

**THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB**

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re National Sales and Supply, LLC

Serial No. 76593850

Stephen J. Meyers of Drinker Biddle & Reath LLP for
National Sales and Supply, LLC.

Alina S. Morris, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).¹

Before Seeherman, Quinn and Hohein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

National Sales and Supply, LLC has appealed from the
final refusal of the Trademark Examining Attorney to
register MAJESTIC MULCH, with the word MULCH disclaimed, as
a trademark for "rubber mulch product, namely, mulch made
of recycled rubber for use in landscaping and horticulture

¹ A different Examining Attorney was responsible for the
examination of the application.

applications."² 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 resembles the following previously registered marks, both of which are owned by the same party, that, if used on applicant's identified goods, it is likely to cause confusion or mistake or to deceive: MAJESTIC EARTH for "potting soil and fertilizer for domestic use" and "peat moss";³ and MAJESTIC EARTH and design, as shown below, for "potting soil" and "peat moss and seeded flower and lawn rolls."⁴ In both of the cited registrations, the word EARTH has been disclaimed.



² Application Serial No. 76593831, filed May 24, 2004, based on Section 1(b) of the Trademark Act (intent-to-use).

³ Registration No. 2458344, issued June 5, 2001.

⁴ Registration No. 2482834, issued August 28, 2001. In applicant's appeal brief, it states that registration has also been refused in light of Registration No. 2711522. Although registration was initially refused on the basis of this registration, this refusal was withdrawn by the Examining Attorney in the final Office action dated August 10, 2005.

Applicant and the Examining Attorney have filed appeal briefs. An oral hearing was not requested.

The issue in this appeal is very similar to one we decided a few weeks ago, involving the same applicant, goods, cited registrations and evidence. In re National Sales and Supply, LLC, Serial No. 76593831 (TTAB August 15, 2006). The only difference is that the mark in that case was MAJESTIC MELT. Our analysis in this appeal is, therefore, very similar to what we said in the prior decision. If anything, the mark in the subject appeal is even more similar to the cited marks than was MAJESTIC MELT. Accordingly, we affirm the refusal of registration.

As we stated in the previous decision, 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 Co., Inc., 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003)

Turning first to the marks, both applicant's mark, MAJESTIC MULCH, and the registrant's word mark, MAJESTIC EARTH, begin with the word MAJESTIC. Because MULCH is a generic term for applicant's goods, and therefore has no source-identifying significance, MAJESTIC is the dominant

element of applicant's mark. MAJESTIC, too, is the dominant element of the cited marks, since EARTH is descriptive and has been disclaimed. Similarly, the word MAJESTIC in the registrant's word and design mark must also be considered the dominant element; the design portion does not make as great an impression because it is the word portion by which consumers would request the goods. See *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987). Thus, while we acknowledge applicant's argument that, in determining the issue of likelihood of confusion, the marks must be considered in their entirety, it is well established that there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). When we consider the marks in their entirety, but give appropriate weight to the dominant element MAJESTIC in each mark, we find that the marks are similar in appearance, pronunciation, connotation and commercial impression. In connection with the connotation of the marks, we note that "mulch" and "earth" both have similar connotations, such that the overall connotation of the marks is similar. Thus, although applicant's mark differs from the cited marks because it includes the generic word MULCH, and those

marks contain the descriptive word EARTH, the differences caused by the presence of these generic/descriptive words in the respective marks (or the design element in Registration No. 2482834) are not sufficient to distinguish applicant's mark from the registered marks.

Applicant has asserted that the portion common to its mark and the cited marks, MAJESTIC, is weak because it is a laudatory term, and therefore the cited registrations are entitled to a narrow scope of protection.⁵ The word "majestic" is defined as "having or showing lofty dignity or nobility, stately."⁶ As applied to such goods as mulch,

⁵ During the course of prosecution applicant made the assertion that "MAJESTIC is a laudatory term, and the subject of some 137 active registrations and applications as the examining attorney can confirm by performing an all class search for 'MAJESTIC' limited to active marks only." Response filed July 1, 2005. Applicant never submitted a copy of the search summary, let alone copies of these asserted marks. Thus, no third-party registrations or applications for MAJESTIC marks were ever made of record. In any event, copies of third-party applications would only have been evidence of the fact that such applications were filed, while copies of third-party registrations are not evidence that the marks are in use, as applicant had argued in its response. We note that in the final Office action, the Examining Attorney stated that a search of the USPTO database on August 9, 2005 revealed only five "live marks," and that two belonged to the applicant, two to the registrant, while the fifth, for MAJESTIC FOUNDATION CO, identified unrelated goods and/or services, e.g., building materials and foundation structures made therefrom. Applicant did not refer to these asserted third-party marks in its brief, so it appears that it recognized the evidentiary weakness of this particular argument, and decided not to pursue it.

⁶ The American Heritage Dictionary of the English Language, 4th ed. © 2000. The Examining Attorney submitted this definition with her appeal brief. The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J. C.*

potting soil, peat moss and fertilizer, it is not immediately clear how the word MAJESTIC has any laudatory significance. Even if we were to accept that "majestic" has some laudatory suggestiveness, however, the term is certainly not so strongly suggestive that the cited registrations would be entitled only to the narrow scope of protection asserted by applicant. We also point out that the cases cited by applicant in support of its argument that weak marks are entitled to a limited scope of protection are those in which there was evidence of third-party use; as noted in footnote four of this opinion, even if applicant had properly submitted copies of third-party registrations, such registrations would not be evidence that the marks shown therein are in use.

Turning to the goods, we begin our analysis with the well-settled principle that it is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered

Gourmet Food Imports Co., Inc., 213 USPQ 594 (TTAB 1982), aff'd, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In order to demonstrate the relatedness of the goods, the Examining Attorney has made of record excerpts from various websites that show that products such as applicant's and the registrant's are advertised and sold together. For example, The Garden Factory, www.gardenfactoryofny.com, advertises rubber mulch and also lists "Tools & Fertilizer," "Lawn Care" and "Landscaping Products." The Bloomin Haus, <http://bloominghaus.com>, advertises that "We carry Rubber mulch, regular mulch, topsoil, potting soil, peat moss," indicating that this seller views rubber mulch, potting soil and peat moss as falling into the same general product category.

These website excerpts demonstrate that both applicant's identified goods and the goods identified in the cited registrations may be sold in the same channels of trade.

Moreover, such goods may be used for complementary purposes. Potting soil, peat moss, fertilizer and seeded flower and lawn rolls, and mulch made of recycled rubber

for use in landscaping and horticulture applications, may all be used for landscaping. While we agree with applicant that rubber mulch would not actually nourish a plant in the way that soil or fertilizer would, the products could still be bought and used together as part of a landscaping project. It is clear from applicant's identification that its goods are to be used for landscaping and horticulture. Further, rubber mulch can be used to reduce weeds. The Garden Factory website specifically advertises that the rubber mulch it sells "does not promote weed growth" and gives "a freshly landscaped look." Peat moss, too, can be used as mulch to prevent weeds. In this connection, we take judicial notice of the dictionary definitions of "peat moss" and "mulch," submitted by the Examining Attorney with her brief. The definition of "peat moss" states that it is "used as a mulch and plant food," while "mulch" is defined as "a protective covering, usually of organic matter such as leaves, straw, or peat, placed around plants to prevent the evaporation of moisture, the freezing of roots, and the growth of weeds." The American Heritage Dictionary of the English Language, 4th ed. © 2000. (emphasis added).

Although applicant has made the general assertion that its goods and those identified in the cited registrations are different, it has not addressed the Examining

Attorney's arguments that the goods are complementary or serve similar functions. As noted above, it is not necessary that goods be identical in order to support a finding of likelihood of confusion. It is only necessary that the goods be related in some manner, and the Examining Attorney has demonstrated such relatedness.

The final du Pont factor that applicant and the Examining Attorney have addressed is that of the conditions under which and the buyers to whom sales are made. Applicant asserts in its brief that "the goods are relatively expensive rational purchase goods" and that discriminating purchasers will not be confused. Brief, p. 4. However, there is no evidence in the record that the goods are "relatively expensive," or that the purchasers are discriminating. On the contrary, it is clear that goods of this type may be purchased by do-it-yourself gardeners for their own homes. In fact, in its response to the first Office action, applicant stated that its mulch is intended "for purchasers who are end-users." Such consumers are also likely to purchase fertilizer, peat moss and the like for their gardening and landscaping needs. These end users are not professional gardeners or landscapers, and do not constitute discriminating purchasers. Further, the evidence submitted by the

Examining Attorney shows that a bag of rubber mulch costs \$12.99 (see The Garden Factory website excerpt), while a bag of cow manure (a fertilizer) costs \$1.49 (see Stone & Mulch Place website). We do not consider such items to be "relatively expensive," such that purchasers would exercise a great deal of care in choosing them, or pay a great deal of attention to the trademarks in terms of differentiating MAJESTIC MULCH from MAJESTIC EARTH or MAJESTIC EARTH and design. On the contrary, they are likely to focus their attention on the first and dominant word MAJESTIC in the marks and, even if they notice that there is a difference in the second, descriptive term, merely regard MAJESTIC MULCH as a variation of the trademark MAJESTIC EARTH or MAJESTIC EARTH and design, with all three marks indicating goods emanating from a single source.

Because the du Pont factors of the similarity of the marks, the relatedness of the goods, the similarity of trade channels, and the conditions of sale all favor a finding of likelihood of confusion, and because there is no evidence of third-party use of MAJESTIC marks, or other evidence that demonstrates that MAJESTIC is a weak term for the goods at issue herein, we conclude that if applicant were to use its mark MAJESTIC MULCH for its identified

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goods it would be likely to cause confusion with the MAJESTIC EARTH marks of the two cited registrations.

Decision: The refusal of registration is affirmed.