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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Naturally Scientific, Inc.**

Serial No. 76/130,604

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 appealed from the
final refusal of the Trademark Examining Attorney to register the
mark ENERGY MENDER for a "nutritional and dietary supplement."¹

The Trademark Examining Attorney has refused registration
under Section 2(d) of the Trademark Act on the ground that

¹ Application Serial No. 76/130,604, filed September 20, 2000, alleging
dates of first use and first use in commerce on November 1, 1998. The
word "ENERGY" has been disclaimed.

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"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Briefs have been filed, 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 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 or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976) and *In re Azteca Restaurant Enterprises Inc.*, 50 USPQ2d 1209 (TTAB 1999).

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 third-party registrations showing that the same marks are registered for both nutritional supplements and at least one of registrant's goods.

Applicant maintains, however, that confusion is not likely because the respective goods are of "different types" and are

² Registration No. 2,494,588, issued October 2, 2001.

marketed in "different manners" (brief, p.5). Applicant denies that the goods are sold in the same channels of trade to the same purchasers and contrasts its own goods, claiming they are sold in liquid form and administered with a dropper or teaspoon, 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. (Brief, p.7).

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 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 form of its product and the manner in which it is marketed, in the absence of any restrictions in the application, applicant's nutritional supplements would not be limited to sale in liquid form and moreover, must be deemed to be marketed to the same purchasers and in the same trade channels as those of registrant. See, e.g., *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). 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 no evidence to support applicant's claim that its products are purchased by a "reasonably informed" public. In fact, to the contrary, it is reasonable to assume that both applicant's nutritional 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 when viewed in their entirety, including consideration of the disclaimed word ENERGY, the marks are different in sound, appearance and commercial impression primarily in view of the differences in meaning of ENERGY and MOOD.

Applicant argues 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..." (brief, p.4). Relying on dictionary definitions of "energy" and "mood," applicant contrasts the meaning of ENERGY MENDER which, according to applicant, suggests nutritional supplements for imparting vim, vigor and vitality, with MOOD MENDER which "is used in the context of improving a somber, melancholy state of mind." (Brief, p.6).

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 word in applicant's mark. At the same time, "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." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

When we compare ENERGY MENDER and MOOD MENDER in their entireties, we find that the two marks create similar overall commercial impressions and would convey similar meanings to those who would purchase the products. The shared word MENDER, a term which is only somewhat suggestive of the identified goods, is visually and aurally a significant part of both marks. There is no

evidence that MENDER is highly suggestive of the identified goods or that the term is commonly used by others on these or related goods. Applicant has introduced no evidence of third-party registrations or uses of MENDER in connection with 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.³ 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, for example, "mending" their mood. Thus, the word is more likely to be remembered by purchasers when seeing the marks on the goods at different times or in different places.

While the words ENERGY and MOOD have different meanings, they are clearly related concepts, particularly in relation to the identified goods. 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 with similar or at least complementary benefits, i.e., elevating mood and energy levels to restore an overall healthful state.

³ The Examining Attorney submitted a printout of the results of an electronic search of Office records and a list of third-party registrations and applications for marks containing "mender" as evidence of the strength of the word. To begin with, a list is insufficient to make third-party applications and registrations of record. Moreover, since the list fails to include any goods or services, it does nothing to support the Examining Attorney's contention. Finally, the significance of the search results and the relationship, if any, of those results to the

In view of the substantially similar meanings and commercial impressions conveyed by these marks, 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.

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 is affirmed.

list of applications and registrations is unclear and unexplained and therefore of no probative value.