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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Naturally Scientific, Inc.**

Serial No. 76097189

Serial No. 76130605

Evelyn M. Sommer for Naturally Scientific, Inc.

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

Before Bucher, Bottorff and Holtzman, Administrative Trademark
Judges.

Opinion by Holtzman, Administrative Trademark Judge:

Applicant, Naturally Scientific, Inc., has filed applications
to register the marks STRESS MENDER¹ and SLEEP MENDER² for goods

¹ Serial No. 76097189, filed July 27, 2000, based on an assertion of a bona fide intention to use the mark in commerce. The word "STRESS" is disclaimed. On September 13, 1999, applicant filed an amendment to allege use asserting a date of first use on September 13, 1999 and a date of first use in commerce on October 1, 1999.

² Serial No. 76130605; filed September 20, 2000; alleging dates of first use and first use in commerce on November 1, 1998. The word "SLEEP" is disclaimed.

identified in each application as "nutritional and dietary supplements."³

As to each application, the trademark examining attorney has refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the mark MOOD MENDER for "health and performance foods, namely, ready-to-eat food bars, chewing gum and tea-based beverages"⁴ as to be likely to cause confusion.

Applicant has appealed, and because the issues in both cases are the same, the appeals are hereby consolidated. Briefs have been filed,⁵ but an oral hearing was not requested.

Here, as in any likelihood of confusion analysis, we look to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476

³ Applicant is the owner of three additional applications for the same goods and related marks, ENERGY MENDER (S.N. 76130604); MEMORY MENDER (S.N. 76509057); and IMMUNE MENDER (S.N. 76509059). On August 4, 2003, the Board affirmed the refusal to register the mark ENERGY MENDER on the basis of the same cited registration. Applicant points out that its other two applications, however, were allowed for publication by a different examining attorney. While the Office strives for consistency, the Board must decide each case on its own facts and record. The Board is not bound by an examining attorney's determination as to registrability. See, e.g., *McDonald's Corp. v. McClain*, 37 USPQ2d 1274 (TTAB 1995). See also *In re Stenographic Machines, Inc.*, 199 USPQ 313, 317 (Comm'r Pats. 1978) ("Consistency of Office practice must be secondary to correctness of Office practice"). In addition, applicant incorrectly states in its reply brief (S.N. 76097189) that "in all cases a disclaimer of the term MENDER was required." In fact, a disclaimer of MENDER was not required in any of the applications.

⁴ Registration No. 2494588, issued October 2, 2001.

⁵ A signed copy of applicant's reply brief in application S.N. 76130605 was faxed to the Board on June 23, 2004. The reply brief is accepted.

F.2d 1357, 177 USPQ 563 (CCPA 1973), giving particular attention to the factors most relevant to the case at hand, including the similarity of the marks and the relatedness of the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, the examining attorney argues that the respective goods are related and that they are sold in the same trade channels to the same purchasers. The examining attorney has made of record a number of third-party registrations showing that the same marks are registered for both nutritional supplements and at least one of registrant's goods.

Applicant, on the other hand, maintains that confusion is not likely because the respective goods are "very different" (Briefs, p. 7). Pointing to the label submitted as a specimen in each case, applicant argues that its own goods "are administered sublingually [under the tongue] from a small bottle provided with an eye dropper" (Briefs, p. 7) and that those goods are not likely to be confused with the food bars, chewing gum and tea-based beverages offered by registrant. According to applicant, the respective products would be displayed in separate aisles or on separate shelves and the purchasers of its products would be reasonably informed and less likely to be confused than the ordinary purchaser.

To begin with, the question is not whether purchasers can differentiate the goods themselves, but rather whether purchasers are likely to confuse the source of the goods. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). Thus, it is not necessary that the goods be identical or even competitive to support a finding of likelihood of confusion. It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Applicant's nutritional and dietary supplements, on the one hand, and registrant's health and performance food bars and tea-based beverages, on the other, are closely related products. While the characteristics of the products may differ, they all nonetheless constitute dietary products having the same intended purpose, to restore or improve a person's sense of physical or emotional well-being. The third-party registrations made of record by the examining attorney (including a registration for a different mark owned by Celestial Seasonings, Inc., the owner of the cited registration) show, in each instance, a mark which is registered for both nutritional supplements and either health food bars or

teas. These registrations, while not evidence of use of the marks therein, tend to show that purchasers would expect the types of products offered by applicant and registrant, if sold under similar marks, to emanate from the same source. See, e.g., *In re Albert Trostel & Sons Co.*, supra at 1785-1786; and *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

Although applicant has attempted to distinguish the respective goods on the basis of the form of its product, in the absence of any restriction in the application, applicant's nutritional and dietary supplements would not be limited to sale in a particular form, and may take any type of form that is normal for such goods. See *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198 (Fed. Cir. 1983). In addition, these closely related goods must be deemed to travel in the same channels of trade and be sold to the same classes of purchasers.

We have no evidence that applicant's and registrant's products typically would be displayed in different aisles of a store, nor do we find that to be an important consideration since these products may not even be purchased at the same time. There is also no evidence to support applicant's claim that its products are purchased by a "reasonably informed" public. In fact, it is reasonable to assume that both applicant's nutritional and dietary supplements and registrant's health and performance foods would be purchased by customers of all types including members of the

general public. While some of these consumers may care about the products they are purchasing or exercise a certain degree of care in selecting these products, they are not necessarily "informed" purchasers or likely to exercise a high degree of care in terms of examining the trademarks. As relatively inexpensive products (and applicant has not argued otherwise) they are more likely to be purchased casually and on impulse, thereby increasing the risk of confusion. *Kimberly-Clark Corp. v. H. Douglas Enter., Ltd.*, 774 F.2d 1144, 1146, 227 USPQ 541, 542 (Fed. Cir. 1985).

Thus, we turn our attention to the marks, keeping in mind that when marks would appear on closely related goods, the degree of similarity between the marks necessary to support a finding of likelihood of confusion declines. *Century 21 Real Estate v. Century Life*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

Applicant argues that its marks STRESS MENDER and SLEEP MENDER are unitary expressions, and that when applicant's and registrant's marks are properly viewed in their entireties, including consideration of the disclaimed words, STRESS and SLEEP, the respective marks convey different commercial impressions in view of the differences in sound, appearance and meaning between STRESS or SLEEP on the one hand, and MOOD on the other. Applicant has submitted dictionary definitions of STRESS, SLEEP and MOOD to support her position. Applicant contends that the word MENDER, the only similar portion of the marks, has little significance in view

of its suggestive meaning in relation to the goods, and that "[i]t would be expected that the word ... would be widely adopted in the trade..." (Briefs, p. 5).

Applicant is correct that the marks must be considered in their entireties and that the commercial impressions are conveyed by the marks as a whole, including the disclaimed words in applicant's marks. The fact is, however, that in viewing the marks in their entireties, the purchasing public is more likely to rely on non-descriptive portions of a mark as an indication of source. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985) ("there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entireties.")

When we compare STRESS MENDER and similarly SLEEP MENDER with MOOD MENDER in their entireties, we find that, in each case, the marks create similar overall commercial impressions and convey similar meanings to those who would purchase the products. The shared word MENDER, a term that is at most suggestive of the identified goods, is visually and aurally a significant part of both applicant's and registrant's marks. There is no evidence that MENDER is highly suggestive of the identified goods and applicant has introduced no evidence of other marks containing "mender" for similar goods, or any other evidence that would suggest that the

term is weak or entitled to anything less than a broad scope of protection. In fact, MENDER would seem to be a somewhat unusual word to use for these types of products. Consumers would not typically think in terms of "mending" their mood, their stress levels, or their sleeping problems. As such, MENDER is a relatively strong word and is more likely to be remembered by purchasers when seeing registrant's mark MOOD MENDER and either of applicant's marks STRESS MENDER or SLEEP MENDER at different times on closely related goods.

While STRESS and similarly SLEEP have different meanings than MOOD, they are all interrelated concepts in that, as the examining attorney points out, one's level of stress or quality of sleep can impact one's mood. Their relationship becomes even more obvious when each of those words is combined with the distinctive term MENDER. When viewed as a whole in the context of the goods, both marks suggest products which perform related functions or at least provide complementary benefits, i.e., elevating mood, relieving stress, and promoting sleep, in order to restore an overall healthful state.

In view of the substantially similar meanings and commercial impressions conveyed by these marks as a whole, we believe that the differences in sound and appearance are not sufficient to avoid confusion. This is particularly true when we consider, as indicated earlier in this decision, that the purchasers of dietary

supplements and health and performance food bars and teas are ordinary members of the general public who, for the most part, are not necessarily "informed" and who, especially considering the inexpensive nature of these goods, would not be expected to exercise a high degree of care and thus would be more prone to confusion.

The fact that there may have been no instances of actual confusion between the cited mark and either of applicant's marks is not particularly significant since there is no evidence in the record from which we can determine whether there has been any meaningful opportunity for confusion to occur. Nor do we have any information about whether registrant has encountered any confusion.

Finally, to the extent that there is any doubt on the issue of likelihood of confusion, it is settled that such doubt must be resolved in favor of the prior registrant. In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).

Decision: The refusal to register in each application is affirmed.