

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Oral Hearing:  
August 19, 2008

Mailed: September 24, 2008  
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Health Ventures Partners

v.

Jason E. Evans

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Cancellation No. 92045171

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Manny D. Pokotilow and Salvatore Guerriero of Caesar, Rivise, Bernstein, Cohen & Pokotilow, Ltd. for Health Ventures Partners.

Jason E. Evans, pro se.

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Before Hairston, Rogers and Taylor, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Health Ventures Partners (Petitioner) filed a petition to cancel the registration issued to Jason E. Evans (Respondent) for the mark NATURE'S CORE in standard character form for "nutritional supplements, namely, vitamin and mineral supplements, protein powders and herbal supplements excluding nutritional supplements for use in

connection with skin care, beauty care, hair care and homeopathic treatment" in International Class 5.<sup>1</sup>

Petitioner alleges that since 1997 it has used the mark NATURE'S CODE for vitamins and nutritional supplements; and that respondent's mark, when applied to respondent's goods, so resembles petitioner's mark, as to be likely to cause confusion. Petitioner pleaded ownership of Registration No. 2177582 (Issued on July 28, 1998; renewed) for the mark NATURE'S CODE for "vitamins and nutritional supplements" in International Class 5.

Respondent, in his answer, has denied the allegations of the petition to cancel which are essential to petitioner's Section 2(d) claim.

Before outlining the evidence in this case, we must discuss two preliminary matters. We note that respondent, in his brief on the case, indicates that he was under the impression that petitioner's responses to respondent's interrogatories and requests for admissions were automatically of record in this case. Respondent is mistaken in this regard inasmuch as Trademark Rule

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<sup>1</sup> Registration No. 2859888; issued on July 6, 2004.

2.120(j) provides that responses to interrogatories and requests for admissions may be made of record by notice of reliance during the testimony period of the offering party. In other words, it was incumbent upon respondent to make these materials of record by notice on reliance during his testimony period. Having failed to do so, such materials are not part of the record in this case. So as to be perfectly clear, to the extent that respondent's brief includes statements of fact that are not based on evidence properly of record, such statements have been given no consideration by the Board in reaching our decision herein.

In addition, we note that respondent, for the first time in his brief on the case, asserts that petitioner is guilty of laches. Respondent's assertion of laches is untimely because laches is an affirmative defense which must be made by way of an affirmative pleading in the answer or by way of motion under Trademark Rule 2.133. See Trademark Board Manual of Procedure (TBMP) §311.02 (2d ed. rev. 2004). Moreover, to prevail on the affirmative defense of laches, a respondent must establish that there was undue or unreasonable delay by petitioner in asserting its rights, and prejudice to respondent resulting from the delay. *Bridgestone/Firestone Research Inc. v. Automobile Club de l'Quest de la France*, 245 F.3d 1359, 58 USPQ2d 1460 (Fed. Cir. 2001). Suffice it to say that, even if laches had been

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pleaded as an affirmative defense, respondent has not demonstrated that petitioner's claim is barred by laches.

The record consists of the pleadings; the registration sought to be cancelled; and the testimony deposition (with exhibits) of Richard E. Yoegel, director of merchandising for QVC, the exclusive licensee of petitioner's goods. Petitioner submitted notices of reliance on a certified copy of its pleaded registration showing that such registration is subsisting and is owned by petitioner, and respondent's responses to petitioner's Interrogatory No. 2 and Requests for Admission Nos. 1, 26, 27 and 34.

Respondent did not take testimony or submit any other evidence herein.

Briefs have been filed and an oral hearing was held.

Priority of use is not an issue in this proceeding inasmuch as petitioner has proven that, as noted above, its pleaded registration is subsisting and is owned by petitioner. See *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Petitioner's ownership of this registration also serves to establish its standing to bring this proceeding. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000); and *Lipton Industries, Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185 (CCPA 1982).

Our likelihood of confusion determination is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E. I. duPont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The duPont factors deemed relevant in this proceeding are discussed below.

We consider first the duPont factor of fame. Petitioner contends that its mark is a strong mark and is entitled to a broad scope of protection. So as to be clear on this point, petitioner has not claimed that its mark is "famous" as contemplated by case law.

The evidence supporting the strength of petitioner's mark includes petitioner's continuous use of the NATURE'S CODE mark for ten years; sales of more than 4.5 million units of nutritional supplements with revenues totaling \$188 million; 14,000 minutes of airtime featuring petitioner's products on the QVC home shopping television program which represents \$30 million in advertising, and advertising on other television programs and in publications.

Although this evidence demonstrates that petitioner has achieved a degree of success with its NATURE'S CODE brand, the length of use of the mark, and the sales figures and advertising are not so impressive that we are persuaded that petitioner's mark is entitled to more than the normal scope of protection.

We turn next to the duPont factors of the similarity or dissimilarity of the parties' goods, and the trade channels and buyers to whom sales are made. It is well settled that in determining the issue of likelihood of confusion, we must consider the description of goods set forth in the petitioner's registration and the registration sought to be cancelled, regardless of what the record may reveal as to the particular nature of the goods at issue, their trade channels, or the classes of purchasers to whom sales are made. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); and *Paula Payne Products Co. v. Johnson Publishing Co., Inc.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973).

In this case, the "vitamins and nutritional supplements" identified in petitioner's registration encompass the "nutritional supplements, namely, vitamin and mineral supplements, protein powders and herbal supplements excluding nutritional supplements for use in connection with skin care, beauty care, hair care and homeopathic treatment" identified in respondent's registration. Thus, the goods of the parties are legally identical.

Moreover, where as here, the goods are identical, we must presume that the goods move in all channels of trade that are normal for such goods and that they may be sold to all the usual classes of purchasers for such goods. Miles

Laboratories v. Naturally Vitamin Supplements, 1 USPQ2d 1445 (TTAB 1987).

Although the record shows that petitioner's goods are marketed primarily on the QVC home shopping television channel and the Internet, this is not reflected in the identification of goods in petitioner's registration. We must conclude, therefore, that respondent's nutritional supplements and petitioner's vitamins and nutritional supplements move in some of the same channels of trade (e.g., health food stores and drug stores) and are sold to same class of purchasers, namely, ordinary consumers.

With respect to the duPont factor of the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful sophisticated purchasing, the record shows that certain of petitioner's vitamins and nutritional supplements are relatively low-priced (e.g. a bottle of 100 Enteric-Coated Fish Oil Concentrate soft gels sells for \$19.57 and a bottle of 90 24-Hour Allergy Relief tablets sells for \$18.00). Also, we note that respondent admitted that his nutritional supplements are low-priced products and subject to impulse buying. (Response to Request for Admission Nos. 26-27). The Court of Appeals for the Federal Circuit has held that "[w]hen the products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because the purchasers

of such products are held to a lesser standard of purchasing care." *Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

We next turn to the duPont factor focusing on the similarity or dissimilarity of the marks. We must consider the marks in their entireties in terms of appearance, sound, meaning and commercial impression. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.2d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). 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. The focus is on the recollection of the average purchaser who normally retains a general rather than a specific impression of trademarks. *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975).

Furthermore, where, as in this case, the marks appear on 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, 23 USPQ2d 1698 (Fed. Cir. 1992).

Respondent argues that the marks NATURE'S CORE and NATURE'S CODE do not look or sound alike; that the two marks have different meanings; and that the only feature common to

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the two marks is the word NATURE'S, which as applied to the goods involved in this case, is highly suggestive.

We find that when respondent's mark NATURE'S CORE and petitioner's mark NATURE'S CODE are considered in their entirety, the overall similarities in the marks far outweigh their differences. Each mark consists of the term NATURE'S followed by a one-syllable term which differs by only a single letter; CORE in the case of respondent's mark and CODE in the case of petitioner's mark. The marks have the same number of letters and syllables, and the words in the marks are the same length. The result is that the marks NATURE'S CORE and NATURE'S CODE are similar in appearance and sound.

With respect to meaning, we recognize that the words CORE and CODE added to the identical term NATURE'S gives each mark a somewhat different connotation. Nonetheless, we find that the similarities in sound and appearance outweigh the differences in connotation.

Further, when the petitioner's mark and respondent's mark are considered in their entirety, the marks engender sufficiently similar overall commercial impressions that when identical goods are offered thereunder, confusion would be likely to result among consumers.

Respondent argues that the number of registered marks that include the term NATURE for goods in class 5 is

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"extensive." Respondent argues that this shared term is suggestive and weak and that consumers will look to the other elements to distinguish the involved marks.

Respondent, however, did not make of record any third-party registrations for marks that include the term NATURE for goods in class 5. Furthermore, the Board does not take judicial notice of third-party registrations. Nonetheless, we note that even if marks that include the term NATURE are considered to be weak due to an assertedly high degree of suggestiveness conveyed by such term, even weak marks are entitled to protection where confusion is likely. This is especially the case where the goods are identical.

Hollister Inc. v. Ident A Pet, Inc., 193 USPQ 439 (TTAB 1976).

Finally, respondent argues that the lack of evidence of actual confusion indicates that there is no likelihood of confusion. We note that respondent's argument in this regard is based upon petitioner's response to a request for admission which is not of record in this case. Even assuming that the response had been made of record, we do not believe that the lack of evidence of actual confusion is a significant factor in this case in view of respondent's very limited sales and promotion of his nutritional supplements. *Cunningham v. Laser Golf Corp.*, supra at 1847. [In order for the lack of actual confusion to be a

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meaningful factor, there must be evidence showing that there has been an opportunity for incidents of actual confusion to occur.]

In weighing the relevant likelihood of confusion factors present in this case, we find that the goods at issue are identical, that the goods move in the same channels of trade and are sold to the same class of consumers, that the goods are relatively low-priced, and that the marks are similar. Accordingly, respondent's mark NATURE'S CORE, when used in connection with "nutritional supplements, namely, vitamin and mineral supplements, protein powders and herbal supplements excluding nutritional supplements for use in connection with skin care, beauty care, hair care and homeopathic treatment" so resembles petitioner's mark NATURE'S CODE for "vitamins and nutritional supplements," as to be likely to cause confusion.

**Decision:** The petition to cancel is granted and the registration will be cancelled in due course.