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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Primary Investments Group Limited

Serial No. 76630560

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Before Quinn, Hohein and Hairston, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Primary Investments Group Limited has filed an application to register the mark SUPER KID MULTI for "vitamins and nutritional supplements."[1]

The trademark examining attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark so

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[1] Serial No. 76630560, filed February 7, 2005, based on an allegation of a bona fide intention to use the mark in commerce. The term "MULTI" is disclaimed apart from the mark as shown.

resembles the mark SUPERKIDS, previously registered for "nutritional supplements,"[2] that if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs.

The examining attorney contends that applicant has essentially appropriated the registered mark and added to it the descriptive term MULTI, which does not serve to distinguish the marks. Further, the examining attorney argues that, even assuming the registered mark SUPERKIDS is a weak mark, such mark is still entitled to protection against applicant's very similar mark. Finally, the examining attorney maintains that the goods of applicant and registrant are identical in part and otherwise closely related.

Applicant, in urging reversal of the refusal to register, argues that the addition of the term MULTI in its mark creates a mark which is different in sound, appearance, connotation and commercial impression from the registered mark. Further, applicant contends that the registered mark SUPERKIDS is not distinctive, that marks

[2] Registration No. 1614589, issued September 25, 1990, first renewal.

containing/consisting of SUPERKIDS are weak marks, and that the registered mark is therefore entitled to only a limited scope of protection. With respect to the goods, applicant does not dispute that they are identical in part and otherwise closely related. However, applicant maintains that consumers are not likely to be confused because consumers exercise greater than normal care when purchasing health products such as vitamins and nutritional supplements.

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). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. 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).

Considering first the similarity of the goods, as noted, applicant does not dispute that its goods are

identical in part (nutritional supplements) and otherwise closely related (vitamins) to registrant's goods. In view thereof, and in the absence of any limitations in the respective identifications of goods, we must presume that the identifications encompass all goods of the type described, and that the identified goods move in all channels of trade and to all classes of purchasers that would be normal for such goods. In re Elbaum, 211 USPQ 639 (TTAB 1981). Thus, for purposes of our likelihood of confusion analysis, we must presume that the channels of trade and classes of purchasers are identical.

Turning next to the marks, we must compare applicant's mark SUPER KID MULTI and registrant's mark SUPERKIDS in terms of appearance, sound, meaning and commercial impression. See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In comparing the marks, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in their entireties that confusion as to the source of the goods offered under the respective marks is likely to result. Furthermore, although the marks must be considered in their entireties, it is well settled that one feature of a mark may be more significant than

another, and it is not improper, for rational reasons, to give more weight to this dominant feature in determining the commercial impression created by the mark. See In re National Data Corp., 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Finally, we note that "when marks would appear on virtually identical goods …, 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, 32 USPQ2d 1698 (Fed. Cir. 1992).

Applicant's mark is SUPER KID MULTI; the cited mark is SUPERKIDS. Applicant argues that the additional term MULTI in its mark creates a mark which is different in appearance, pronunciation, connotation and commercial impression. We disagree. The term MULTI, as applied to applicant's goods, is descriptive thereof. In this regard, we take judicial notice that the term "***multi***" is defined as "[m]any; much; multiple," and the term "***multivitamin***" is defined as "[c]ontaining many vitamins." The American Heritage Dictionary of The English Language (4th ed. 2000). In addition, we note applicant's disclaimer of the term MULTI and the numerous third-party registrations submitted by the examining attorney of MULTI marks for vitamins and nutritional supplements which bear a disclaimer of the term. Thus, consumers will view the term SUPER KID as the

source-indicating portion of applicant's mark. Accordingly, it is entirely proper to treat this portion of applicant's mark as the dominant element.

The minor differences in appearance, pronunciation and connotation of the marks resulting from the fact that applicant's mark includes the singular SUPER KID and MULTI while the registered mark consists solely of the plural SUPERKIDS do not serve to distinguish the marks. The dominant term SUPER KID in applicant's mark is still substantially similar in appearance, pronunciation and connotation to registrant's mark SUPERKIDS. We recognize that the additional descriptive term MULTI in applicant's mark connotes vitamins and nutritional supplements that contain more than one vitamin and/or mineral and that this extra connotation is not present in the registrant's mark. However, we find that this point of difference is not sufficient to distinguish the marks. Rather, when the applicant's mark and registrant's mark are considered in their entireties, the marks engender sufficiently similar commercial impressions that if the identical and closely related goods involved in this case are offered thereunder, confusion would be likely to occur among consumers. Consumers familiar with registrant's mark SUPERKIDS are likely to view SUPER KID MULTI as identifying a line of

"multi" vitamins and nutritional supplements originating from registrant.

Applicant, in contending that the marks are not similar, asserts that marks containing/consisting of the term SUPERKIDS are weak marks which are entitled to only a limited scope of protection. Specifically, applicant maintains that the term SUPERKIDS is not distinctive when used in connection with vitamins and nutritional supplements, that such term is frequently used in marks, and consumers are therefore able to distinguish between such marks on the basis of even slight differences. In support of its position in this regard, applicant submitted three printouts from the USPTO's TESS database consisting of lists of marks that include the term SUPERKIDS, SUPER, and KIDS, respectively; printouts of four third-party applications and five third-party registrations of marks that consist of or include the term SUPERKIDS; printouts from the Google and Yellowpages.com search engines of hits retrieved by the search of "superkids;" and two examples of uses of "Super Kids" at third-party websites, i.e., "Super Kids Throat Spray" and "Super Kids Salve."

First, applicant's assertion that the term SUPERKIDS is not distinctive is essentially a contention that registrant's mark is merely descriptive. Such a contention

constitutes an impermissible collateral attack on the validity of the cited registration and will not be entertained in an ex parte appeal. See e.g., In re Peebles Inc., 23 USPQ2d 1795 (TTAB 1992); and In re C. F. Hathaway Co., 190 USPQ 343 (TTAB 1976).

Second, applicant's evidence is of limited probative value for several reasons. With respect to the TESS printouts, those consist simply of lists of marks with registration numbers and serial numbers and fail to indicate the particular goods or services in connection with which the marks are registered or are sought to be registered. A mere listing of registration/application numbers and marks is insufficient to make the registrations and applications properly of record. See In re Duofold Inc., 184 USPQ 638 (TTAB 1974). With respect to the printouts of third-party applications, the Board has held that third-party applications are evidence only of the fact that they were filed; they otherwise have no probative value. In re Juleigh Jeans Sportswear, Inc., 24 USPQ2d 1694 (TTAB 1992). In any event, a review of these applications reveals that none covers vitamins and/or nutritional supplements. Similarly, with respect to the third-party registrations, none covers vitamins and/or nutritional supplements. Insofar as the Google and

Yellowpages.com search results are concerned, a review of the excerpts reveals that none of the "hits" appears to use the term "superkids" in connection with vitamins and/or nutritional supplements. Finally, the goods identified at the third-party websites, i.e., throat spray and salve, are different from those involved herein. In short, the evidence submitted by applicant does not constitute a showing that SUPERKIDS marks have been so commonly adopted for their suggestive significance in the field of vitamins and nutritional supplements that purchasers would be expected to look to other portions of such marks as the distinguishing elements thereof. Nevertheless, even if marks which consist of or contain the term SUPER KIDS are considered to be weak, due to a high degree of suggestiveness conveyed by such term, even weak marks are entitled to protection where confusion is likely. Here, notwithstanding any alleged weakness in the term SUPER KIDS, for the reasons discussed, the applicant's mark is still substantially similar in sound, appearance, connotation and commercial impression to registrant's mark.

Finally, applicant argues that consumers are not likely to be confused because consumers exercise greater than normal care when purchasing health products such as vitamins and nutritional supplements. The fact that

consumers are conscious of health and nutritional matters, however, does not necessarily mean that they are immune from source confusion, particularly where as here, identical and otherwise closely related health products would be offered under substantially similar marks. In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

In view of the foregoing, we conclude that purchasers and prospective customers, familiar with the registered mark SUPERKIDS for nutritional supplements, would be likely to believe, upon encountering the substantially similar mark SUPER KID MULTI for applicant's vitamins and nutritional supplements, that such identical and otherwise closely related goods emanate from or are associated with or sponsored by the same source.

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