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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Services Corp.

Serial No. 75407763

Michael A. Painter for Leiner Health Services Corp.

Brian D. Brown, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hanak, Hohein and Rogers, Administrative Trademark
Judges.

Opinion by Hanak, Administrative Trademark Judge:

Leiner Health Services Corp. (applicant) seeks to register in typed drawing form NATURE'S ORIGIN for "vitamins and dietary food supplements." The intent-to-use application was filed on December 18, 1997.

Citing Section 2(d) of the Trademark Act, the Examining Attorney has refused registration on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the mark ORIGIN previously registered in typed drawing form for "vitamins, minerals and other health food supplements consumed primarily for

their vitamin or mineral content." Registration No. 991,240.

When the refusal to register was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In most likelihood of confusion analyses, the two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

However, in this case, we have a third key consideration, namely, a detailed consent to allow applicant to use and register NATURE'S ORIGIN for "vitamins and dietary food supplements" signed by the owner of the cited registration. Contrary to the Examining Attorney's assertion at page 2 of his Supplemental Brief, this is not a "naked consent agreement." A naked consent agreement is where the registrant merely consents to the registration of, and perhaps the use of, applicant's mark with no explanation as to why the registrant is of the view that the contemporaneous use of its mark and applicant's mark would not result in a likelihood of confusion. A true naked consent agreement is of minimal value to the

applicant because such a naked agreement does not even state that registrant is of the view that the contemporaneous use of the two marks would not result in a likelihood of confusion. For all the Board may know, registrant may have signed such a true naked consent agreement for, as an example, monetary consideration while believing that confusion would occur.

Before reviewing this particular consent agreement, we should note that our primary reviewing Court has on numerous occasions demanded that this Board give "great weight" to consent agreements which are not merely naked consent agreements. Bongrain International v. Delice de France, 811 F.2d 1479, 1 USPQ2d 1775, 1778 (Fed. Cir. 1987); Amalgamated Bank v. Amalgamated Trust & Savings, 842 F.2d 1270, 6 USPQ2d 1305, 1308 (Fed. Cir. 1988); In re Four Seasons Hotels Ltd., 987 F.2d 1565, 26 USPQ2d 1071 (Fed. Cir. 1993); and In re N.A.D. Inc., 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985).

Considering the present consent agreement, registrant agrees with applicant that "the marks are sufficiently different in overall sound, meaning and appearance to enable the public to distinguish the marks." The fact that the marks (NATURE'S ORIGIN and ORIGIN) are by no means

"identical" is an important factor in giving weight to any consent agreement. In re N.A.D. Inc., 224 USPQ at 971.

In addition, registrant makes the following statement in the consent agreement: "As a result of the extensive use of the respective trademarks and third-party composite trademarks which include individual segments which are similar in sight, sound and meaning to those of the parties hereto, the public has become sophisticated in the selection of such products and would not be likely to believe that there is any connection between the trademarks of [applicant and registrant] which have been in concurrent use for over three years." The extensive use of similar third-party marks for goods identical to or closely related to those of applicant and registrant is a point not disputed by the Examining Attorney. Indeed, quite to the contrary, the Examining Attorney made of record numerous third-party registrations whose marks are similar to applicant's and registrant's marks, and which were permitted to be registered over registrant's mark.

Given the fact that applicant's mark and registrant's mark are by no means identical; the fact that there is no dispute that there are a number of third-party marks which are similar to registrant's mark and applicant's mark such that the public has indeed become sophisticated in

distinguishing them; and the fact that registrant is of the firm belief that the contemporaneous use of its mark and applicant's mark is not likely to result in confusion, we find that there exists no likelihood of confusion. To do otherwise would be yet another "misguided effort" of the Board to substitute its judgment for the judgment of those most knowledgeable about the marketplace. In re Four Seasons Hotel Ltd., 26 USPQ2d at 1071. As our primary reviewing Court has admonished us, the "decisions of men who stand to lose if wrong are normally more reliable than those of examiners and judges ... [such that] it can be safely taken as fundamental that reputable businessmen-users of valuable trademarks have no interest in causing public confusion." Amalgamated Bank, 6 USPQ2d at 1308 (original emphasis).

Decision: The refusal to register is reversed.