

**THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB**

Mailed:  
June 6, 2008  
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

\_\_\_\_\_  
**Trademark Trial and Appeal Board**

\_\_\_\_\_  
In re Sensient Flavors Inc.

\_\_\_\_\_  
Serial No. 78776331

\_\_\_\_\_  
Lori S. Meddings and Katrina G. Hall of Michael Best &  
Friedrich LLP for Sensient Flavors Inc.

\_\_\_\_\_  
Mariam Aziz Mahmoudi, Trademark Examining Attorney, Law  
Office 112 (Angela Wilson, Managing Attorney).

\_\_\_\_\_  
Before Bucher, Taylor and Wellington, Administrative  
Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Sensient Flavors Inc. seeks registration on the  
Principal Register of the mark **DAIRYBOOST** (*in standard  
character format*) for goods identified as "flavor and texture  
enhancers for use in the manufacture of food and beverage  
products" in International Class 30.<sup>1</sup>

This case is now before the Board on appeal from the  
final refusal of the Trademark Examining Attorney to  
register this designation based upon Section 2(d) of the  
Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining  
Attorney has found that applicant's mark, when used in

\_\_\_\_\_  
<sup>1</sup> Application Serial No. 78776331 was filed on December 19,  
2005 based upon applicant's allegation of a *bona fide* intention to  
use the mark in commerce.

connection with the identified goods, so resembles the mark **BOOST** (*in standard character format*) for "natural food flavoring for manufacturing use only"<sup>2</sup> also in International Class 30, as to be likely to cause confusion, to cause mistake or to deceive under Section 2(d) of the Trademark Act.

The Examining Attorney and applicant have filed briefs in the case. We affirm the refusal to register.

The Trademark Examining Attorney contends that applicant's and registrant's marks are quite similar in sound, appearance, connotation and commercial impression, and that the goods are very closely-related if not legally-identical.

By contrast, in arguing for registrability, applicant argues that there is no likelihood of confusion because the goods are sold to sophisticated purchasers; that the marks are obviously different when viewed in their entireties; and that given the common usage of the suggestive word "Boost" in trademarks for supplements, flavorings and additives, the cited mark should not be accorded a wide scope of

---

<sup>2</sup> Registration No. 1573673 issued on December 26, 1989; renewed. According to the records of the Assignment Branch of the United States Patent and Trademark Office, this registration is now owned by AB Mauri Food Inc. [Reel 3516 / Frame 0707].

protection. The record contains the following information about applicant and its products:

## **FOOD & BEVERAGE**

### **Expertise & Capabilities - Dairy**

Combining the fine art of flavor chemistry with sophisticated food technology, we create, manufacture, and deliver superior ingredients for use in a variety of dairy products. In the ongoing tradition of our founding companies, we continue to support our customers through cutting-edge technology. Our newly-constructed technical center in the U.S. facilitates product development and research in the consumer market, allowing us to keep pace with the dynamic growth in the dairy industry.

Sensient has manufacturing and R&D locations worldwide. We encourage our customers to work side-by-side with our technical staff during product development to ensure rapid, efficient delivery of scientifically-sound products.

We rely on our international resources to inspire new ideas and flavor concepts that cross borders and cultures. From concept to commercialization, Sensient assists dairy manufacturers with creating total flavor systems.

[http://www.sensient-tech.com/solutions/food\\_flavors\\_dairy\\_EC.htm](http://www.sensient-tech.com/solutions/food_flavors_dairy_EC.htm)

## **FOOD & BEVERAGE**

### **Cultured Products & Dairy Beverages**

Sensient is an experienced supplier of fruit preparations and flavor bases. These products incorporate the perfect blend of flavor and color into one user-friendly system.

Our worldwide purchasing coordination ensures the highest quality fruit at the best value; we monitor all major fruit types at the field level and incorporate the latest technologies in color and flavor development into our products.

Sensient also offers an extensive library of flavors and colors specifically designed for cultured dairy applications. Whether you're looking for indulgent, adult-oriented flavors or fun, familiar flavors with kid-appeal, Sensient Flavors offers a complete portfolio of ingredients for dairy beverages.

#### **Fruit Drinks**

More than 100 years of beverage experience goes into our flavor systems for juice- and non-juice-based fruit drinks. Flavor, color, juice, stabilizers, sweeteners, acids, and clouds--we have experience working with them all.

#### **Flavored Milks**

Flavored milk is a perennial favorite. Rich, dark chocolate or smooth, creamy fruit flavors--whatever your flavored milk need, we have powder or liquid base delivery systems to fill it.

#### **Eggnog**

Eggnog is not just another product at Sensient, it's a tradition. Sensient Flavors/BlankeBaer first developed a prepared eggnog base in 1935, mixing small batches of fresh eggs, selected blends of rum, and purely ground nutmeg.

This tradition of quality continues today. We offer a variety of natural and natural/artificial eggnog bases and syrups, each with its own unique blend of spices and color to distinguish your product line.

[http://www.sensient-tech.com/solutions/food\\_flavors\\_dairy\\_cultured.htm](http://www.sensient-tech.com/solutions/food_flavors_dairy_cultured.htm)

### ***Likelihood of Confusion***

We turn then to a consideration of the issue of likelihood of confusion. Our determination of likelihood of confusion is based upon our analysis of all of the probative facts in evidence that are relevant to the factors bearing on this issue. *See 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); and *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). In any likelihood of confusion analysis, however, two key, although not exclusive, considerations are the similarities between the marks and the relationship between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

### **The goods**

We turn first to a comparison of applicant's goods to those of registrant. Inasmuch as both could be marketing the same types of food flavorings, we must deem the goods to be legally-identical. This factor favors the position of the Trademark Examining Attorney.

**The Trade Channels**

Given the identity of the goods, we must presume that the respective products travel in all normal channels of trade for those products to all normal purchasers of those goods. See *Canadian Imperial Bank of Commerce v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987). Both applicant and registrant would be selling their products to the same set of consumers, i.e., those who further manufacture food products using flavor-enhancing additives, in the ordinary trade channels where such products are found. This related *du Pont* factor also favors the position of the Trademark Examining Attorney.

**Similar marks registered for similar goods**

Dictionary definitions indicate that the term "boost," when used in the context of a food or beverage flavoring or ingredient means "to increase" or "improve." Applicant argues that this term is commonly used in connection with foods and beverage products to denote the addition of a beneficial or extra ingredient, or a dietary supplement. In further support thereof, applicant points to the following three registrations:

- BOOST** for "adult nutritional supplement" in International Class 5;<sup>3</sup>
- BOOST!** for "concentrated syrups for making soft drinks" in International Class 32;<sup>4</sup> and
- BOOST** for "laxatives and nutritional fiber supplements" in International Class 5;<sup>5</sup>

Similarly, in its request for reconsideration, applicant argued that "Jamba Juice, a popular restaurant specializing in smoothie drinks, offers a menu of available 'Boosts' that may be added to their drinks."

The screenshot shows the Jamba Juice website page for 'boosts'. At the top, it says 'Jamba Juice' and 'Page 1 of 2'. The main heading is 'TODAY is the first day of the BEST of your health.' Below this, it says 'Smoothies, boosts & shots designed to treat your body better.' There is a navigation menu with links like 'what is jamba?', 'nutrition guide', 'locations', 'careers', 'talk to us', 'jambacard', 'catering', and 'community'. The 'boosts' section is highlighted. On the left, there are two columns of boost categories: 'FREE BOOSTS' (Energy, Calcium, Fiber Boost, Immunity, Soy Protein, Daily Vitamin, Green Caffeine) and 'SUPER BOOSTS' (Matcha, Heart Happy, Antioxidant Power, Whey Protein, Weight Burner). The main content area features a large image of a smoothie cup with a strawberry and the word 'boosts' in a stylized font. To the right of the image, there is text explaining the benefits of boosts: 'If you could target your body's daily nutritional and wellness needs with simple, sensible solutions... you would, right? Say HELLO to Jamba Boosts... high-quality, effective supplements to boost your body and mind. And, we blend your boost right into your favorite smoothie! We blend multiple complementary and efficacious ingredients into our boosts instead of standard, single-ingredient supplements. Jamba Boosts target and serve multiple health and nutritional needs... because they're designed to! Choose your boosts according to your daily nutritional needs! However, please consult your physician before starting any supplement program, especially if you have an autoimmune disorder, are pregnant, nursing, or taking other medications.' Below this, there is a section titled 'What sets Jamba boosts apart?' with a bulleted list of three points: 1. We select only the highest quality vitamins, minerals, and botanicals with guaranteed potency so you get consistent quality and great nutrition every time you boost your Jamba Smoothie. 2. Jamba Boosts are carefully formulated to provide you with the best nutrition possible. We base our formulas upon RDI, or Reference Daily Intake, so you get the nutrients you need in efficacious and beneficial amounts. We constantly track the latest research to ensure that the amount of vitamins and minerals will enhance and improve your health. 3. We do not use questionable, hyped or unproven nutrients or botanicals that lack thorough research. We do not believe in... At the bottom right, there is an 'EXHIBIT A' stamp. The URL 'http://www.jambajuice.com/menuguide/index\_boosts.html' and the date '8/9/2007' are also visible.

<sup>3</sup> Registration No. 1882769 issued on March 7, 1995; renewed. According to the records of the Assignment Branch of the United States Patent and Trademark Office, this registration is now owned by Societe des Produits Nestle, S.A. [Reel 3595 / Frame 0208].

<sup>4</sup> Registration No. 2060696 issued on May 13, 1997; renewed.

<sup>5</sup> Registration No. 2720025 issued on May 27, 2003. According to the records of the Assignment Branch of the United States Patent and Trademark Office, this registration is now owned by Societe des Produits Nestle, S.A. [Reel 3595 / Frame 0208].

However, it seems that the Jamba Juice product and the Nestle products are sold directly to average consumers, while the concentrated syrups would likely be sold to the proprietors of retail soda shops or to restaurant owners. In a likelihood of confusion analysis, actual usage or third-party registrations which contain a particular term (e.g., "boost") can be used to show that the term has been adopted by those in the field of food additives, supplements and flavorings for its suggestive significance. However, this evidence does not demonstrate that registrant's mark is weak in the field of food flavorings marketed to food manufacturers. On this record, under Section 7 of the Trademark Act, we must accord registrant's mark the scope of protection appropriate for any mark on the Principal Register. Hence, this *du Pont* factor also favors the position of the Trademark Examining Attorney herein.

### **The marks**

This *du Pont* factor focuses on the similarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). We begin this part of the analysis mindful of the fact that when marks would appear on virtually identical goods, the degree

of similarity in the marks 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).

Applicant argues than when viewed in their entirety, applicant's **DAIRYBOOST** mark and registrant's **BOOST** mark are obviously different. Citing to cases such as *Keebler Co. v. Murray Bakery Products*, 866 F.2d 1386, 9 USPQ2d 1736, (Fed. Cir. 1998) [no likelihood of confusion between **PECAN SANDIES** and **PECAN SHORTIES** for cookies]; *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992) [no likelihood of confusion between **VARGA GIRL** and **VARGAS** for calendars]; *Colgate-Palmolive Co. v. Carter-Wallace, Inc.*, 432 F.2d 1400, 167 USPQ 529 (CCPA 1970) [finding that **PEAK** and **PEAK PERIOD** neither look nor sound alike]; *Carefirst of Maryland, Inc. v. First Care, P.C.*, 350 F.Supp.2d 714, 73 USPQ2d 1833 (E.D.Va. 2004) [no likelihood of confusion between **CAREFIRST** for health insurance and **FIRST CARE** for physician's group medical office], applicant argues that the marks at issue herein are no more similar than the ones involved in those cases. Furthermore, applicant points out that in these reported cases, the marks were used in connection with ordinary consumer products, whereas **DAIRYBOOST** and **BOOST** products will be sold only to food/beverage manufacturers.

By contrast, the Examining Attorney contends that when the marks are compared in their entireties under a Section 2(d) analysis, one feature of a mark may be recognized as more significant in creating the commercial impression. In this light, greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693 (CCPA 1976); and *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987).

The Trademark Examining Attorney is correct in noting that inasmuch as the word "Dairy" lacks meaningful source-indicating significance when used in connection with enhancers for dairy products, it is quite rational to accord the word "Dairy" little weight in comparing the respective marks. Without dissecting the mark, we conclude that the shared element, "Boost," is the dominant feature of both marks. Consumers familiar with registrant's mark **BOOST** for its food flavoring who later encounter applicant's **DAIRYBOOST** mark for its food flavoring are likely to believe mistakenly that the **DAIRYBOOST** product comprises a new dairy flavoring product offered by the maker of **BOOST** flavorings. Hence, this critical *du Pont* factor also favors the position of the Trademark Examining Attorney herein.

**Sophistication of purchasers**

In its brief, applicant leads with what is certainly its strongest argument for a reversal of the Trademark Examining Attorney's final refusal to register this mark - namely, the alleged sophistication of the involved purchasers herein. We acknowledge that both applicant's and registrant's goods are to be used by food or beverage manufacturers - all of whom must be deemed to be fairly sophisticated purchasers. However, this factor alone does not trump all the other *du Pont* factors. In reviewing the relevant factors discussed above, we note that the goods are legally identical, the channels of trade are the same, and the marks have very similar connotations and commercial impressions. Under these circumstances, even a sophisticated purchaser might well be confused. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988).

Finally, any doubt that we may retain at the conclusion of our likelihood of confusion determination must be resolved in favor of registrant. *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

*Decision:* The refusal to register under Section 2(d) of the Lanham Act is hereby affirmed.