

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
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coggins

Mailed: February 1, 2016

Cancellation No. 92061857

Vemma Nutrition Company

v.

NutraClick, LLC

**Before Mermelstein, Bergsman, and Heasley,  
Administrative Trademark Judges.**

**By the Board:**

Now before the Board is Respondent/Counterclaim-Plaintiff NutraClick, LLC's ("NutraClick") motion, filed February 1, 2016, for reconsideration of the Board's January 29, 2016 Order denying NutraClick's earlier motion for judgment on the pleadings. In an effort to efficiently manage our docket, we exercise our discretion to determine the motion prior to the time in which Petitioner/Counterclaim-Defendant Vemma Nutrition Company ("Vemma") might otherwise file a brief in response to the motion.

Inasmuch as NutraClick filed its motion for reconsideration three days after our January 29th Order, the motion is timely and may be considered. *See* Trademark Rule 2.127(b) (request must be filed within one month). Similarly, we presume the parties' familiarity with our January 29th Order since so little time has passed.

The premise underlying a motion for reconsideration is that, based on the facts before it and the prevailing authorities, the Board erred in reaching the order or decision it issued. Such request should be limited to a demonstration that based on the facts before it and the applicable law the Board's ruling is in error and requires appropriate change. *See Vignette Corp. v. Marino*, 77 USPQ2d 1408, 1411 (TTAB 2005); TBMP § 518 (2015).

NutraClick argues that “the Board erred in relying upon [Vemma’s] unpleaded allegations that its marks have acquired distinctiveness.” Motion, p. 1 (unnumbered) 16 TTABVUE 3. NutraClick cites the Board’s statement at page 5 of the Order that “[e]ven if Vemma’s marks are merely descriptive, as NutraClick argues, Vemma would have the option – indeed, the necessity – to show that its marks have acquired secondary meaning at common law.” NutraClick believes that such a statement would be accurate if Vemma had pleaded that its BOD-E and **bodē** marks had acquired distinctiveness. As NutraClick correctly points-out, Vemma made no such allegation in the pleadings.

NutraClick argues that it was only in Vemma’s brief in opposition to the motion for judgment that Vemma mentioned acquired distinctiveness, and that neither Vemma nor the Board may rely on an unpleaded allegation or affirmative defense during consideration of a motion for judgment on pleadings.

NutraClick is mistaken in its belief that the Board relied on any matter outside the pleadings, and, specifically that the Board relied on Vemma’s argument that its

marks have acquired distinctiveness. The Board did not rely on any unpleaded allegation.

We point out, once again, that paragraphs 2, 19, and 20 of Vemma's Petition for Cancellation may be construed to allege Vemma's common law rights in its pleaded BOD-E mark. Inherent in Vemma's asserting likelihood of confusion due to its prior use of the "trademark BOD-E" (para. 2), which NutraClick alleges is a merely descriptive term, is the necessity that Vemma show BOD-E functions as mark. NutraClick not only ignores the allegations of Vemma's common law rights, but also ignores our citation to *Jewelers Vigilance Comm. Inc. v. Ullenberg Corp.*, 7 USPQ2d 1628 (Fed. Cir. 1988) and *Otto Roth & Co. v. Universal Foods Corp.*, 209 USPQ 40 (CCPA 1981). As the court stated in *Jewelers Vigilance*, "[w]here an opposer asserts likelihood of confusion because of its prior use of what appears to be a merely descriptive term ... the opposer must show that such term has come to identify the opposer as the source of goods or services." 7 USPQ2d at 1632.

We find no error with our earlier ruling on the motion for judgment on the pleadings. In view thereof, NutraClick's motion for reconsideration is **denied**.

Dates remain as set.