

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Hearing:
October 18, 2006

Mailed: March 23, 2007
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Sara Lee Global Finance, LLC
v.
Champion Performance Products, Inc.

Opposition No. 91156552
to application Serial No. 76336173
filed on November 9, 2001

Joshua S. Bish of Reed Smith, LLP for Sara Lee Global
Finance, LLC.

Perry S. Clegg of Bateman IP Law Group for Champion
Performance Products, Inc.

Before Hairston, Drost and Walsh, Administrative Trademark
Judges.

Opinion by Hairston, Administrative Trademark Judge:

Sara Lee Global Finance, LLC ("Opposer") has opposed
the application of Champion Performance Products, Inc.
("Applicant") to register the mark CHAMPION NUTRITION (in
standard character form) for "dietary and nutritional
supplements."¹

¹ Application Serial No. 76336173, filed November 9, 2001,
alleging first use dates of September 1987. The word NUTRITION
has been disclaimed apart from the mark as shown.

Opposition No. 91156552

As grounds for its opposition, opposer asserts that it and its predecessors "have been engaged in the manufacture, distribution and sale of men's, women's, and children's athletic apparel and other related products specifically directed to the field of athletics and sports;" that since prior to applicant's filing date, opposer has used the trademark CHAMPION and other trademarks that include the term CHAMPION in connection with such products; and that applicant's mark CHAMPION NUTRITION, as used in connection with applicant's identified goods, so resembles opposer's CHAMPION trademarks as to be likely to cause confusion.² Opposer pleaded ownership of a number of registrations for the mark CHAMPION for various athletic apparel and related items.

Applicant, in its answer to the notice of opposition, has denied the salient allegations therein.³

At the outset, we note that applicant has filed a motion to strike the rebuttal testimony of opposer's witness

² Opposer also alleged that registration of applicant's CHAMPION NUTRITION mark would cause dilution of opposer's CHAMPION marks. Apart from the fact that opposer did not pursue a claim of dilution, the pleading is insufficient because it does not include an allegation that opposer's CHAMPION marks became famous before the filing date of applicant's involved application. Thus, we have given no further consideration to opposer's allegation in this regard.

³ Applicant also set forth certain affirmative defenses in its answer that were neither tried nor argued and are therefore deemed waived.

Opposition No. 91156552

Amber Lewis, as improper rebuttal. We agree with applicant that this testimony constitutes improper rebuttal. During a plaintiff's rebuttal testimony period, the plaintiff may introduce evidence and testimony to deny, explain, or discredit facts and witnesses adduced by the defendant. Evidence is improper rebuttal, however, where it does not serve to do the above, but rather where it relates to a witness and facts that might appropriately have been introduced during the party's case-in-chief. *Western Leather Goods Co. v. Blue Bell, Inc.*, 178 USPQ 382 (TTAB 1973). In this case, the Lewis testimony relates to opposer's pleaded registrations and opposer's marketing activities. As such, it is properly part of opposer's case-in-chief. Thus, applicant's motion to strike is granted, and we have not considered the Lewis testimony and related exhibits in reaching our decision herein.

The record, therefore, consists of the pleadings; the file of the involved application; the testimony, with exhibits, of applicant's president and CEO, Michael Zumpano; and applicant's notice of reliance on third-party registrations for marks that include the term CHAMPION.

Briefs have been filed; only applicant's attorney appeared at the oral hearing.

Priority

As noted above, opposer did not properly introduce testimony or offer any other evidence. In particular, opposer did not submit evidence which would establish its priority. However, during the testimony deposition of applicant's witness, Mr. Zumpano, applicant introduced printouts of several of opposer's pleaded registrations taken from the USPTO's TESS database along with current status and title information taken from the USPTO's TARR system. The printouts were introduced by applicant to show that opposer's registrations do not include applicant's kinds of goods, i.e., dietary and nutritional supplements. However, where a party makes evidence of record, the adverse party is entitled to rely upon such evidence for any purpose. A review of the printouts shows that two of the registrations are subsisting and currently owned by opposer.⁴ They are Registration No. 1860938 issued November 1, 1994 for the mark CHAMPION, as shown below,



for "travel bags, athletic bags, and backpacks" in class 18;

⁴ The printouts show that the other registrations are owned by a party other than opposer.

Opposition No. 91156552

"shirts, vests, shorts, windwear tops and bottoms, athletic uniforms, replica athletic jerseys, singlets and tights, belts, headbands, and wristbands" in class 25, (renewed); and Registration No. 2125303 issued December 30, 1997 for the mark CHAMPION in standard character form for "back packs, fanny packs, gym bags, tote bags" (Section 8 & 15 affidavit filed and accepted, respectively). Thus, for purposes of our discussion of likelihood of confusion herein, we presume that opposer has priority as to the marks CHAMPION in standard character form and CHAMPION and design, respectively, for the clothing, bags and backpacks identified in the two registrations. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

The Parties

The only information with respect to opposer is that, as noted above, it is the owner of two registrations for the mark CHAMPION and that such registrations are subsisting.

As to applicant, the record shows that Michael Zumpano formed applicant as Champion Foods in 1983 to develop and sell dietary and nutritional supplements. In 1988 Champion Foods incorporated and changed its name to Champion Performance Products, Inc. Since 1987 opposer has continuously sold dietary and nutritional supplements in the

form of bars, capsules, and drinks under the CHAMPION NUTRITION mark.

Likelihood of Confusion

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, two key considerations are the similarities between the marks and the similarities between the goods and/or services. 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).

We note that opposer, at p. 13 of its brief, states that applicant cannot "dispute the fame and remarkable success" of opposer's CHAMPION marks throughout the athletic industry. The fame of a plaintiff's mark, when fame is shown in the record, is an important factor in the likelihood of confusion determination. In this case, however, opposer failed to properly make any evidence of record with respect to the fame of its CHAMPION marks. In addition, we note that opposer also argues in its brief that

Opposition No. 91156552

there has been one incident of actual confusion. However, the testimony concerning this alleged incident of actual confusion was contained in the Lewis deposition, which has been stricken from the record. Suffice it to say that opposer has not established the fame of its CHAMPION marks or actual confusion.

Turning then to the marks, we find that when considered in their entirety, applicant's mark CHAMPION NUTRITION is highly similar to opposer's CHAMPION marks in standard character form and with design. As the Court of Appeals for the Federal Circuit has stated, while marks must be considered in their entirety, including any descriptive matter, in articulating reasons for reaching a conclusion on the issue of likelihood 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." *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). Disclaimed or descriptive terms, though they must be considered when comparing marks, are typically less significant. *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). Moreover, when a mark consists of a word portion and a design portion, the word portion is more likely to be impressed upon a

Opposition No. 91156552

purchaser's memory as it is used in calling for the goods. In re Appetito Provisions Co., 3 USPQ2d 1553 (TTAB 1987).

In this case, when the marks are considered in their entirety, it is clear that they are highly similar in sound, appearance, connotation and commercial impression. The dominant and distinguishing portion of applicant's CHAMPION NUTRITION mark is the word CHAMPION due to the descriptiveness, as evidenced by the disclaimer, of the word NUTRITION. Moreover, it is well settled that a side-by-side comparison is not the proper test to be used in determining the issue of likelihood of confusion since such a comparison is not the ordinary way that a prospective customer would be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the consequent lack of perfect recall, whether confusion is likely. The proper emphasis is thus on the recollection of the average consumer, who normally retains a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573 (CCPA 1973); Envirotech Corp. v. Solaron Corp., 211 USPQ 724 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106 (TTAB 1975). We find that the descriptive word NUTRITION, while not present in opposer's marks, is insufficient to distinguish the parties' marks

Opposition No. 91156552

because the shared term CHAMPION renders the marks highly similar in sound, appearance and connotation. Overall, opposer's CHAMPION marks and applicant's CHAMPION NUTRITION mark project substantially similar commercial impressions.

Applicant has asserted that opposer's CHAMPION marks are weak and therefore entitled to a limited scope of protection. In support of its position, applicant submitted copies of over 100 third-party registrations of CHAMPION marks. Third-party registrations are not evidence of use of the marks shown therein, nor are they proof that consumers are familiar with the marks. *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). They may, however, be relied on to show that a word common to each mark has a readily understood and well-known meaning and that it has been adopted by third parties to express that meaning. *Ritz Hotel Ltd. v. Ritz Closet Seat Corp.*, 17 USPQ2d 1467 (TTAB 1990). In this case, the third-party registrations show that CHAMPION connotes "[o]ne that is clearly superior or has the attitudes of a winner;" "superior to all others."⁵ Thus, CHAMPION is suggestive in a laudatory sense. Nonetheless, it is still the case that the opposer's CHAMPION marks and applicant's CHAMPION

⁵ The American Heritage Dictionary of the English Language (4th ed. 2000). The Board may take judicial notice of dictionary definitions.

Opposition No. 91156552

NUTRITION mark are substantially similar in connotation and general commercial impression.

Turning then to the parties' respective goods, opposer maintains that its athletic clothing, in particular, and applicant's dietary and nutritional supplements are related because these goods are used by persons who are engaged in athletic activity. Further, opposer argues that dietary and nutritional supplements are within the natural expansion of its athletic clothing business such that prospective purchasers would be likely to assume that CHAMPION NUTRITION dietary and nutritional supplements emanate from opposer.

In considering the goods, we begin with the premise that they need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods be related in some manner or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances which could give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the respective goods. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein. We find opposer's proofs to be entirely lacking in this regard.

Opposition No. 91156552

Contrary to opposer's assertion, the fact that the parties' goods are used by persons engaged in the same activities does not establish that the goods of the parties are sufficiently related that the use of these marks in connection with them would be likely to cause confusion. This record is devoid of any probative evidence to show reasons why consumers would be likely to assume that clothing (including athletic clothing), bags, and backpacks, on the one hand, and dietary and nutritional supplements, on the other hand, emanate from the same source. Further, with respect to opposer's "natural expansion" argument, it has offered no evidentiary support for this argument. In particular, there is no evidence of record with respect to the factors considered by the Board when determining whether an expansion is or would be natural. See *Mason Engineering and Design Corp. v. Mateson Chemical Corp.*, 225 USPQ 956 (TTAB 1985). In the absence of such evidence, opposer's argument in this respect also falls short.

Rather, when we compare opposer's clothing, bags and backpacks, on the one hand, and applicant's dietary and nutritional supplements, on the other hand, we find that the goods are sufficiently distinguishable. The nature of the respective goods is quite different; opposer's goods are worn or carried, whereas applicant's goods are consumed.

Opposition No. 91156552

We find that notwithstanding the similarity of the marks, opposer has simply failed to establish that the parties' respective goods are commercially related such that the uses of these marks in connection with the goods would be likely to cause confusion.

Decision: The opposition is dismissed.