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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Halliday

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Serial No. 76604784

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Marcus P. Dolce of Price, Heneveld, Cooper, DeWitt & Litton  
for Michael R. Halliday.

Marilyn D. Izzi, Trademark Examining Attorney, Law Office  
112 (Angela Bishop Wilson, Managing Attorney).<sup>1</sup>

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Before Zervas, Walsh and Cataldo, Administrative Trademark  
Judges.

Opinion by Walsh, Administrative Trademark Judge:

On July 29, 2004, Michael R. Halliday (applicant)  
filed an intent-to-use application to register the mark IN  
in standard-character form on the Principal Register for  
goods identified as "energy drinks; sports drinks" in  
International Class 32.

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<sup>1</sup> A different examining attorney was responsible for this  
application prior to the filing of the appeal briefs.

Ser No. 76604784

The Examining Attorney has refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark shown below in Reg. No. 2927350 for "snack bars made of grains and containing soy protein, vitamins and minerals, fruits and nuts" in International Class 5, and "wholesale, distributorship, mail order, on-line and retail store services featuring dietary and nutritional supplements, snack bars, food for human consumption, personal gifts, beverages, personal and home hygiene products, books, video and audio cassettes on nutrition, health and wellbeing" in International Class 35.



The cited registration issued on February 22, 2005. The registration specifies a date of first use anywhere and a date of first use in commerce on June 1, 2000 for both classes.

Applicant argued against the refusal; the Examining Attorney made the refusal final; and applicant appealed. Applicant and the Examining Attorney have filed briefs.

We affirm.

Section 2(d) of the Trademark Act precludes registration of an applicant's mark "which so resembles a mark registered in the Patent and Trademark Office... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion..." The opinion in In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1977) sets forth the factors we may consider in determining likelihood of confusion. Here, as is often the case, the crucial factors are the similarity of the marks and the similarity of the goods and services of the applicant and registrant. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.").

#### The Marks

In comparing the marks we must consider the appearance, sound, connotation and commercial impression of the marks at issue. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005).

While we must consider the marks in their entirety, it is entirely appropriate to accord greater importance to

the more distinctive elements in the marks. As the Court of Appeals for the Federal Circuit observed, "...in articulating reasons for reaching a conclusion on the issue of confusion, 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 entirety. Indeed, this type of analysis appears to be unavoidable." In re National Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues that the marks differ in all respects -- appearance, sound, connotation and commercial impression. In particular, applicant argues that the design elements, particularly the vertical line between the I and N in the registered mark, differentiates the marks in all respects. Applicant also points out, through use of the specimen in the registration file, that the letters in the registered mark correspond to the first letters in the registrant's company name, Intelligent Nutrients, Inc. Applicant argues that the appearance of the company name with the mark in the specimen affects the meaning or connotation of the registered mark. Applicant states, "The marks are so dissimilar in appearance, sound, and meaning or connotation that, in combination with the differences in

the goods discussed below, there is no likelihood of confusion." Applicant's brief at 4.

The Examining Attorney disagrees and states, "The literal portion of both marks are nearly identical in appearance, sound and meaning. The addition of the design element does not obviate the similarity between the marks in this case." Examining Attorney's brief at unnumbered pages 6 and 7 (citations omitted).

We agree with the Examining Attorney. We find the design elements, the vertical line and the background square, insufficient to distinguish the marks.

In comparing the marks, it is improper to engage in a side-by-side comparison; rather, the emphasis is on the recollection of the average purchaser who retains a general rather than a specific impression of trademarks. Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975). Furthermore, literal elements are more important than design features in the perception of marks. In re Dixie Restaurants, Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997).

In this case, we conclude that the letters "IN" are the dominant elements in both marks, and that, in both instances, the letters would be perceived as forming the word "IN." We reject applicant's broad, unsupported

contention that potential purchasers would perceive the registered mark as two separate letters and would not see or pronounce it as the word "IN." We concur with the Examining Attorney's conclusion that potential purchasers are not likely to perceive the vertical line in a way which would alter the perception of the literal portion of the mark as the word "IN."

We likewise reject applicant's specific argument that potential purchasers will see the registered mark as two letters because registrant's name, Intelligent Nutrients, Inc., appears on the specific specimen registrant filed. Vornado, Inc. v. Breuer Electric Mfg. Co., 390 F.2d 724, 156 USPQ 340, 342 (CCPA 1968) (" . . . the display of a mark in a particular style is of no material significance since the display may be changed at any time as may be dictated by the fancy of the applicant or the owner of the mark."). The rights conferred by the registration reside in the mark as it appears in the registration without regard to other subject matter which the registrant may elect to use or not use in a particular display. Therefore, we have not considered the specimen in reaching our determination in this case.

Accordingly, we conclude that the marks are similar.

The Goods and Services

The goods and services of applicant and registrant need not be identical to find a likelihood of confusion under Trademark Act Section 2(d). The goods and services need only be related in such a way that the circumstances surrounding their marketing would result in relevant consumers mistakenly believing that the goods and services originate from the same source. On-Line Careline Inc. v. America Online Inc., 229 F.3d 1080, 56 USPQ2d 1471 (Fed. Cir. 2000).

Furthermore, in comparing the goods and services and the channels of trade for the goods and services, we must consider the goods and services as identified in the application and registration. CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); In re Melville Corp., 18 USPQ2d 1386, 1388 (TTAB 1991).

Also, the proper inquiry is not whether the goods and services could be confused, but rather whether the source of the goods and services could be confused. Safety-Kleen Corp. v. Dresser Indus., Inc., 518 F.2d 1399, 186 USPQ 476, 480 (CCPA 1975); In re Rexel, Inc., 223 USPQ 830, 831 (TTAB 1984).

Applicant has identified his goods as, "energy drinks; sports drinks"; the goods and services in the cited registration are identified as, "snack bars made of grains and containing soy protein, vitamins and minerals, fruits and nuts" and "wholesale, distributorship, mail order, on-line and retail store services featuring dietary and nutritional supplements, snack bars, food for human consumption, personal gifts, beverages, personal and home hygiene products, books, video and audio cassettes on nutrition, health and wellbeing."

Applicant argues that his goods are distinct from the goods and services identified in the cited registration. He states, "Applicant's goods are for energy, for assisting in playing sports and/or for general beverage consumption similar to soft drinks. Notably sports drinks and energy drinks are currently marketed along with sodas and other soft drinks. Contrarily, Registrant's goods are for long term nutritional benefits and are typically marketed as health products."

On the other hand, the Examining Attorney argues that the goods and services of applicant and registrant are related and that they are marketed through the same trade channels. To support her position, the Examining Attorney submitted copies of several third-party registrations which

included both types of goods. For example, those registrations include the following:

Reg. No. 2971198 for the mark MAXIMUSCLE for goods including "Medicated nutritional dietary and food supplements and vitamins in the form of powders, tablets and capsules, all for body building and sports nutrition; medicated energy and protein preparations in the nature of dietary supplements and nutritional supplements in the form of energy and nutritional drinks; nutritional meal replacement bars for the sports market; dietary supplements and nutritional supplements in the form of weight gain bar for the sports market; nutritional and energy drinks in the nature of vitamin and nutritionally fortified water for sports people and athletes" in International Class 5, "Protein based, nutrient dense snack bars for the sports market; energy and sports drinks, namely, milk-based drinks for sports people and athletes" in International Class 29, "Energy bars in the nature of candy bars, cereal bars, cereal food bars, granola snack bars, chocolate based and covered food bars for the sports market; energy and sports drinks, namely protein shakes for sports people and athletes" in International Class 30, and "Energy and sports drinks, namely herbal drinks in the nature of herbal food beverages and herbal tea for food purposes, mineral waters and soft drinks for sports people and athletes" in International Class 32;

Reg. No. 2770205 for the mark FIRED UP for goods including "dietary supplements and nutritional beverages" in International Class 5 and "sports drinks and preparations for the same" in International Class 32;

Reg. No. 2903795 for the mark SPORT SAFE for goods including "dietary drink mix for use as a meal replacement; dietary food supplements; dietary supplements; vitamin supplements; mineral supplements; dietary supplements containing ginseng; and dietary supplements containing chondroitin; and meal replacement and dietary supplement drink mixes" in International Class 5 and "sports drinks and powders and syrups for making the same; sports drinks containing ginseng and powders and syrups for making

the same; sports drinks containing chondroitin and powders and syrups for making the same; non-alcoholic beverages for the replacement of fluids and electrolytes; protein shakes and energy drinks; powders and syrups used in the preparation of protein drinks; and powders and syrups used in the preparation of energy-electrolyte drinks" in International Class 32;

Reg. No. 2702617 for the mark XHUMAN for goods, including "Nutritional and dietary supplements" in International Class 5 and "Mineral waters and aerated waters and other beverages, namely, flavored waters; soft drinks; fruit drinks; and fruit juices; powders and syrups for making soft drinks, fruit drinks, fruit juices; and sports drinks; and alcoholic beverages, namely, beer" in International Class 32; and

Reg. No. 2974183 for the mark N MOTION for goods including "Protein based, nutrient-dense snack bars" in International Class 29 and "Non-alcoholic beverages for use by athletes and those engaged in active or stressful sports and activities, such beverages being, namely, bottled waters, mineral waters, aerated waters, carbonated waters, flavored waters, fruit drinks and fruit juices, flavored sports drinks, energy drinks, isotonic drinks, hypertonic drinks, and hypotonic drinks" in International Class 32.

These registrations, and the others submitted by the examining attorney, are not evidence that the registered marks are in use, but they are of some probative value and do indicate that the types of goods and services of applicant and registrant may emanate from the same source. In re TSI Brands Inc., 67 USPQ2d 1657, 1659 (TTAB 2002); In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993).

The third-party registrations contradict applicant's unsupported assertion that sports drinks and energy drinks are totally distinct from nutritional or health foods or drinks. The evidence indicates that sports and energy drinks may include nutritional or health drinks. The evidence indicates further that sports drinks and energy drinks may be sold under the same marks as nutritional products, including nutritional supplements and nutritional bars.

Accordingly we conclude that applicant's goods and the goods and services identified in the cited registration are closely related and that the goods and services of applicant and registrant could travel through the same trade channels and reach the same potential purchasers.

Conclusion

Finally, we conclude that there is a likelihood of confusion between applicant's mark and the mark in the cited registration because the marks are similar and the goods and services of applicant and registrant are closely related.

**Decision:** The refusal to register under Trademark Act Section 2(d) is affirmed.