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Mailed:
February 27, 2013

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Kemin Industries, Inc.

v.

Naturex
—

Opposition No. 91199191
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Kent A. Herink and Matthew A. Warner-Blankeship of Davis, Brown, Koehn, Shors & Roberts, PC for Kemin Industries, Inc.

John S. Egbert of Egbert Law Offices PLLC.
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Before Kuhlke, Grendel and Bergsman, Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Naturex (“applicant”) filed an application to register the mark NATROX, in standard character form, for the following goods, as amended:¹

Chemicals as raw materials for cosmetics and the food and pharmaceutical industries, mainly comprising plant extracts; active chemical ingredients used in cosmetic

¹ Application Serial No. 79076683 filed October 1, 2009. The application is a request for protection under Section 66(a) of the Trademark Act of 1946, 15 U.S.C. § 1144f(a).

formulation; mineral salts, namely, magnesium salts, in Class 1; and

Soaps; perfumes; cosmetics; essential oils; odoriferous substances, namely, body sprays used as personal deodorants and as fragrance, perfumery; cosmetics in galenic form and mainly containing plant extracts, not for medical purposes; plant and herb extracts sold as components of cosmetics for beauty and skin, body, facial, hair or nail care, in the form of capsules, tablets, ampules, yeast, powders, bars, creams or beverages, in Class 3.

Kemin Industries, Inc. (“opposer”) opposed the registration of applicant’s mark on the ground of likelihood of confusion pursuant to Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). Specifically, opposer alleged that applicant’s mark so resembles opposer’s mark NATUROX for human food and animal food preservatives in the nature of a natural antioxidant as to be likely to cause confusion. Opposer alleged ownership of Registration No. 2853283 for the mark NATUROX, in typed drawing form, for “human food and animal food preservatives in the nature of a natural antioxidant,” in Class 1.²

Applicant denied the essential allegations in the notice of opposition.

The Record

The record includes the pleadings and, by operation of Trademark Rule 2.122(b), 37 C.F.R. § 2.122(b), applicant’s application file. In addition, opposer introduced the following testimony and evidence:

1. Testimony deposition of Jim Mann, opposer’s product manager and technical service manager for antioxidants, with attached exhibits;

² Issued June 15, 2004; Sections 8 and 15 affidavits accepted and acknowledged.

2. Testimony deposition of Paul Tunink, Senior Vice President of Finance for Kemin Nutrinsurance, with attached exhibits;

3. A notice of reliance on a copy of opposer's pleaded registration printed from the electronic records of the U.S. Patent and Trademark Office showing the status of and title to the registration;

4. Applicant's responses and supplemental responses to opposer's first set of interrogatories; and

5. Applicant's responses to opposer's request for production of documents, including copies of some documents.³

In addition, opposer introduced through a notice of reliance what purports to be a copy of applicant's website. However, the webpage does not display a URL or the date it was printed. *See Safer, Inc. v. OMS Investments, Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (if a document obtained from the Internet identifies its date of publication or date that it was accessed and printed, and its source (e.g., the URL), it may be admitted into evidence pursuant to a notice of reliance in the same manner as a printed publication in general circulation in accordance with Trademark Rule 2.122(e)). Therefore, the copy of applicant's website may not be

³ Trademark Rule 2.120(j)(3)(ii) provides that a party who obtains documents through Fed. R. Civ. P. 34 may not make the documents of record through a notice of reliance alone, except to the extent that they are admissible by notice of reliance under Rule 2.122(e). Written responses to document requests indicating that no documents exist may be submitted by notice of reliance. *ShutEmDown Sports Inc. v. Lacy*, 102 USPQ2d 1036, 1038 n. 7 (TTAB 2012). In addition, documents obtained through Fed. R. Civ. P. 34 and improperly offered into evidence may be considered if the nonoffering party does not object thereto. *Jeanne-Marc, Inc. v. Cluett, Peabody & Co.*, 221 USPQ 58, 59 n. 4 (TTAB 1984). Since applicant made no objection to the documents, we will treat the documents as having been stipulated into the record for whatever probative value they may have.

introduced through a notice of reliance. Opposer also introduced a copy of a settlement agreement between opposer and applicant concerning the NATUREX mark in another proceeding. This document may not be made of record through a notice of reliance. In view thereof, the copy of applicant's website and the settlement agreement have not been considered.

Applicant did not introduce any testimony or evidence during its testimony period, nor did applicant file a brief.

Standing

As opposer has properly made its pleaded registration of record, opposer has established its standing. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 U.S.P.Q.2d 1842, 1844 (Fed. Cir. 2000); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 U.S.P.Q. 185, 189 (C.C.P.A. 1982).

Priority

As opposer's pleaded registration is of record, Section 2(d) priority is not an issue in this case as to the mark and the goods covered by the registration. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 U.S.P.Q. 108, 110 (C.C.P.A. 1974).

Likelihood of Confusion

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 services. *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.

Applicant is seeking to register its mark for “chemicals as raw materials for cosmetics and the food and pharmaceutical industries, mainly comprising plant extracts; active chemical ingredients used in cosmetic formulation; mineral salts, namely, magnesium salts,” in Class 1 and cosmetics in Class 3. Opposer has registered its mark for “human food and animal food preservatives in the nature of a natural antioxidant,” in Class 1.

In response to opposer’s Interrogatory No. 4, applicant described its NATROX products as “a line of natural antioxidants.” This is corroborated by the documents responsive to opposer’s Document Request No. 2 identifying applicant’s NATROX products and “antioxidants” providing “a range of extracts with preservative properties for improving formulation quality.” This information serves to clarify the nature of applicant’s chemicals as being in the nature of antioxidants and the identification encompasses such goods.

According to Jim Mann, opposer's product and technical service manager for antioxidants, NATUROX is "a natural antioxidant that's primarily for pet foods, for preserving the quality of fats and protein meals."⁴ "The primary constituents are mixed tocopherols and rosemary extract and then lecithin."⁵ A "tocopherol" is "one of several forms of vitamin E ... and is an antioxidant retarding rancidity by interfering with the autoxidation of fats."⁶ "Lecithin" is comprised of fatty acid molecules and choline that are "essential constituents of animal and vegetable cells."⁷ "Rosemary extract" is a flavoring prepared from essential oil extract by "dissolving an essential oil in alcohol ... adding water and where desirable and permitted by law, a small amount of certified food colour."⁸ Accordingly, opposer's "human food and animal food preservatives in the nature of a natural antioxidant" are chemicals used as raw materials in the food industry.

Applicant's description of chemicals as raw materials for the food industry is subsequently modified as "mainly comprising plant extracts." However, that modification does not limit the chemicals to plant extracts. It just means that the

⁴ Mann Dep., p. 3.

⁵ Mann Dep., p. 4.

⁶ Stedman's Medical Dictionary (stedmansonline.com). The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

⁷ *Id.*

⁸ Flavouring, **ENCYCLOPAEDIA BRITANNICA**, *Encyclopaedia Britannica Online Academic Edition* (2013). The Board may take judicial notice from encyclopedias. *Productos Lacteos Tocumbo S.A. de C.V. v. Paleteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 n. 61 (TTAB 2011).

chemicals are chiefly or principally plant extracts. Applicant's chemicals may still include raw materials and antioxidants other than plant extracts.

Where, as here, applicant's description of goods is broadly constructed, we must allow for all possible products that may fall within the description of goods, keeping in mind that a likelihood of confusion may be found with respect to a particular class based on any products within the description of goods for that class. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *Shunk Mfg. Co. v. Tarrant Mfg. Co.*, 318 F.2d 328, 137 USPQ 881, 883 (CCPA 1963); *Apple Computer v. TVNET.Net, Inc.*, 90 USPQ2d 1393, 1397 (TTAB 2007).

In view of the foregoing, applicant's "chemicals as raw materials for ... the food ... industries" is broad enough to include opposer's "human food and animal food preservatives in the nature of a natural antioxidant" and, therefore, the goods are in part legally identical.

There is no evidence in the record regarding the similarity or dissimilarity of applicant's cosmetics and opposer's goods.

B. Similarity or dissimilarity of the established likely-to-continue trade channels and classes of consumers.

Because applicant's Class 1 goods are in part legally identical, we must presume that the channels of trade and classes of purchasers are the same. See *American Lebanese Syrian Associated Charities Inc. v. Child Health Research Institute*, 101 USPQ2d 1022, 1028 (TTAB 2011); *In re Smith and Mehaffey*, 31 USPQ2d 1531, 1532 (TTAB 1994) ("Because the goods are legally identical, they

must be presumed to travel in the same channels of trade, and be sold to the same class of purchasers.”). *See also In re Viterra 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).

There is no evidence regarding channels of trade or classes of consumers for applicant’s cosmetics in Class 3.

C. The similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.

We turn now 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.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). 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 legally 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. *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).

Further, 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 terms of their overall commercial impression so that confusion as to the source of the goods offered under the respective marks is likely to result. *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 unpublished*, No. 92-1086 (Fed. Cir. June 5, 1992).

Applicant is seeking to register the mark NATROX and opposer's mark is NATUROX. The only difference between the marks is the letter "U" in opposer's mark. Slight differences in marks do not normally create dissimilar marks. *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions"). *See also United States Mineral Products Co. v. GAF Corp.*, 197 USPQ 301, 306 (TTAB 1977) ("'AFCO' and 'CAFCO,' which differ only as to the letter 'C' in USM's mark, are substantially similar in appearance and

sound”) and *In re Bear Brand Hosiery Co.*, 194 USPQ 444, 445 (TTAB 1977) (“The mark of the applicant, ‘KIKS’ and the cited mark ‘KIKI’ differ only in the terminal letter of each mark. While differing in sound, the marks are similar in appearance and have a somewhat similar connotation”). Thus, the marks are similar in appearance and sound.

The marks NATROX and NATUROX are both coined terms without any meaning so there is no question regarding the similarity of meaning. However, opposer’s mark engenders the commercial impression “Natural Antioxidant.” By the same token, the “Nat” prefix of applicant’s mark also engenders the commercial impression of a product with natural characteristics, specifically a “natural antioxidant.”

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

D. Balancing the factors.

1. Class 1

Because the marks are similar and applicant’s goods are in part legally identical to opposer’s goods and, thus, presumptively move in the same channels of trade and are sold to the same classes of consumers, we find that applicant’s mark NATROX for “chemicals as raw materials for cosmetics and the food and pharmaceutical industries, mainly comprising plant extracts; active chemical ingredients used in cosmetic formulation; mineral salts, namely, magnesium salts”

is likely to cause confusion with opposer's mark NATUROX for "human food and animal food preservatives in the nature of a natural antioxidant."

2. Class 3

There is no evidence or testimony establishing a relationship between applicant's cosmetics in Class 3 and opposer's goods. Therefore, opposer has not met its burden of establishing likelihood of confusion between similar marks used in connection with applicant's "soaps; perfumes; cosmetics; essential oils; odoriferous substances, namely, body sprays used as personal deodorants and as fragrance, perfumery; cosmetics in galenic form and mainly containing plant extracts, not for medical purposes; plant and herb extracts sold as components of cosmetics for beauty and skin, body, facial, hair or nail care, in the form of capsules, tablets, ampules, yeast, powders, bars, creams or beverages" and opposer's "human food and animal food preservatives in the nature of a natural antioxidant." *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 192 USPQ at 28 (a combined application is regarded as a group of individual applications so that oppositions to combined applications require separate analyses for each class of goods opposed). *See also Frantz v. Sky Distributing Co.*, 169 USPQ 185, 189 n. 3 (TTAB 1971) (a refusal in one class is not determinative of the right to register in the other classes).

Decision: The opposition is sustained in connection with the goods in Class 1.

The opposition is dismissed in connection with the goods in Class 3.