

11/26/01

**THIS DISPOSITION
IS NOT CITABLE AS PRECEDENT
OF THE T.T.A.B.**

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Diet Fitness Corporation

Serial No. 75/669,021

Laura J. Zeman for Diet Fitness Corporation.

Jennifer Stiver Chicoski, Trademark Examining Attorney,
Law Office 115 (Thomas B. Vlcek, Managing Attorney).

Before Hanak, Hohein and Holtzman, Administrative
Trademark Judges.

Opinion by Hanak, Administrative Trademark Judge.

Diet Fitness Corporation (applicant) seeks to register ARIZONA MAGIC in typed drawing form for "vitamin and mineral supplements." The intent-to-use application was filed on March 26, 1999. In the first Office Action, the Examining Attorney required that applicant disclaim the "exclusive right to use ARIZONA because it is geographically descriptive of applicant's goods." In response, applicant complied with this disclaimer requirement.

Citing Section 2(d) of the Trademark Act, the

Examining Attorney has refused registration on the basis that applicant's mark ARIZONA MAGIC, as applied to vitamin and mineral supplements, is likely to cause confusion with four
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marks previously registered to the same entity. The first three marks are word and design marks registered for garlic caplets. Registration Nos. 1,844,050; 1,844,051 and 1,863,449. These three marks are reproduced below. In each of these three registrations, registrant disclaimed the exclusive right to use ARIZONA NATURAL.

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The fourth cited mark is ARIZONA NATURAL in typed drawing form for "dietary supplements, namely, vitamin, mineral and herbal supplements." Registration No. 2,126,873. In this registration, registrant disclaimed the exclusive right to use the word NATURAL.

In any likelihood of confusion analysis, two key, although not exclusive, considerations are the similarities of the marks and the similarities of the goods or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

Obviously, of the four registered marks, applicant's mark ARIZONA MAGIC is most similar to the fourth registered mark, namely, ARIZONA NATURAL. In addition, applicant's goods (vitamin and mineral supplements) are encompassed by the goods for the ARIZONA NATURAL registration (dietary supplements, namely, vitamin,

mineral and herbal supplements). Hence, we will confine our likelihood of confusion analysis to a comparison of applicant's mark ARIZONA MAGIC and registrant's mark ARIZONA NATURAL.

To state the obvious, the only element common to both marks is the term ARIZONA. However, the Examining Attorney has stated that the term ARIZONA "is geographically

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descriptive" as applied to vitamin and mineral supplements and therefore cannot be exclusively appropriated by any one entity. (Office Action No. 1 page 4). However, in her brief at page 5 the Examining Attorney takes a somewhat different approach by arguing that "registrant has taken steps in securing exclusive rights to the term ARIZONA." The Examining Attorney bases her argument on the fact that the registration for ARIZONA NATURAL was obtained pursuant to the provisions of Section 2(f) of the Trademark Act, and the fact that this registration contains a disclaimer of simply the term NATURAL.

What the Examining Attorney fails to fully

appreciate is that in securing a registration of ARIZONA NATURAL pursuant to Section 2(f), registrant demonstrated that the term ARIZONA NATURAL in its entirety had become distinctive of applicant's dietary supplements. The registration of ARIZONA NATURAL in no way established that registrant has exclusive rights to the term ARIZONA per se for dietary supplements.

In comparing marks, we are obligated to compare the marks in their entireties, including any matter which is descriptive or geographically descriptive. American Home

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Products v. B.F. Ascher, 473 F.2d 903, 176 USPQ 532, 533 (CCPA 1973). However, having said the foregoing, in comparing two marks, it is quite natural to give less weight to the common geographically descriptive portion of these marks which, in this case, is ARIZONA. When we compare the remaining portion of applicant's mark (MAGIC) with the remaining portion of the registered mark (NATURAL), we find that these two words are very different in terms of visual appearance, pronunciation and meaning.

In sum, we find that considered in their entireties,

the marks ARIZONA MAGIC and ARIZONA NATURAL are dissimilar enough such that their use on identical goods (vitamin and mineral supplements) is not likely to result in confusion. In making this determination, we accept applicant's argument that even ordinary consumers exercise a higher level of care when selecting products which have a direct bearing on their health, such as vitamin and mineral supplements. Indeed, at page 8 of her brief the Examining Attorney also accepts this proposition. However, the Examining Attorney then goes on to make the rather unusual statement that "care and caution with regard to what one ingests is not an issue when considering whether or not purchasers could mistakenly

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believe that the goods emanate from a common source." We simply do not understand the reasoning of the Examining Attorney. When consumers exercise a higher level of care and caution in selecting any type of product, including vitamin and mineral supplements, these consumers are more likely to notice differences in the trademarks appearing on these products. Thus, a consumer concerned with his

or her health and exercising care and caution in selecting vitamin and mineral supplements would be quite likely to notice the differences in the marks ARIZONA MAGIC and ARIZONA NATURAL.

Decision: The refusal to register is reversed.

