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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re **Naturally Scientific, Inc.**

Serial No. 76233167

Evelyn M. Sommer for Naturally Scientific, Inc.

Toni Y. Hickey, Trademark Examining Attorney, Law Office
115 (Adam Striegel, Acting Managing Attorney).

Before Simms, Seeherman and Hanak, Administrative Trademark
Judges.

Opinion by Seeherman, Administrative Trademark Judge:

Naturally Scientific, Inc. has appealed from the final
refusal of the Trademark Examining Attorney to register FAT
SPONGE as a trademark for "nutritional supplements and
veterinary nutritional supplements."¹ Registration has been
refused pursuant to Section 2(d) of the Trademark Act, 15
U.S.C. 1052(d), on the ground that applicant's mark so

¹ Application Serial No. 76233167, filed April 2, 2001, and
asserting first use in December 2000 and first use in commerce in
February 2001.

resembles the mark BIO-SPONGE, previously registered for "nutritional supplements and veterinary nutritional supplements,"² that, as used on applicant's goods, it is likely to cause confusion or mistake or to deceive.

Applicant and the Examining Attorney have filed appeal briefs. Applicant did not request an oral hearing.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

The goods are, in part, identical, applicant's goods being identified as a nutritional and dietary supplement and the cited registration including nutritional supplements. Because these goods are legally identical,

² Registration No. 2552340, issued March 26, 2002.

they must be deemed to travel in the same channels of trade, and to be sold to the same classes of consumers, which would include the general public.

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In this case, although there are obvious differences between the marks, notably that each begins with different words--FAT and BIO--there are obvious similarities, too. Most importantly, each mark contains the word SPONGE, which creates some similarities in appearance and pronunciation. There are other similarities in appearance, since not only does each mark include the word SPONGE, but in each this word is preceded by a three-letter term, separated from sponge by either a space or a hyphen, with the separation emphasizing the presence of the word SPONGE. This term also has the same connotation in both marks, that of something that absorbs, so that in the case of FAT SPONGE the mark suggests a product that absorbs fat.³ The mark BIO-SPONGE does not

³ Applicant's literature confirms this meaning. The listing for "FAT SPONGE" describes Chitosan, one of the ingredients in the product: "Chitosan is an all-natural, non-digestible fiber derived from the exoskeletons of shellfish. This unique substance attaches to fats and lips in the stomach before the

have as clear a meaning, since "BIO" is defined as "biology,...a combining form meaning organism...life...akin to living...."⁴. Used for nutritional supplements, the mark BIO-SPONGE can suggest a product that absorbs elements that are helpful to life, or keeps such elements from being eliminated. Although the ultimate purpose of the absorption suggested by the marks may be different, the overall connotation deriving from the common use of the word SPONGE is the same.

It should also be noted that SPONGE, although suggestive, appears to be a strong mark for such goods. The Examining Attorney conducted a search of the Office records, and did not discover any "SPONGE" marks for similar or related goods in Class 5.⁵ And applicant has acknowledged that the word SPONGE has not been widely adopted in the trade. Brief, p. 4. In fact, applicant has not pointed to any evidence of third-party use which would

fats are digested. Then the Chitosan fibers, with the fats attached, are naturally eliminated from the body."

⁴ This definition was provided by applicant during the course of prosecution, and is stated to be from The Random House Webster's College Dictionary.

⁵ The third-party registrations which included the word SPONGE were for air deodorizer, a bone and collagen human tissue for use in the regeneration of bone, pads of absorbent material saturated with antiseptic to be used to clean skin prior to injection, and a sponge-brush impregnated with a microbicidal cleaner.

lead us to conclude that the cited registration is entitled to a limited scope of protection.

Applicant argues that the purchasers of nutritional supplements are reasonably informed, and read the labels of the products. We do not suggest that such purchasers would misread FAT SPONGE for BIO-SPONGE, or purchase the FAT SPONGE nutritional supplement when they meant to purchase BIO-SPONGE nutritional supplements. However, even a careful purchaser who is familiar with BIO-SPONGE nutritional supplements might well believe, upon encountering the FAT SPONGE nutritional supplement, that the latter is a new product which emanates from the same source as the BIO-SPONGE products.

To the extent that we have any doubt about our conclusion, we follow the well-established principle and resolve such doubt in favor of the registrant and prior user of the mark. In re Pneumatiques, Caoutchouc Manufacture et Plastiques Kleber-Colombes, 487 F.2d 918, 179 USPQ 729 (CCPA 1973).

Decision: The refusal of registration is affirmed.