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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bluebonnet Nutrition Corp.

Serial No. 78260202

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(Dan Vavonese, Managing Attorney).

Before Grendel, Drost, and Cataldo, Administrative
Trademark Judges.

Opinion by Drost, Administrative Trademark Judge:

On June 9, 2003, applicant Bluebonnet Nutrition Corp. applied to register the mark RAINFOREST ANIMALZ (in typed or standard character form) on the Principal Register for goods ultimately identified as "nutritional supplements for children" in Class 5. The application (Serial No. 78260202) is based on an allegation of a bona fide intention to use the mark in commerce.

The examining attorney has refused to register applicant's mark on two grounds. First, the examining

attorney has determined that applicant's mark is not registrable under Section 2(d) of the Trademark Act (15 U.S.C. § 1052(d)) because it is confusingly similar to the registered mark RAINFOREST NATURALS in typed or standard character form for "nutritional and dietary supplements" in Class 5. The registration (No. 2978317) was issued on July 26, 2005, and it contains a disclaimer of the term "Naturals."

In addition, the examining attorney refused to register applicant's mark under Section 2(e)(1) of the Trademark Act because the examining attorney found that the term RAINFOREST ANIMALZ was merely descriptive of applicant's goods. 15 U.S.C. § 1052(e)(1).

After the examining attorney made the refusals to register final, this appeal and a request for reconsideration followed.

Descriptiveness

The first issue that we will address is the descriptiveness issue. "A term is merely descriptive if it immediately conveys knowledge of a quality, feature, function, or characteristic of the goods or services with which it is used." *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007). *See also In re MBNA America Bank N.A.*, 340 F.3d 1328, 67 USPQ2d

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1778, 1780 (Fed. Cir. 2003) (A "mark is merely descriptive if the ultimate consumers immediately associate it with a quality or characteristic of the product or service"); *In re Nett Designs*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); and *In re Abcor Development Corp.*, 588 F.2d 811, 200 USPQ 215, 217 (CCPA 1978). In any mere descriptiveness analysis, we do not consider the allegedly descriptive term in the abstract, but rather in relation to the goods or services with which it is, or intended to be, used. *MBNA*, 67 USPQ2d at 1783 ("Board correctly found MBNA's emphasis on the regional theme through marketing promotions and picture designs provides circumstantial evidence of how the relevant public perceives the marks in a commercial environment"). See also *Abcor*, 200 USPQ at 218. Furthermore, a term is merely descriptive even if it only describes a single significant quality or property of the goods. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); *Meehanite Metal Corp. v. International Nickel Co.*, 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959).

The examining attorney submits that applicant admits that its "supplements are shaped like 'rainforest animals.' A term that describes the form or shape of a product is merely descriptive." Brief at unnumbered p. 12. Applicant

in turn argues that the "[w]ithout the gathering of further information, the relevant public would believe the mark to be arbitrary, fanciful, or suggestive... [T]he present mark is suggestive in that 'RAINFOREST ANIMALZ' elicits thoughts of tropical and adventurous creatures and exotic locations, but does not immediately convey to the consumer the thought of nutritional supplements for children." Brief at 11.

As we pointed out previously, the test is not whether prospective purchasers can guess what the goods are when they are presented with the mark in the abstract. *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998). Indeed, we not only consider the mark in "relation to the goods or services for which registration is sought, [but we also consider] the context in which the designation is being used on or in connection with said goods or services, and the possible significance that it would have, because of such manner of use, to the average purchaser of the goods or services." *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979).

In this case, applicant has acknowledged that its nutritional supplements for children are "shaped like various creatures found in the rainforest so as to make the supplements more attractive to children." Response dated April 19, 2006 at 2-3. The examining attorney has

submitted numerous articles to demonstrate that the term "rainforest animals" or "animals of the rain forest" are commonly used terms to describe creatures that inhabit the rainforest areas¹ of the world.

Amazing Rainforest Animals

A collection of rainforest animal pictures, wingspark [sic] writings, and resource links.

<http://asterix.ednet.lsu.edu>

Animals of the Rainforest

Now that you have chosen your Rainforest Animal, you are required to address several questions in your written report.

www.mmonney49.lhwy.com

A Sampling of Tropical Rainforest Animals

Animals that Live in Rainforests: Ridiculously huge numbers of animals live in rainforests, including microscopic animals, invertebrates (like insects and worms), fish, amphibians, birds, and mammals.

www.enchantedlearning.com

Rainforest Animals

African Forest Elephant

www.blueplanetbiomes.org

Rainforest Animals

There are many species of plants and animals in rainforests. A common estimate is that approximately half of the world's animal species live in rainforests.

www.rainforestanimals.net

Animals of the Rainforest

The rainforest is home to more than half of the world's animals. Colorful and unusual animals dwell

¹ A "rainforest" is defined as "a tropical forest, usually of tall, densely-growing, broad-leaved evergreen trees in an area of high annual rainfall." *The Random House Dictionary of the English Language (unabridged)* (2d ed. 1987). We take judicial notice of this definition. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

in all four layers of the forest. All types of creatures are represented, from tiny insects to large mammals.

www.srl.caltech.edu

Rain Forest Animals!

The rain forest is home to over 50% of all the animals in the world. There are millions of different species of animals in the world's rain forests.

www.edtech.kennesaw.edu

The examining attorney also submitted evidence that the term "Animals" is used to describe animal-shaped nutritional supplements, particular ones intended for use by children.

Twinlabs Animal Friends Children's Chewable Vitamins Bunch-O-Berry

www.vitacost.com

Nature's Plus - Animal Parade - Grape

www.amazon.com

Children's Chewable Animal Chews

These delicious animal-shaped tablets make vitamin time fun time for kids.

www.puritan.com

Animal Shape Vitamin + Extra C Oral

www.webmed.com

Awesome Animals

With its great taste and fun shapes, this formula is one that both kids and parents enjoy.

www.newvision.com

Therefore, the term "rainforest animals" is commonly used to refer to the species of animals that live in the rainforest regions of world. Furthermore, the term "animals" is used to describe nutritional supplements that

are shaped like animals. Inasmuch as applicant's goods are shaped like rainforest animals, the term "rainforest animals" describes a feature of the goods. A "term or word which merely describes the form or shape of a product falls under the proscription of Section 2(e)(1) of the Trademark Act." *In re Metcal Inc.*, 1 USPQ2d 1334, 1335 (TTAB 1986). See also *In re Ideal Industries, Inc.*, 134 USPQ 416, 416 (TTAB 1962) ("It is apparent from the record that applicant's electrical connector is a wing device with a threading action 'like a nut' and falls within the definition of a 'wing nut'").

We also note that applicant spells the term "animals" with a "Z" rather than the traditional letter "S" for a plural. This is not a significant difference. *Fleetwood Co. v. Mende*, 298 F.2d 797, 132 USPQ 458, 460 (CCPA 1962) ("TINTZ [is] a phonetic spelling of 'tints'"). They would be pronounced identically and there is little difference in their appearance. A slight misspelling does not convert a descriptive term into a suggestive one. *In re Quik-Print Copy Shops*, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'").

Therefore, we conclude that, when potential purchasers encounter the mark RAINFOREST ANIMALZ on nutritional

supplements for children that are in the shape of animals from the rainforest, they would immediately understand that the term describes a feature of the goods, i.e., that the goods are shaped like animals from the rainforest.

We, therefore, affirm the examining attorney's refusal to register on the ground that applicant's mark is merely descriptive.

Likelihood of Confusion

Now we address the likelihood of confusion issues. We consider the evidence of record as it relates to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003); and *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000). In considering the evidence of record on these factors, we must keep in mind that "[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

The first question is whether registrant's and applicant's goods are related. We must consider the goods as they are identified in the identifications of goods in

the application and registration. *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). See also *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods [or services] set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods [or services], the particular channels of trade or the class of purchasers to which the sales of goods [or services] are directed").

Registrant's goods in this case are "nutritional and dietary supplements." Applicant's goods are "nutritional supplements for children." Inasmuch as there are no restrictions on registrant's nutritional supplements, we must assume that they include all types of nutritional supplements including nutritional supplements for children. Therefore, the goods are identical in part. "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, 1701 (Fed. Cir. 1992).

Inasmuch as both applicant's and registrant's goods include the same goods, nutritional supplements for children, we must assume that there is no difference in the channels of trade or purchasers.

Where the goods in the application at issue and/or in the cited registration are broadly identified as to their nature and type, such that there is an absence of any restrictions as to the channels of trade and no limitation as to the classes of purchasers, it is presumed that in scope the identification of goods encompasses not only all the goods of the nature and type described therein, but that the identified goods are offered in all channels of trade which would be normal therefor, and that they would be purchased by all potential buyers thereof.

In re Jump Designs LLC, 80 USPQ2d 1370, 1374 (TTAB 2006).

See also *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). We must also assume that registrant's adult nutritional supplements would move in similar channels of trade and be purchased by some of the same consumers, e.g., parents of small children.

Next, we compare the similarities and dissimilarities of the marks in their entireties as to their appearance, sound, meaning, and connotation. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The marks in this case are RAINFOREST NATURALS and RAINFOREST ANIMALZ.

Both marks are depicted without any stylization so the marks are similar because they both start with the same word RAINFOREST. They are different because their second words are not the same, NATURALS and ANIMALZ. Registrant has disclaimed the word "Naturals" for its nutritional and dietary supplements. The term would describe nutritional and dietary supplements that contain natural ingredients. "Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'" *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000), quoting, *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). See also *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (Disclaimed matter is often "less significant in creating the mark's commercial impression"). Thus, we determine that "Rainforest" is the dominant part of registrant's mark. As the first term in applicant's mark, "Rainforest" is also more significant than "Animalz" for supplements, which are frequently shaped like animals. Therefore, "Rainforest" would also be the dominant part of applicant's mark. *Palm Bay Imports*, 73 USPQ2d 1692 ("To be sure, CLICQUOT is an important term in the mark, but VEUVE nevertheless remains a 'prominent feature' as the first

word in the mark and the first word to appear on the label. Not only is VEUVE prominent in the commercial impression created by VCP's marks, it also constitutes 'the dominant feature' in the commercial impression created by Palm Bay's mark").

Because the term "Rainforest" would dominate both marks, the marks are more similar in appearance and sound than they are different. Furthermore, both marks have similar meanings because both would refer to something from the rainforest, i.e., natural products or animals. Finally, their commercial impressions are also similar because consumers familiar with registrant's nutritional supplements for adults are likely to believe that applicant's identical products for children are simply a different version of registrant's supplements. Therefore, we conclude that the marks in their entireties are similar in appearance, sound, meaning, and commercial impression. *In re Chatam International Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946 (Fed. Cir. 2004) ("With respect to JOSE, the Board correctly observed that the term simply reinforces the impression that GASPARGOLD is an individual's name. Thus, in accord with considerable case law, the JOSE term does not alter the commercial impression of the mark." The marks JOSE GASPARGOLD and GASPARGOLD'S ALE were determined to

be similar) and *Plantronics Inc. v. Starcom Inc.*, 213 USPQ 699, 702 (TTAB 1982) ("Accepting that the marks have differences in sound and appearance, they are identical in respect of their dominant features i.e. the prefix "STAR". Similarity of dominant features must be accorded greatest weight").

Applicant does argue that:

Parents use extraordinary caution and care when choosing nutritional supplements for their children. The consumers of the Applicant's goods will use the utmost attention to detail, and the purchase will be carefully scrutinized prior to a product selection. Due to the extraordinary amount of caution and care used in purchasing these goods, consumers, i.e., parents and other concerned adults purchasing nutritional supplements for a child, will not be confused as to the source of the [goods]."

Brief at 3.

Applicant bases its argument at least in part on its understanding that this "is arguably where a consumer's sophistication is at its highest peak, especially given the fact that these supplements are ingested into a child's body." Reply Br. at unnumbered p. 2.

While we do not dispute that parents and others purchasing nutritional supplements would exercise care when purchasing these supplements that would be used as a health aid, we cannot assume that it would be the "extraordinary caution" that applicant is arguing. See, e.g., *Miles*

Laboratories Inc. v. Naturally Vitamin Supplements Inc., 1 USPQ2d 1445, 1451 (TTAB 1986) ("We agree with applicant... that purchasers of vitamins are likely to exercise special care in making their product selections"). First, we point out that applicant has submitted no evidence to support its argument. Second, there is no per se rule that simply because children "ingest" a product, parents exercise extraordinary care in these purchasers. Children ingest numerous products such as candy, French fries, hot dogs, and cookies. Applicant's argument should be equally applicable to these items, but applicant points to no similar rule for these items that are also ingested by children. Finally, we add that even if such a rule applied, we remain convinced that the result would not change here. Even careful purchasers would most likely be interested in the ingredients of the nutritional supplements and their likely effect on the child. They would not necessarily be able to distinguish the sources of the marks in this case. *In re Total Quality Group Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999) ("We recognize applicant's attorney's point that its software is expensive and that purchasers of it are likely to be sophisticated. Suffice it to say that no evidence in support of these assertions was submitted. In any event, even careful purchasers are

not immune from source confusion"). Indeed, many careful purchasers here are likely to believe that applicant's RAINFOREST ANIMALZ children's nutritional supplements are simply a children's version of registrant's supplements.

Finally, applicant argues that "the mark 'RAINFOREST' is a weak mark, which is used to describe numerous goods and services outside of the scope of the Registrant's services. A customary search of the TESS list of registrations and applications containing the term 'RAINFOREST,' in various forms, retained over 250 instances." Brief at 8. Despite its reference to a list, applicant has not made any registrations or even a list of record and the mere reference to a search does not make the evidence of record. Even if a list was actually submitted, it would not be proper evidence. *In re Duofold, Inc.*, 184 USPQ 638, 640 (TTAB 1974) ("[T]he submission of a list of registrations is insufficient to make them of record") and *In re Carolina Apparel*, 48 USPQ2d 1542, 1542 n.2 (TTAB 1998) ("The Board does not take judicial notice of third-party registrations, and the mere listing of them is insufficient to make them of record"). Obviously, any list submitted with an appeal brief would also have been untimely. 37 CFR § 2.142(d); *In re First Draft Inc.*, 76 USPQ2d 1183, 1192 (TTAB 2005) ("Submission of the TARR

printout with its appeal brief, however, is an untimely submission of this evidence"). Therefore, we agree with the examining attorney's argument that this statement is not proper evidence. We note that applicant's own description of the search results, to the extent that it involves "numerous goods and services *outside the scope of the Registrant's services*" (Brief at 8, emphasis added), indicates that the evidence, even if was properly made of record, would have very limited relevance.

We add that while applicant argues that "'RAINFOREST' is therefore a undeniably dilute mark" (Brief at 9), inasmuch as applicant has not submitted any evidence on this point, we cannot agree with applicant. Even if it were a weak term, it is still entitled to protection when marks as similar as applicant's and registrant's are used on identical goods. See *In re Colonial Stores*, 216 USPQ 793, 795 (TTAB 1982) and *In re The Clorox Co.*, 578 F.2d 305, 198 USPQ 337, 341 (CCPA 1978).

We conclude that when the marks RAINFOREST NATURALS and RAINFOREST ANIMALZ are used on the identified goods, confusion would be likely.

Decision: The refusals to register the mark on the grounds of mere descriptiveness and likelihood of confusion are affirmed.