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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Aaron T. Tabor, M.D.
v.
Frank J. LaBarba, II

Opposition No. 91166743
to application Serial No. 78399621
filed on April 9, 2004

George T. Mann of Allman, Spry, Leggett & Crumpler for Aaron
T. Tabor, M.D.

Frank J. LaBarba, II, pro se.

Before Quinn, Kuhlke and Wellington, Administrative
Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Frank J. LaBarba, II, seeks registration of
the mark REVIVAL WATER (in standard character form, WATER
disclaimed) for goods identified as "non-alcoholic
beverages, namely, bottled water, spring water, drinking

water, purified water, lemon flavored water and mint flavored water" in International Class 32.¹

Opposer, Aaron T. Tabor, M.D., has opposed registration of applicant's mark on the ground that, as applied to applicant's goods, the mark so resembles opposer's previously used and registered mark REVIVAL, for "soybean-derived dietary supplement," and "soy protein for use as a food additive in cereals, breads, muffins and meat," among other goods and services, as "to be likely when used on or in connection with the goods of Applicant to cause confusion, or to cause mistake or to deceive."

Applicant filed an answer by which it denied the salient allegations.²

The evidence of record consists of the pleadings, the file of the opposed application, and the testimony depositions, with accompanying exhibits, of Aaron T. Tabor, M.D., opposer, taken on June 29, 2006, and of Mr. Frank J. LaBarba, II, applicant, taken on September 6, 2006. In

¹ Serial No. 78399621, filed April 9, 2004, alleging a bona fide intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. §1051(b).

² Applicant's answer also contained several affirmative defenses, including laches, estoppel and unclean hands. However, inasmuch as applicant did not pursue any of its affirmative defenses in taking testimony, submitting evidence, or filing its brief, we consider these affirmative defenses to be waived. In addition, applicant's allegation that opposer committed fraud in obtaining his registrations, to the extent it is separate from the defense of unclean hands, is an impermissible collateral attack in the absence of a counterclaim against the registrations.

addition, opposer submitted, under notice of reliance, status and title copies of each of his three pleaded registrations, applicant's responses to Interrogatories Nos. 19, 20 and 23, as well as printouts from selected covers and pages of two published books and ten published magazine periodicals.³

STANDING/PRIORITY

The pleaded registrations, which are in full force and effect, and are owned by opposer, are summarized as follows:

Registration No. 2208921, for the mark REVIVAL (in typed form) for "soybean-derived dietary supplement" in International Class 5, issued on December 8, 1998, Section 8 accepted and Section 15 acknowledged;

Registration No. 2348156, for the mark REVIVAL (in typed form) for "newsletters featuring information on diet, cancer prevention, and health" in International Class 16, for "soy protein for use as a food additive in cereals, breads, muffins and meat" in International Class 29, and for "educational services, namely, conducting instructional courses in the fields of diet, cancer prevention, and health" in International Class 41, issued on May 9, 2000, Section 8 accepted; and

Registration No. 2362163, for the mark REVIVAL (in typed form) for "providing information in the field of health and well being, nutrition, diet, dietary supplements, drugs, cancer and other

³ We note that applicant filed concurrently with its brief a document titled "notice of reliance" and listed various exhibits introduced during the course of Mr. LaBarba's testimony deposition. A notice of reliance is a method by which a party may introduce certain types of evidence, e.g. printed publications or official records, and must be filed during a party's trial period. We consider applicant's filing merely to be an addendum to applicant's brief highlighting certain evidence of record, and not an untimely notice of reliance under Trademark Rule 2.122.

diseases, prevention and the health care industry by means of a global computer network" in International Class 42, issued on June 27, 2000, Section 8 accepted and Section 15 acknowledged.

Because opposer has made the pleaded registrations summarized above properly of record, opposer has established its standing to oppose registration of applicant's mark and its priority is not in issue. See *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). In addition, opposer's testimony of record establishes that the first of its products to be sold bearing its REVIVAL mark was "a soy shake mix," and that the date of such use of the mark was 1997, a date prior to the filing date of the opposed application. Tabor Dep. p. 17.

LIKELIHOOD OF CONFUSION

Our likelihood of confusion determination under Trademark Act Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie*

Restaurants Inc., 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We begin with an analysis of the marks. Under this du Pont factor, we look to the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their overall commercial impressions that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the perception and recollection of the average purchaser, who normally retains a general rather than specific impression of trademarks. See *Chemetron Corp. v. Morris Coupling & Clamp Co.*, 203 USPQ 537 (TTAB 1979); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

As a preliminary matter, in making this determination we have considered applicant's argument that the existence of third-party registered marks that contain the root word "REVIVE" or its foreign equivalent for various beverages, and third-party registered marks that contain the word "REVIVAL" for a variety of goods and services, not including dietary supplements, water or shake mixes, limit the scope of protection to which opposer's mark is entitled. However, we find the argument unpersuasive. First, such

registrations are not evidence of use and have little probative value as to the sixth du Pont factor, namely, the number and nature of similar marks in use on similar goods in the marketplace. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973). Second, while third-party registrations may be "useful to demonstrate the sense in which a term is used in ordinary parlance" and "can show that a particular term has been adopted by those engaged in a certain field or industry and that said term has less than arbitrary significance with respect to certain goods or services," *In re Dayco Products-Eaglemotive, Inc.*, 9 USPQ2d 1910, 1911 (TTAB 1988), none of the third-party registrations containing the word "REVIVAL" are for beverages, dietary supplements or shake mixes. Therefore, they have little probative value as to this point.

With regard to the three third-party registrations for various beverages, the marks REVIVE, BODY REVIVE and RINASCENTE (translated to "The Reviving"),⁴ these marks are different from both opposer's and applicant's marks. Moreover, the registration for RINASCENTE registered solely on the basis of a foreign registration under Trademark Act Section 44, and thus is of very limited probative value.

⁴ In his testimony deposition, applicant placed into the record U.S. Registrations Nos. 2145494, 2616045, and 2984425.

Cf. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993). In view thereof, we do not consider the mark REVIVAL to be a weak mark entitled to only limited protection.

We find the marks at issue, REVIVAL and REVIVAL WATER, to be nearly identical. The dominant portion of applicant's mark is the term REVIVAL, inasmuch as the disclaimed term WATER is the generic word for the goods. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("That a particular feature is descriptive [or otherwise lacking in distinctiveness]. . . with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark ..."). Thus, the dominant element in applicant's mark is identical to the entirety of opposer's mark.

As to the connotation of this common term, each party provided significant testimony and arguments explaining the commercial meaning that his respective mark is intended to create in the minds of potential purchasers. Whereas both parties asserted that "revival" is indicative of products one ingests to attain or sustain good health, feel renewed or restored, the parties also proffered testimony that provides a more specific and targeted commercial impression of the term REVIVAL *vis-à-vis* defined consumer groups to whom both opposer and applicant exert marketing efforts.

Opposer testified that its REVIVAL mark "really imparts a notion of someone being refreshed, feeling better, being revived." Tabor Dep. p. 14. Through the introduction of three exhibits in the nature of consumer newsletters, opposer highlighted that its goods are marketed, in part, through humanitarian efforts with various Christian ministries. Tabor Dep. pp. 22-23. In identifying and describing an array of advertising efforts that encompass online, print, direct mail, radio and television venues, opposer noted that certain radio efforts include "spots ... on Christian radio." Tabor Dep. p. 34. He stated that certain television placements are "with a Christian ministry, the CB, Christian Broadcasting Network," and that its advertising has been "targeting the Christian audience..." Tabor Dep. p. 35. Opposer continued that "we also work with quite a few Christian ministries on-line." Tabor Dep. p. 36. He also stated, "We've spent ... over \$19 million building the Revival trademark, with a great portion of that in the Christian area, as well as secular area." Tabor Dep. P. 41. Moreover, opposer testified that its widespread advertising efforts are "targeted to a secular market." Tabor Dep. p. 35.

Applicant testified that "our company is an openly Christian company. And the association between the word "revival" and the word "water" is a spiritual connotation."

LaBarba Dep. p. 10. He stated that applicant markets the bottled water primarily to Christian ministries, churches, organizations, conferences, and "events that are usually Christian based." LaBarba Dep. p. 35. Applicant promotes his product through a website, word-of-mouth, phone calls, emails, attendance at church conferences and bookstores, and through conversations with pastors and pastor offices.

LaBarba Dep. pp. 62-62.

Thus, the record evidences that, with respect to a significant portion of their target audience, both marks would evoke the impression of a "revival" in a religious sense as well as a healthful sense. The parties have amply described this connotation behind their respective REVIVAL and REVIVAL WATER marks. Consequently, in addition to evoking a common suggestive feeling of being physically revived, both marks also create the same shared suggestive religious-oriented impression. We further note that the application is not limited to a particular market and as such the non-religious connotation is applicable to applicant's goods.

In view of the above, and underscoring that the only feature differentiating the marks is the generic disclaimed term WATER, we conclude that the marks are essentially identical in their appearance, as well as in the commercial

impressions and meanings they readily convey. Accordingly, this du Pont factor strongly favors opposer.

We next consider the relatedness of opposer's and applicant's goods. As regards the application and the registrations, we must make our findings based on the goods as they are recited in the application and registrations, respectively. See *Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *In re Linkvest S.A.*, 24 USPQ2d 1716 (TTAB 1992); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

The goods at issue need not be identical or directly competitive in order for there to be a likelihood of confusion. Rather, the respective goods need only be related in some manner or the conditions surrounding their marketing be such that they could be encountered by the same purchasers under circumstances that could give rise to the mistaken belief that the goods come from a common source. *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Moreover, "the greater the degree of similarity between the applicant's mark and [opposer's mark], the lesser the degree of similarity between the applicant's goods or services and the [opposer's] goods or services that is required to support a finding of likelihood of confusion." *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001);

Ancor, Inc. v. Ancor Industries, Inc., 210 USPQ 70 (TTAB 1981); TMEP §1207.01(a) (4th ed. 2005). Cf. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 877, 23 USPQ2d 1698, 1701 (Fed. Cir. 1992), *cert. denied* 506 U.S. 1034 (1992) (where the goods or services are virtually identical, the degree of similarity in the marks that is necessary to support a conclusion of likely confusion declines). However, if the goods are not related or are not marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *Shen Manufacturing Co. v. Ritz Hotel Ltd*, 393 F.3d 1238, 73 USPQ2d 1350, (Fed. Cir. 2004).

Opposer's pleaded Registrations Nos. 2208921 and 2348156 cover a "soybean-derived dietary supplement" in International Class 5 and "soy protein for use as a food additive in cereals, breads, muffins and meat" in International Class 29,⁵ respectively. As identified, the differences between these goods on one hand, and bottled, flavored and purified water on the other, are too great to

⁵ Opposer's pleaded Registrations Nos. 2348156 and 2362163 cover services in the nature of providing information and education in the fields of diet, cancer prevention, health, nutrition, dietary supplements, drugs, and Registration No. 2348156 covers newsletters on such topics. However, neither party pursued arguments relating to such goods or services. Accordingly, our

find a likelihood of confusion in the absence of further evidence to support such a conclusion. Nor does the record conclusively establish that the goods are complementary. Opposer has presented no evidence that any of the goods named in his three pleaded registrations are closely related to the goods named in the application, or that they are used in such a manner as to be complementary in the marketplace.⁶

Hence, we cannot determine from the pleaded registrations, the application, and the evidentiary record before us that the goods are related, or complementary in actual use.

In view thereof, and notwithstanding any possible similarity in the marks, the differences in these goods, as identified in the application and registrations, are too great to find a likelihood of confusion without evidence to support such a conclusion.

Thus, in view of our finding that opposer has not shown that the goods are related or that the channels of trade overlap, we conclude that the evidence of record as it

analysis centers on the Class 5 and Class 29 goods that opposer's registrations encompass.

⁶ Opposer appears to argue that the "soybean-derived dietary supplement" identified in Registration No. 2208921 includes its "soy shake mixes." Opposer has presented no evidence to support this contention, and we find that the goods identified in Registration No. 2208921 do not include "soy shake mixes." Not only is it not clear from the record that "dietary supplement" would include a shake mix form; it is also not clear that a soy shake mix would be exclusively considered a dietary supplement. We discuss these goods, *infra*, in connection with opposer's common law rights.

pertains to the relevant du Pont factors does not support a finding of a likelihood of confusion as to opposer's Registration Nos. 2208921 and 2348156. See *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) (a single factor may play a dominant role in a likelihood of confusion analysis).

As noted above, opposer also pleaded and presented sufficient evidence that establishes his common law rights in the REVIVAL mark as used in connection with a "soy shake mix" prior to the filing date of the opposed application. In his testimony, opposer stated that he first used the mark in 1997, and that such use was on "soy-derived nutritional supplements." Tabor Dep. p. 15. More specifically, such use was on "a soy shake mix." Tabor Dep. p. 17. Opposer also testified that the instructions on the packages of his mixes state that the product is to be blended with water. Tabor Dep. p. 42. Thus, these goods are complementary inasmuch as opposer's soy shake mixes must be blended with water before consumption. See, e.g., *General Foods Corporation v. Wisconsin Bottling, Inc.*, 190 USPQ 43, 44 (TTAB 1976) (soft drinks are related to instant breakfast drink inasmuch as such beverages are often used as a component of or mixed with other ingredients). The complementary nature of related products when they are likely to be used together is relevant to the question of

likelihood of confusion. See *In re Martin's Famous Pastry Shoppe, Inc., supra*, at 1290 (bread and cheese found to have complementary uses). Therefore, we find that opposer's nutritional supplements in shake mix form designed for use with water are sufficiently related to applicant's bottled, flavored or purified drinking water such that use of a similar mark on these goods would likely cause confusion, particularly here, where the marks are nearly identical.

With regard to the channels of trade through which the goods move in commerce, the identification of goods in the application is not limited by trade channels and would include opposer's demonstrated trade channels, which primarily consist of sales through an online website and a direct mailing product catalogue.⁷ Moreover, the record demonstrates that the parties are, in fact, operating in overlapping markets. Specifically, both parties testified to undertaking ongoing marketing efforts directed towards individuals and organizations in the Christian community, thereby indicating an intersection among a portion of their targeted consumer base. See, e.g., Tabor Dep. p. 35 ("Our most successful television advertising has been with a Christian ministry, the CB, Christian Broadcasting Network, which is a top ten ministry with great national,

⁷ There is some indication in the record that at least some of opposer's products are also sold in health food stores, but the record is not clear on this point.

international distribution of their content.") and LaBarba Dep. pp. 34-35 "Q. ... Can you please identify customers of your company that have actually purchased water from you for profit ... A. They're ministries or they're churches.")

We further note that the goods at issue are relatively inexpensive general consumer items, and not purchased with a level of care that would outweigh the similarity in the marks and relatedness of the goods. Thus, we find that the goods could be encountered by the same consumers in situations that would create the incorrect assumption that they originate from the same source.

In view of the above, the du Pont factors of the relatedness of the goods, channels of trade, purchasers and conditions of sale clearly favor opposer with regard to the soy shake mixes.

Applicant argues that there have been no instances of actual confusion. As applicant acknowledges, however, the parties' marks have not been in concurrent use for a long period, in that applicant only started producing its water in November, 2004. LaBarba Dep. p. 25. Thus, there has not been a meaningful time period of concurrent use for actual confusion to occur. Moreover, a showing of actual confusion is not necessary to a finding that a likelihood of confusion exists. See *Weiss Associates Inc. v. HRL Associates Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990).

Considering the marks in their entireties, we conclude that the evidence of record as it pertains to the relevant du Pont factors supports a finding of a likelihood of confusion as between applicant's REVIVAL WATER mark and opposer's common law REVIVAL mark previously used in connection with soy shake mixes, such that registration of applicant's mark is barred under Trademark Act Section 2(d). Finally, to the extent that we have any doubt, it must be resolved "against the newcomer because the newcomer has the opportunity and obligation to avoid confusion with existing marks." See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002).

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