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UNITED STATES PATENT AND TRADEMARK OFFICE

11/17/00_____

Trademark Trial and Appeal Board

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Kemin Industries, Inc.
v.
Daniel Hes

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Opposition No. 110,124
to application Serial No. 75/189,400
filed on October 29, 1996

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Kent A. Herink of Davis Brown Koehn Shors & Roberts, P.C. for Kemin Industries, Inc.

Daniel Hes, *Pro Se*.

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Before Quinn, Walters and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

An application has been filed by Daniel Hes to register the word NATUROL for "food supplements containing one or more of the following: garlic extract in pure alcohol, grape extract in pure alcohol, pumpkin extract in pure alcohol, olive extract in pure alcohol, parsley extract in pure alcohol, fenugreek extract in pure alcohol, garlic and parsley

extract in pure alcohol, [and] olive and fenugreek extract in pure alcohol," in International Class 5.[1]

As grounds for opposition, Kemin Industries, Inc. asserts that applicant's NATUROL trademark, when used in connection with plant extracts in pure alcohol, so resembles opposer's previously used mark, MADE WITH NATUROX -- A NATURAL ANTIOXIDANT & design, as shown below:

for human food and animal feed preservatives in the nature of a natural antioxidant,[2] as to be likely to cause confusion, to

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[1] Application Serial No. 75/189,400, filed October 29, 1996, based on an allegation of a *bona fide* intention to use the mark in commerce.

[2] Opposer has pending application Serial No. 75/185,277, in International Class 1, filed on October 22, 1996, for the composite mark, MADE WITH NATUROX -- A NATURAL ANTIOXIDANT & design, identifying the goods covered thereunder as "human food and animal feed preservatives in the nature of a natural antioxidant." The application includes the statement that the words "MADE WITH" and "A NATURAL ANTIOXIDANT" are disclaimed apart from the mark as shown.

Opposer's application, Ser. No. 75/185,277, was filed a week before applicant's instant application (Serial No. 75/189,400, filed on October 29, 1996). However, opposer's application is presently suspended, pending the outcome of Canc. No. 28,629. In that cancellation proceeding, opposer is petitioning to cancel a registration for NATUREX used on, *inter alia*, chemicals in International Class 1 such as preservatives for use in the manufacture of foods (Reg. No. 2,176,051).

cause mistake, or to deceive, under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d).

In his answer, applicant denied the salient allegations of the notice of opposition.

The record consists of the pleadings; the file of the involved application; a file wrapper copy of opposer's application file; the trial testimony by opposer of applicant, Daniel Hes, as an adverse witness; the trial testimony, with related exhibits, of Sharon Luncsford of Des Moines, Iowa, billing supervisor for Kemin Industries, Inc.; the trial testimony of opposer's counsel, Daniel A. Rosenberg, with related exhibits; and copies of various publications, submitted by notice of reliance on March 1, 1999. Opposer and applicant filed briefs on the case.[3]

We turn first to the issue of priority. In this regard, opposer asserts that the date on which it first used the NATUROX & design composite trademark predates the filing date of the involved application, i.e., October 29, 1996 - the earliest date upon which applicant may rely. As evidentiary support therefor, opposer has submitted the testimony of Ms. Luncsford, opposer's billing supervisor since 1979. Through

[3] Because applicant's Exhibits A to D (attached to his final brief on the case) were not properly made of record during his testimony period, we have given them no consideration. We hasten to add, however, that even if he had timely made this matter of record, the

her testimony and related exhibits, opposer has demonstrated ever-increasing sales from 1993 to the time of trial under its pleaded mark (NATUROX & design) in connection with naturally occurring preservatives having antioxidant properties. As such, opposer has clearly established use of its pleaded mark on or in connection with its asserted goods in the dietary supplement market prior to applicant's filing date which, in the absence of evidence of use, is the earliest date applicant can rely upon.

Accordingly, we turn to the critical issue of likelihood of confusion. Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In a likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

In putting forward his position on the dissimilarity of the marks in their entireties, applicant argues that because

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outcome of the opposition would remain the same in view of the entire record in this case.

the word “Nature” is “generic” for both parties’ goods, our focus should be on the final syllable, -OX versus –OL:

> The word “nature” is a generic term used often in marketing and in the title of products. Therefore, the focus of the comparison between Naturol and Naturox should be on their suffixes “-*ol*” and “-*ox*” respectively. These suffixes look and sound different. They emphasize and represent two entirely different products, the first being an herbal supplement based on alcohol, the latter being and (*sic*) antioxidant animal feed.

Applicant also points to the prominent design feature in opposer’s composite mark, noting by contrast that the mark reflected in his own typed drawing has no artwork or special formatting:

> “[Opposer’s design] also distinguishes the two marks. Naturox includes a large circular bubble logo with three rings in its design mark. Naturox is printed in large bold typeface on its mark. Naturol simply has black typeface of the word “Naturol.” Naturol has no artwork or logo attached to its mark. (applicant’s brief, unnumbered page 3).

Taking the opposite tact, opposer argues that NATUROX and NATUROL are most similar, differing only as to the final letter.

The parties agree about the similar derivations of these two terms. Both parties tout the “natural” origins of their respective products. In large letters of such a size they dwarf the size of the trademark, applicant has the following title emblazoned across the front page of a tri-fold brochure:

100%

NATURAL

The text of this brochure goes on to say (emphasis supplied):

> For the past ten years, we have researched the best ways to extract the therapeutic properties of garlic and preserve them in pure alcohol. Within the last three years, we have developed the technology to extract ***natural*** components of many other plants and herbs and preserve them in the same way…
>
> Pure alcohol is a ***natural*** preservative …
>
> NATUROL™ products are 100% ***natural***…
>
> These products are produced from fresh ***natural*** plants and herbs… Alcohol is a superb ***natural*** preservative, in which the organic components of the plants and herbs are good for a prolonged number of years…

Both parties have conceded the overall suggestiveness of these coined marks, due to the initial "NA?TUR?" syllables. Furthermore, they agree that these marks share etymological roots in the words "nature" plus "anti*ox*idant" (NATUROX) and "nature" plus "alcoh*ol*" (NATUROL). In spite of this agreement, they would have us draw opposite conclusions about the similarity/ dissimilarity of the marks.

The test is not whether applicant's mark can be distinguished from opposer's mark when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the

recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Opposer notes that when each of these marks is spoken, the leading syllables (NA? and TUR?) will likely be pronounced identically. We agree with applicant that there is a dissimilarity in the pronunciation of the trailing syllables (?OX versus ?OL). However, when spoken, this final syllable will carry the least emphasis of any portion of the mark. Hence, on balance, we find great similarity in the sound of the respective marks, when sounded out in their entireties. The fact that the trailing syllables will inevitably result in perceptible aural differences is simply not sufficient for us to find that the marks are dissimilar as to overall sound.

As to appearance, NATUROX and NATUROL are both seven letters long. The first six letters in these two seven-letter strings are identical (N·A·T·U·R·O·). Hence, the striking, overall similarities are much more critical than is the slight difference between the final consonants.

The NATUROX portion of opposer's mark is the dominant portion of this composite mark. The phrase "Made with" that precedes it, and the descriptor, "A Natural Antioxidant," that follows it, are significantly smaller than the term NATUROX. In addition to being much smaller in size, these modifying

phrases merely serve an informational function. As indicated earlier, the words “Made With” and “A Natural Antioxidant” have been disclaimed apart from the mark as a whole.

Neither the border nor the design in opposer’s composite mark is particularly unique -- the latter suggesting complex chemicals making up this ingredient mark. Further, with regard to the design element, where both words and a design comprise a mark, the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the goods. *See Giant Food, Inc. v. Nation’s Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scuotto*, 228 USPQ 461, 462 (TTAB 1985).

As to overall commercial impression, NATUROX and NATUROL will both likely be seen as coined words carrying a strong suggestion of “nature” or “natural.” It is not clear to us that the ordinary purchaser of these goods will analyze the final suffixes so as to extract from ·OX the connotation of an antioxidant, or to isolate the meaning of alcohol from ·OL. Furthermore, to the person knowledgeable enough to engage in this level of analysis, both suffixes would likely convey similar concepts of chemical agents and processes. Moreover,

the design feature of opposer's mark would simply serve to reinforce this chemical connotation.

Despite the shared views of the parties that these marks are suggestive, we should note that the record is devoid of any evidence as to the use or registration by third parties of marks similar to NATUROX in the same or related fields.

Accordingly, we find that the marks are similar -- when spoken, seen and/or analyzed as to overall commercial impression.

We turn next to the goods of the respective parties. Applicant bases its case on the fact that his food supplements are sold in small (50 ml) bottles and are clearly targeted for human consumption. Applicant argues that opposer, by contrast, sells its products in large quantities to industrial manufacturers of animal feed. According to applicant, the real-world difference between the parties' respective end users -- humans versus animals -- should force an easy decision by this Board that there is no likelihood of confusion in this case.

It is clear that opposer touts NATUROX liquid to the poultry industry, for example, in maintaining the freshness of meat and flavor of broilers, as well as in making eggs more stable and protecting them from oxidation. (See also replacement specimens in application Serial No. 75/185,277).

However, even if the majority of Kemin Industries' current NATUROX products are indeed used in the feed industry, opposer is not so restricted in this proceeding. Opposer has also undertaken efforts to improve food by the use of natural antioxidants as food preservatives. Opposer has submitted for the record evidence demonstrating that its customers, including Solgar Laboratories, use NATUROX brand products in formulating food supplements having dietary antioxidants for humans.

Opposer has also submitted for the record a number of articles drawn from scientific journals, including: a basic introduction to biochemistry; a special focus on the properties of Vitamin E; detailed descriptions of applied science at the molecular level -- i.e., the chemical activities of antioxidants in decreasing the adverse effects of reactive oxygen species, reactive nitrogen species, or both on normal physiological functions; arguments about the potential benefits of dietary antioxidants and related compounds in avoiding chronic disease and maintaining good health; and of the specific antioxidant properties of rosemary extract -- a primary ingredient in opposer's products.

These articles demonstrate that both of the parties' products are components of the dietary supplement industry, and that some of the same active ingredients are found in

applicant's products and in opposer's products. We conclude from the entire record that both applicant and opposer selected their respective marks to emphasize the fact that their respective goods are made from naturally occurring products, and both agree with scientific research that when their respective products (vitamins, herbs and other sources of antioxidants) are ingested, they provide a range of highly-touted health benefits.

In conclusion, we find that these marks are quite similar as to sound, appearance and connotation, and that the goods have a relationship in the marketplace, such that when applicant's NATUROL mark is used in connection with the sale of its products, manufacturers of dietary supplements are likely to be confused.

Decision: The opposition is sustained and registration to applicant is refused.

T. J. Quinn

C. E. Walters

D. E. Bucher

Administrative Trademark
Judges, Trademark Trial and
Appeal Board