notice (i) that one of the third-party registrations (No. 1,130,654) expired in February 2001, and (ii) that another of the third-party registrations (No. 1,907,020) was voluntarily surrendered as to the goods in International Class 5 in June 2001, both occurring subsequent to the trial periods in this case. The Board does not generally take judicial notice of the records of the USPTO. See TBMP §703.02(b). However, it is clear that trial dates had closed in this case when these actions occurred, and it seems judicially inefficient to require a reopening of trial in order for opposer to submit such documentation. Moreover, applicant made no objection at the oral hearing to opposer's requests for judicial notice. Accordingly, in the circumstances of this case, opposer's requests in its reply brief for judicial notice of these two matters are granted.⁷

⁷ At the oral hearing, opposer requested that the Board take judicial notice of the Board's October 24, 2001 order in Cancellation No. 29,547 (Magno-Humphries Labs, Inc. v. Strength and Conditioning Technologies, Inc., t/a Optimum Training Systems) acknowledging the registrant's partial voluntary surrender of Registration No. 1,907,020; and on November 13, 2001, opposer filed a written request for said judicial notice. Inasmuch as the Board has taken judicial notice that the registrant in Registration No. 1,907,020 filed a voluntary surrender of the International Class 5 goods, opposer's further request for judicial notice of a Board order relating thereto is unnecessary and is denied as moot.

Both parties have filed briefs on the case, and they were represented at an oral hearing held before this Board on November 6, 2001.

Preliminarily, we note that both parties included in their respective briefs on the case evidentiary objections to certain evidence submitted by the other party during trial, all of the objections based on hearsay and lack of proper authentication. At the oral hearing each party's attorney was asked about the evidentiary matter in question and if it was in or out of the record whether their case was fatally affected thereby. Each attorney responded that it would not affect the outcome and that his or her side would still prevail. Given this waiver by both attorneys and in view of the nature of the material in question, the Board hereby overrules all evidentiary objections by both parties, and all of the disputed evidence was considered of record, for whatever probative value it may have.

The Parties

Magno-Humphries Laboratories, Inc., located in Oregon, is a manufacturer and distributor of vitamins, dietary supplements and over-the-counter drugs. It has continuously used the mark OPTIMUM since February 1980 on vitamins, vitamin supplements and dietary supplements, selling over 200 such products under the mark OPTIMUM.

Approximately 75% of opposer's goods (under the OPTIMUM mark) are sold in the Pacific Northwest and Alaska, and the other 25% are distributed nationally. Opposer's goods are sold through mass merchandisers (e.g., Shopko, K-Mart, Wal-Mart), grocery stores (e.g., Safeway, Albertson's), chain drug stores, and independent pharmacies. Opposer sells to the five major distributors/wholesalers of drugs in the country, thus potentially selling to virtually every drug store. Opposer's goods cost at retail from \$3 to \$20 for various types of vitamins and dietary supplements in various forms (capsules, tablets) and in various numbers per container.

Sales of opposer's products bearing the OPTIMUM trademark have been over \$5.5 million per year recently, with annual advertising costs over \$300,000 for the last few years. Opposer engages in "co-op fully" advertising whereby stores (i.e., grocery, drug) run advertisements for many products in the newspaper and opposer pays for its portion of that ad; and opposer also distributes fliers or leaflets or point-of-purchase displays regarding the OPTIMUM line of products to the stores.

Applicant, located in California, sells vitamins, herbs and dietary food supplements through grocery stores such as Safeway, Albertson's and Winn Dixie.

The involved application is based on applicant's assertion of a bona fide intent to use its mark, and the record is clear that applicant commenced use of the mark OPTIMUM SOURCE in December 1997, selling the OPTIMUM SOURCE product only to Winn Dixie stores. From applicant's first use through July 2000, its sales of the product to Winn Dixie totaled approximately \$106,000.

Promotional and advertising materials such as counter displays, floor stands, and shelf markers (known as "shelf talkers") are created by applicant which it then distributes to the Winn Dixie stores.

Priority

The testimony of Thelma-Magno Humphries taken in Cancellation No. 27,235, and made of the record in this opposition pursuant to Trademark Rule 2.122(f), included as Exhibit No. 22 a photocopy of the USPTO certified (on April 21, 1999) status and title copy of opposer's pleaded Registration No. 1,423,553 for the mark OPTIMUM for "vitamins, vitamin supplements and dietary supplements." In its answer, applicant admitted that opposer "adopted and used the registered mark OPTIMUM," and applicant does not contest opposer's priority in this case. In fact, in its brief applicant specifically discussed opposer's subsisting registration, acknowledging that opposer is the owner thereof and that the validity of the registration is not at

issue. (See e.g., applicant's brief, pp. 1, 14 and 16.) Accordingly, we find that applicant has essentially stipulated to opposer's ownership of and the validity of the subsisting registration pleaded by opposer.

Because opposer has established that it owns a valid and subsisting registration of its pleaded mark, OPTIMUM, the issue of priority does not arise. See *King Candy Company v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Moreover, the earliest date on which applicant can rely is the filing date of its application, December 9, 1997,⁸ and the record establishes opposer's continuous use of its mark, OPTIMUM, for vitamins and dietary supplements, since 1980, which is long prior thereto.

Likelihood of Confusion

Thus, the sole issue before the Board is likelihood of confusion. Our determination of likelihood of confusion is based on our analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The parties' respectively identified goods, opposer's "vitamins, vitamin supplements and dietary supplements" and applicant's "vitamins and dietary food supplements," are

⁸ Applicant proved a date of first use of "December 1997."

essentially identical, and applicant does not contend otherwise. Our primary reviewing Court has stated that "when marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines." See *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Inasmuch as neither applicant's application nor opposer's registration includes any type of restriction as to trade channels or purchasers, we must presume in this administrative proceeding that the involved goods are sold in all the normal channels of trade to the usual classes of purchasers for such goods. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). Thus, even if applicant currently sells its goods to only one customer, the Winn Dixie stores, (i) there is no such limitation in applicant's identification of goods; and (ii) opposer sells to the same general types of stores, and the same customers could frequent all such types of stores. We find that the channels of trade and the classes of purchasers for the parties' goods, with no restrictions in either identification of goods, are the same.

The record herein shows that vitamins and dietary food supplements are not particularly expensive goods and that they are sold to the general public, including ordinary consumers as well as health conscious consumers.

Turning next to a consideration of the similarities/dissimilarities of the marks, it is well settled that marks are considered in their entireties, and that we must analyze the marks as to sound, appearance, connotation and commercial impression. Generally, a subsequent trademark user may not appropriate another's entire mark and avoid confusion merely by adding a term thereto. See *In re Rexel Inc.*, 223 USPQ 830 (TTAB 1984).

Obviously, opposer's registered mark consists solely of the word OPTIMUM, while applicant's mark is a two-word mark, OPTIMUM SOURCE. These marks, when viewed in their entireties, are similar in sound and appearance, especially when due consideration is given to the fact that the marks are used on identical goods, and the fallibility of customer memory. See *Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller*, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); and *Spoons Restaurants Inc. v. Morrision, Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd unpub'd* (Fed. Cir., June 5, 1992). That is, the purchasing public may not notice or remember the difference of one word. See *Steelcase Inc. v. Steelcare Inc.*, 219 USPQ 433 (TTAB 1983).

Moreover, it is the first part of a mark which is most likely to be impressed upon the mind of a purchaser and be remembered by the purchaser, and in this case, the first word of applicant's mark is OPTIMUM. See *Presto Products Inc. v. Nice-Pak Products Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988).

While the connotations of OPTIMUM and OPTIMUM SOURCE are not precisely the same, certainly the term OPTIMUM carries a similar connotation with regard to both parties' marks as used on these goods. Specifically, OPTIMUM connotes that the vitamins and/or dietary food supplements contain a full range of necessary nutrients or that the combination of nutrients in a particular product is the most favorable or advantageous possible. We take judicial notice (see TBMP §712) of the Random House Webster's College Dictionary (Second Edition 1997) cited by applicant in its brief (p. 19), wherein "optimum" is defined as "the most favorable point, degree or amount of something for obtaining a given result." Consumers would likely view the term SOURCE in applicant's mark as simply emphasizing that this is the complete product they want to purchase, that is, the product itself is the source of a complete vitamin or dietary food supplement.

We are aware that opposer's witness, Ms. Magno-Humphries, testified that opposer intended the mark OPTIMUM

to connote the "highest quality" (dep. of May 18, 1999, p. 26); while applicant's witness, Neil Hanson, testified that applicant intended the mark OPTIMUM SOURCE to connote that "it is a complete product, a complete multivitamin that would fit all their needs." (dep., p. 26). However, we do not find that the testimony of lay witnesses as to the intention of their respective companies in adopting a mark, is evidence of how consumers will in fact view the mark.

Given the slight difference in the respective marks, which may not be recalled by purchasers seeing the marks at separate times, and the generally similar connotations, the overall commercial impression of the marks is highly similar. See *The Wella Corporation v. California Concept Corporation*, 558 F.2d 1019, 194 USPQ 419 (CCPA 1977).

Even if potential purchasers realize the minor difference between the marks OPTIMUM and OPTIMUM SOURCE, they may mistakenly believe that applicant's mark is simply a new line of OPTIMUM products from opposer, with both marks serving to indicate origin in the same source.

In this case, we find that applicant's addition of the term SOURCE to opposer's mark OPTIMUM does not distinguish the marks; and that these marks are similar in sound, appearance, connotation and commercial impression. See generally, *Kangol Ltd. v. KangaROOS U.S.A. Inc.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992) (Court affirmed Board's

holding of likelihood of confusion between KANGAROOOS and a kangaroo design for clothing, namely, athletic shoes, sweatsuits and athletic shirts and KANGOL and a kangaroo design for golf shirts having collars); In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994) (ROAD KILL CLUB OF AMERICA and design for t-shirts, sweatshirts and pullovers cited against ROAD KILL CATERING for t-shirts, sweatshirts and aprons--refusal affirmed); Chemical New York Corp. v. Conmar Form Systems, Inc., 1 USPQ2d 1139 (TTAB 1986) (PRONTO and PRONTO in stylized lettering for a variety of personal and small business banking and financial services, computer programs, and instruction manuals describing the banking and financial services against PRONTOSYSTEM SIMPLIFIED LOAN FORMS FOR CREDIT UNIONS and design for paper forms for credit unions--opposition sustained); In re Apparel Ventures, Inc., 229 USPQ 225 (TTAB 1986) (SPARKS in stylized form for shoes, boots and slippers cited against SPARKS BY SASSAFRAS in stylized form for women's separates, namely blouses, skirts and sweaters--refusal affirmed); and In re Logue, 188 USPQ 695 (TTAB 1975) (SPRING GLEN FARM KITCHEN in stylized lettering for a variety of prepared foods and condiments cited against SPRING GLEN for orange juice--refusal affirmed).

The crux of this case involves the strength of opposer's mark, including the number and nature of third-

party uses of the term OPTIMUM on similar goods, and the resulting scope of protection to be afforded opposer's mark. In fact, applicant states in its brief, that "Applicant submits the scope of protection to be afforded Opposer's registered trademark is the fundamental issue before the Board." (p. 17.)

Applicant strongly urges that there is no likelihood of confusion in this case because of the weakness of opposer's mark, arguing in its brief (pp. 14-15) as follows:

The word OPTIMUM is one of a group of terms which, for the purpose of evaluating the strength of a trademark, are generally referred to as 'laudatory' terms. A laudatory term is one which generally ascribes a quality of excellence or superiority to the goods. As a general rule, laudatory terms are considered to be indistinctive or weak, a finding which will result in a relatively narrow scope of protection.

Opposer argues that its mark is not a "laudatory" and therefore indistinctive or weak mark because it was registered on the Principal Register with no requirement for a Section 2(f) claim of acquired distinctiveness; and that therefore opposer's mark is presumed not to be descriptive. Opposer further contends that its mark is strong, having been in use since 1980, with recent annual sales of \$5.5 million for its over 200 vitamin, vitamin supplement, and dietary supplement products, sold nationwide, and recent

annual advertising expenses of over \$350,000; and that even if its mark was conceptually weak, it has certainly become strong over time.

Of course, opposer's proven registration on the Principal Register constitutes prima facie evidence of opposer's exclusive right to use of the mark shown therein for the goods identified in the registration as of the filing date of the application which matured into the registration. See *In re National Data Corp.*, 222 USPQ 515 (TTAB 1984), *aff'd* 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Johnson Publishing Company, Inc. v. International Development Ltd., Inc.*, 221 USPQ 155 (TTAB 1982); and *Hyde Park Footwear Company, Inc. v. Hampshire-Designers, Inc.*, 197 USPQ 639 (TTAB 1977). Moreover, as explained previously, the singular answer of opposer's witness regarding opposer's intention as to the meaning of its mark OPTIMUM does not establish that the mark lacks distinctiveness or is otherwise weak in the minds of the purchasing public.

Applicant argues that there are several third-party uses and registrations of the term OPTIMUM in the industry. As evidence thereof, applicant submitted six registrations, all of which are for marks which include the word OPTIMUM, and five of which are for vitamins and nutritional food supplements while one is for retail store services featuring

such goods. Specifically, the six third-party registered marks are OPTIMUM HEALTH OPTIMUM DELIVERY SYSTEM and design, OPTIMUM NUTRIENT ENHANCER and design of the numeral 1, OPTIMUM LIFESTYLE, OPTIMUM LIMIT, OPTIMUM TRAINING SYSTEMS, and OPTIMUM NUTRITION CENTER, all with different owners.

In addition, applicant submitted evidence of third-party uses of the marks OPTIMUM HEALTH, OPTIMUM TRAINING SYSTEMS, OPTIMUM HEALTH OPTIMUM DELIVERY SYSTEMS, OPTIMUM NUTRITION and OPTIMUM HEALTH LIQUID CALCIUM through applicant's director of the eastern division, Neil Hanson, who testified that in November 1998 applicant had some third-party products ordered and delivered to applicant's attorneys' offices (so that their competitors would not "feel unusual" or not want to send products directly to applicant) Dep., p. 26. He also testified that he reviewed some web pages from the Internet.

Of course, third-party registrations are not evidence of use of the marks shown therein, or that the public is familiar with them. But they may be used to indicate that a commonly registered element has a suggestive or descriptive meaning for particular goods such that the differences in other portions of the marks may be sufficient to render the marks as a whole distinguishable. See *Aries Systems Corp. v. World Book Inc.*, 23 USPQ2d 1742, footnote 15 (TTAB 1992).

However, in this case we are not persuaded that the term "OPTIMUM" is so laudable or weak as to be entitled to only a very a narrow scope of protection. See Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125 (TTAB 1995). First of all, the third-party registrations and third-party uses are rather minimal in number. Moreover, opposer submitted rebuttal evidence of the cancellation of the registrations of the first three marks, all the result of cancellation proceedings brought by opposer; and the Board will take judicial notice that the registration for the mark OPTIMUM LIMIT expired under Section 9 of the Trademark Act, and that the registration for the mark OPTIMUM TRAINING SYSTEMS was voluntarily surrendered by the registrant as to all of the International Class 5 goods, and that such was cancelled on February 6, 2002. With regard to the sixth third-party registration for the retail store services, the record shows that opposer brought a cancellation proceeding against the registration, and that the parties settled the dispute with that registrant agreeing not to use OPTIMUM NUTRITION CENTER or variants of OPTIMUM on vitamins and dietary supplements. Thus, the complete record shows that five of the six third-party registrations have been cancelled as to the relevant goods, and the retail store service mark is the subject of an agreement with opposer.

With regard to the evidence of third-party uses, the products actually purchased and delivered to applicant's attorneys' offices include one (OPTIMUM HEALTH) from a company located in Australia, with no evidence of the extent of such use in the United States or purchaser perception of same in the United States; two uses are of marks which have been the subject of successful cancellation proceedings by opposer (OPTIMUM TRAINING SYSTEMS and OPTIMUM HEALTH OPTIMUM DELIVERY SYSTEMS); and opposer has written cease and desist letters to several of the involved companies.

The Board has in the past given weight to credible and probative evidence of widespread, significant and unrestrained use by third parties of marks containing elements in common with the mark being opposed on grounds of likelihood of confusion to demonstrate that confusion is not, in fact, likely. See *Hilson Research Inc. v. Society For Human Resource Management*, 27 USPQ2d 1423, 1431 (TTAB 1993), citing *Miles Laboratories Inc. v. Naturally Vitamin Supplements Inc.*, 1 USPQ2d 1445, 1462 (TTAB 1986, amended 1987). In the case now before us, applicant's evidence of third-party uses and registrations is minimal, consisting of a maximum of six registrations (five cancelled and a settlement agreement on the sixth) and a few third-party uses, one of which is a company located in Australia. There has certainly not been a showing of widespread, significant

and unrestrained third-party use. The commercial real world does not have to be a completely clean slate in order for a trademark owner to prevail in a proceeding regarding registrability.⁹

The absence of any instances of actual confusion by consumers relating to opposer's marks and applicant's mark used on the involved goods (see, e.g., opposer's answer to applicant's interrogatory No. 4) is not a meaningful factor to our decision. The absence of confusion is not surprising given the relatively short duration of use by applicant of its mark; the fact that applicant currently sells to only one customer, Winn Dixie stores; and the fact that the majority of opposer's sales are in the Pacific Northwest and Alaska. Besides, the test is not actual confusion, but likelihood of confusion. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992).

Finally, opposer argues that applicant's intent in adopting the mark OPTIMUM SOURCE was not innocent as applicant had constructive and actual notice of opposer's registered mark OPTIMUM; that despite such notice applicant chose a similar mark; and that applicant's action gives rise

⁹ In an analogous situation, but relating to a "family" of marks, the Court of Customs and Patent Appeals stated long ago that "[a]s a matter of logic it would seem to us that if opposer has a family of six marks all starting with the non-descriptive word 'Golden,' it still has that family notwithstanding there may be some others using the same word to some undisclosed extent." *Motorola, Inc. v. Griffiths Electronics, Inc.*, 317 F.2d 397, 137 USPQ 551, 553 (CCPA 1963).

to an inference that confusion is likely. Mere knowledge of another's mark does not establish bad faith or wrongful intent, and we decline to infer a likelihood of confusion on that basis. See Sweats Fashions Inc. v. Pannill Knitting Co., 833 F.2d 1560, 4 USPQ2d 1793, 1797-1798 (Fed. Cir. 1987); and Electronic Water Conditioners, Inc. v. Turbomag Corporation, 221 USPQ 162, 165 (TTAB 1984).

However, to the extent we have any doubt in this case, we must resolve that doubt against applicant, who, as the newcomer has the opportunity of avoiding confusion, and is obligated to do so. See In re Hyper Shoppes (Ohio) Inc., 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988).

On balance, and considering all of the evidence on the relevant du Pont factors, and giving each such factor its appropriate weight in the circumstances of this case, we find that confusion is likely between applicant's mark OPTIMUM SOURCE and opposer's mark OPTIMUM when used on identical goods.

Decision: The opposition is sustained, and registration to applicant is refused.

CERTIFICATE OF MAILING

The undersigned declares under the penalty of perjury the within **NOTICE OF APPEAL PURSUANT TO 37 C.F.R. §2.145(a)** was forwarded to counsel for Opposer, Nancy J. Moriarty, Esq., Chernoff, Vilhauer, McClung & Stenzel, LLP, 1600 ODS Tower, 601 S.W. Second Avenue, Portland, Oregon 97204-3157, via first class mail, postage prepaid, this 9th day of April, 2002.


SHERYL R. CONAWAY