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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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LBJ Pakke, Inc.
v.
Elenbaas Company, Inc.

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Cancellation No. 28,843
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Bernard p. Molldrem, Jr. of Trapani & Molldrem for LBJ
Pakke, Inc.

Michael R. Hughes of Hughes & Schacht, P.S. for Elenbaas
Company, Inc.

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Before Cissel, Seeherman and Quinn, Administrative Trademark
Judges.

Opinion by Cissel, Administrative Trademark Judge:

On December 24, 1996, Registration No. 2,024,864 issued
on the Principal Register to Elenbaas Co., Inc. for the mark
shown below.

The services are identified in the registration as
"distributorships in the field of bulk animal feeds," in
Class 42. The registration was based on respondent's claim

Cancellation No. 28,843

of use of the mark in commerce since June 30, 1990.

Respondent disclaimed the word "COMPANY" apart from the mark as shown and indicated that the stippling in the drawing is for shading purposes only and is not meant to indicate color.

On April 21, 1999, LBJ Pakke, Inc. filed a Petition to Cancel this registration. As grounds for cancellation, petitioner asserted prior use and registration of the trademarks "DAIRYMAN'S EDGE" for "dairy feed additives, namely a yeast, bacteria and enzyme supplement," in Class 5¹; and "DAIRYMEN'S EDGE" for "livestock feed additives; namely, a bacteria and electrolyte supplement; and silage inoculant," in Class 5²; and that the mark in the registration sought to be canceled, as used in connection with the goods set forth therein, so resembles petitioner's registered trademarks that confusion is likely.

Respondent denied the essential allegations set forth in the Petition to Cancel.

A trial was conducted in accordance with the Trademark Rules of Practice. Petitioner introduced evidence by means of a Notice of Reliance. Included were certified copies of petitioner's pleaded registrations and copies of

¹ Reg. No. 1,768,401, issued to petitioner on May 4, 1993 based on a claim of use since April 19, 1990. Combined affidavit under Sections 8 and 15 accepted and acknowledged.

respondent's responses to petitioner's interrogatories. Neither party took testimony, but both filed briefs presenting their respective positions. An oral hearing before the Board was not requested.

Respondent has not contested petitioner's priority of use. The sole issue before the Board in this proceeding is therefore whether confusion is likely to occur as a result of respondent's use of its mark in connection with its distributorship services in the field of bulk animal feeds in light of petitioner's use of its registered marks in connection with the dairy feed additives and livestock feed additives specified in petitioner's registrations. Based on careful consideration of the record and arguments before us, we find that confusion is likely.

Both parties agree that the test for determining whether confusion is likely is set forth in the case of *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). The Court therein listed thirteen factors, each of which must be considered if evidence relating to it is of record. As is frequently the case, the factors to be considered in the instant case are the similarities of the marks in their entireties as to appearance, sound, connotation and commercial impression and the commercial

² Reg. No. 1,852,187, issued to petitioner on September 6, 1994 based on a claim of use since September 1, 1992. Combined affidavit under Sections 8 and 15 accepted and acknowledged.

Cancellation No. 28,843

relationship between the goods set forth in petitioner's pleaded registrations and the services identified in respondent's registration. In connection with the latter we must consider the similarity of established, likely-to-continue trade channels, and the conditions under which and buyers to whom sales of the goods and services of the parties are made.

We turn our attention first to the marks at issue here. Although they are obviously not the same, the test for likelihood of confusion does not require that the marks be identical in order for confusion to be likely. In the instant case, the marks are similar because respondent's mark incorporates petitioner's mark in its entirety as the slogan or motto in the banner beneath respondent's name and the stylized cow design. Although the words "THE DAIRYMAN'S EDGE" are not the most dominant component of respondent's mark, they are nonetheless a significant portion of it. Retailers of livestock feeds (i.e., the class of purchasers for respondent's services) who are familiar with petitioner's registered marks "DAIRYMAN'S EDGE" and "DAIRYMEN'S EDGE" for feed additives are likely to view the use of "THE DAIRYMAN'S EDGE" in respondent's mark as an indication that petitioner sponsors, endorses, or is somehow affiliated with respondent's services of distributing animal feeds.

Cancellation No. 28,843

This is especially so in light of the fact that respondent itself deals in feed supplements, which are very similar to the feed additive products which petitioner sells under its registered marks, except that the supplements are not mixed directly with the feed, but rather are provided to cows in "discreet bins" in addition to their basic feed. Respondent's interrogatory responses show that the products respondent distributes include a microbial and enzyme inoculant, a grass mineral, a program corn mineral, a program dry cow mineral, and a high phosphorus alfalfa mineral, all of which are for use in conjunction with dairy feeds. This evidence showing that a business which renders distributorship services in the field of animal feeds also sells feed supplements under the same mark it uses in connection with its services demonstrates the close relationship of petitioner's goods to respondent's services.

The use of these similar marks in connection with these goods and services is likely to cause confusion. Although petitioner's mark has a laudatory, suggestive significance in connection with petitioner's products, the slogan portion of respondent's mark is identical, and it has the same laudatory, suggestive significance in connection with respondent's services that it has with respect to petitioner's goods. Further, respondent emphasizes this portion of its mark through its references to its "edge" in

Cancellation No. 28,843

respondent's labels and promotional materials. Respondent plays on the idea of getting the "edge" in the promotion of its inoculant by directing prospective purchasers to "Increase Your Advantage with The Silage Edge." In addition, "FREE CHOICE MINERAL EDGE PROGRAM" is the heading under respondent's mark on the labels for four of the kinds of feed supplements respondent sells.

Respondent's arguments that confusion is not likely are not well taken. The first such argument is that the marks cannot be found to be similar without resorting to impermissible dissection. The second is that the services set forth in respondent's registration are commercially distinct from petitioner's products. Respondent also argues that confusion is unlikely in view of the sophistication of its customers.

The rule against dissecting a mark is just part of the general proposition that in determining whether confusion is likely, marks must be compared in their entirety for similarities in the commercial impressions they engender. As discussed above, respondent has essentially appropriated petitioner's mark in its entirety and added to it respondent's tradename and a design which is highly suggestive of its animal feed distribution services, namely, a picture of a cow. These additional word and design elements do not distinguish respondent's mark from

Cancellation No. 28,843

petitioner's mark; instead, because of the nature of these additional elements, consumers are likely to believe that the marks are variations of each other, both indicating source in the same entity.

With regard to the second argument of respondent, it is well settled that the goods and/or services of the parties need not be identical. Respondent's services, for the reasons discussed above, involve the sale of goods which are closely related to the goods that are listed in petitioner's registrations. The use of these similar marks in connection with these related goods and services is likely to cause confusion.

Respondent's third argument is that confusion is unlikely because its customers are sophisticated. As noted by petitioner, however, there is no evidence of record on this point. In any event, even if a certain level of purchaser sophistication had been established, this fact would not have been determinative of a different result in this case. The fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or that they are immune from source confusion when similar marks are used in connection with related goods and/or services. In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

Cancellation No. 28,843

To the extent that there may be any doubt on the issue of likelihood of confusion, we are obligated to resolve any such doubt in favor of the prior user, in this case, petitioner. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 1025 (Fed, Cir. 1988).

Decision: The Petition to Cancel is granted.