

Paper No. 20
RFC

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

APRIL 1, 98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Nabisco, Inc.
v.
Bluebonnet Nutrition Co.

Opposition No. 94,794
to application Serial No. 74/244,783
filed on February 10, 1992

Steven H. Hartman for Nabisco, Inc.

John S. Egbert of Harrison & Egbert for Bluebonnet Nutrition
Co.

Before Cissel, Hairston and Walters, Administrative
Trademark Judges.

Opinion by Cissel, Administrative Trademark Judge:

On February 20, 1992, applicant filed an application to register the mark shown below on the Principal Register for what were subsequently identified by amendment as "dietary supplements," in Class 5.



The application, as amended, states that the drawing is lined for the colors blue and purple. Applicant claimed use of its mark since November 24, 1991 as the basis for the application.

Following publication of the mark under Section 12 of the Act, a notice of opposition was timely filed by Nabisco, Inc. on March 17, 1994. As grounds for opposition, opposer claimed prior use and registration¹ of the mark shown below

for oleomargarine, and contended that applicant's use of the mark it seeks to register in connection with the goods set forth in the application is likely to cause confusion with opposer's mark within the meaning of Section 2(d) of the Act.

Applicant's answer denied that confusion is likely.

¹ Reg. No. 547,894, issued to applicant's predecessor on September 11, 1951, and renewed twice; The goods are listed as "oleomargarine and sandwich spread."

Opposition No. 94794

A trial was conducted in accordance with the Trademark Rules of Practice, but only opposer took testimony and introduced evidence. Opposer took the testimony of John Holmberg, its business director for margarine. Several exhibits to this testimony were properly introduced into the

Opposition No. 94794

record. Also of record, by means of a notice of reliance filed by opposer on March 14, 1995, are copies of two registrations owned by opposer, and several dozen third-party registrations wherein the listed goods include both vitamins, minerals, dietary supplements or food supplements, on the one hand, and on the other, margarine, vegetable oil spread, butter, edible oil and fat, or other dairy or dairy-based food products. The two registrations owned by opposer were the one pleaded in the notice of opposition, shown above, and Reg. No. 569,025, for the mark shown below,

which was issued to applicant's predecessor on January 13, 1953, and has been renewed twice. The product for which this mark is registered is also oleomargarine.

Both parties filed briefs, but no oral hearing was requested. Based on careful consideration of the written record and arguments of the parties, as well as the applicable legal principles governing our resolution of the issue of likelihood of confusion, we find that opposer is entitled to judgment because confusion is likely.

The record shows that opposer introduced its "BLUE BONNET" brand of margarine in 1927 and has been selling it under its registered trademarks continuously since long

Opposition No. 94794

before applicant began using its mark on its dietary supplements in 1991. In any event, in view of opposer's subsisting unchallenged registrations, priority is not an issue in this proceeding. *King Candy Co. v. Eunice King's Kitchen*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

The Court, in *In re E.I. Du Pont de Nemours*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973), listed the factors which are appropriate to consider in determining whether confusion is likely. Of those factors, the ones argued by the parties to be relevant to the dispute now before us are the similarity of the marks; the relatedness of the goods on which the marks are used and the channels of trade through which the goods move; the notoriety or fame of opposer's mark; and the fact that there is no evidence that actual confusion has occurred in the marketplace for the goods in question.

Turning first to the similarity between the marks, we find them to be quite similar because they create very similar commercial impressions. Applicant contends that its mark connotes the state flower of Texas, the state where applicant is located, whereas opposer's connotes a woman's blue-colored bonnet, and that the word "BLUEBONNET" is extensively used and registered for a variety of goods and services in that state. These arguments, however, are not supported by any testimony or other evidence.

Opposition No. 94794

The fact is that applicant's mark, as shown above, consists of the word "Bluebonnet" above a blue flower design on a purple rectangular background. When we consider applicant's mark in its entirety, as we must, we find that the word portion of the mark is dominant, and it is the nearly identical term, "Blue Bonnet," which is the mark opposer registered in 1951 and has used continuously since then. Notwithstanding the minor differences in appearance because of applicant's design element and the fact that "Blue Bonnet" is shown as two words in opposer's registrations, we find the marks in their entireties to be quite similar. One of opposer's marks is the term alone, without any design component, and it is the term which is the key element by which both opposer's other registered mark and the mark applicant seeks to register will be recalled. *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1192 (TTAB 1994).

That applicant may not have intended to cause confusion when it selected its mark is not determinative of the issue of whether confusion is likely. *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 192 USPQ 797 (TTAB 1976).

While opposer neither pleaded nor proved that its mark is famous, the record does establish that its "Blue Bonnet" marks are well known. We are provided with no evidence that any other business in this country has used or registered

either "Bluebonnet" or "Blue Bonnet" as a trademark or service mark for any other goods or services. Even applicant concedes (brief P.6) "that opposer's 'Blue Bonnet' mark is widely known and widely used," but applicant argues that its dietary supplements are "completely unrelated" (brief p.5) to the goods of opposer. We disagree.

The third-party registrations made of record by opposer are the evidence upon which this conclusion is based. They show that the ordinary consumers who buy both margarine and dietary supplements have a basis for understanding that the use of similar marks on both types of products would likely indicate that they emanate from the same source. See: *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993).

Moreover, both types of products ordinarily move in the same channels of trade to the same kinds of purchasers, ordinary consumers. It seems quite reasonable that such a customer, concerned with his or her diet to the extent that he or she would buy margarine, which has no cholesterol and is low in unsaturated fat, might also purchase dietary supplements such as those applicant sells under its mark. It is significant that neither the application nor opposer's registrations limit or restrict the trade channels for either product. In the absence of any such restrictions or limitations, even if we had been presented with evidence establishing that applicant's goods actually have different

Opposition No. 94794

channels of trade and are sold through different types of stores than opposer's product, (and, again, we have no such evidence), we would disregard this argument. In re Fort Howard Paper Company v. Marcal Paper Mills, Inc., 189 USPQ 305 (TTAB 1975).

Margarine and dietary supplements, as noted above, are relatively inexpensive items, ordinarily sold in retail grocery stores without a particularly high degree of deliberation or care on the part of the purchaser. When applicant's mark, which is so similar to opposer's well known marks, is used on these related goods, confusion is clearly likely.

That no actual confusion has been established by opposer does not alter this conclusion. We have no evidence regarding the area or extent of applicant's use of its mark, so we could hardly evaluate whether there has been any significant opportunity for confusion to have occurred, much less to have been reported. Citing Roffer Industries, Inc. v. KMS Research Laboratories, Inc., 213 USPQ 259 (TTAB 1982), and Allstate Insurance Co. v. DeLibro, 6 USPQ2d 1220 (TTAB 1988), opposer notes further that evidence of actual confusion is notoriously difficult to come by. Again, we agree.

Lastly, even if we were left with any doubt as to whether confusion is likely in the instant case, and we

Opposition No. 94794

emphasize that we have none, such doubt would necessarily be resolved in favor of opposer as the prior user of a well-known registered mark. Hiram Walker & Sons, Inc. v. Castlewood International Corp., 196 USPQ 636 (TTAB 1977).

Accordingly, the opposition is sustained and registration to applicant is refused.

R. F. Cissel

P.

Q. T. Hairston

C. E. Walters
Administrative Trademark Judges
Trademark Trial & Appeal Board