

9/25/01

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

Hearing:
August 9, 2001

Paper No. 14
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re National Nutritional Foods Association

Serial No. 75/707,709

Eugenia S. Hansen, William D. McSpadden and Rod A. Cooper
of Sidley & Austin for applicant.

Kimberly Krehely, Senior Trademark Examining Attorney, Law
Office 107 (Thomas Lamone, Managing Attorney).

Before Hanak, Quinn and Walters, Administrative Trademark
Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by National Nutritional
Foods Association to register the certification mark shown
below



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for "dietary supplement manufacturing certification services."¹ Applicant has disclaimed "Good Manufacturing Practices" and "GMP" apart from the mark. Applicant indicates that "[t]he certification mark, as used by authorized persons, certifies that such persons meet the certifier's good manufacturing practice standards for manufacturing, packing and holding dietary supplements, including standards relating to systems and procedures for: personnel training and supervision; construction, design and sanitation of plant, ground and equipment; quality control and laboratory testing operations; production, packaging and labeling controls; warehousing; distribution; and post-distribution procedures such as product complaints, returns and recalls."

The Senior Trademark Examining Attorney has refused registration under Section 2(d) of the Act on the ground that applicant's mark, when used in connection with applicant's certification services, so resembles the previously registered mark shown below

¹ Application Serial No. 75/707,709, filed May 17, 1999, alleging that it "intends to exercise legitimate control over the use of the certification mark in commerce."

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for "food supplements"² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs, and both were present at an oral hearing before the Board.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods and/or services. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Insofar as the goods and services are concerned, they are tangentially related in that both involve the food/dietary supplement industry. There are specific differences between them, however, because applicant renders dietary supplement manufacturing certification

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services while applicant sells food supplements. The record is devoid of any evidence suggesting that these types of goods and services would ever emanate from or be sponsored by the same source, or that they are otherwise related except to the limited extent of involving the same industry. The connection here is very tenuous. Further, given the nature of the goods and services that deal with a person's diet, applicant's position that purchasers are likely to be somewhat careful is reasonable.

With respect to the marks, the common elements between the two are the letters "GMP" and the words "GOOD MANUFACTURING PRACTICE(S)." The letters are disclaimed in the involved application, and the words are disclaimed in both the application and the cited registration. In this regard, applicant submitted an excerpt from the *Federal Register* regarding proposed rulemaking by the Food and Drug Administration. The rules package is captioned "Current Good Manufacturing Practice in Manufacturing, Packing, or Holding Dietary Supplements." The text is replete with highly descriptive or generic uses of the letters "GMP" and the words "Good Manufacturing Practices." By way of example, the text includes the following excerpt from a document prepared by representatives of the dietary

² Registration No. 2,005,683, issued October 8, 1996. The words "Good Manufacturing Practice" are disclaimed apart from the mark.

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supplement industry: "Good Manufacturing Practices (GMP's) for Dietary Supplements: Statement of Purpose. This document describes Good Manufacturing Practices to be followed in the manufacturing and control operations for dietary supplements and dietary ingredients."

Based on the evidence and disclaimers, it is clear that, in the field of food/dietary supplements, the letters and words common to applicant's and registrant's marks are at least highly descriptive, if not generic. Given these uses in the industry, the evidence suggests that consumers would be accustomed to distinguishing between marks containing such highly descriptive or generic matter upon other elements of the marks.

Indeed, we must compare the marks in their entireties, including the addition in applicant's mark of the initials of applicant's trade name.³ The presence of a trade name may or may not eliminate a likelihood of confusion between the entire marks. See: 3 J.T. McCarthy, *McCarthy on Trademarks and Unfair Competition*, §23:43 (4th ed. 2001). In the present case, the presence of the letters "NNFA" in applicant's mark alleviates the likelihood of confusion with registrant's mark. See: *In re S. D. Fabrics, Inc.*,

³ The letters NNFA have been registered by applicant as a service mark (Reg. Nos. 2,288,686 and 2,292,256).

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223 USPQ 54 (TTAB 1984). In that case, the Board stated
the following (at pp. 55-56):

Although it has often been said that the addition of a trade name, house mark, or surname to one of two otherwise confusingly similar marks will not generally serve to avoid a likelihood of confusion between them, exceptions to this general rule are made (1) when there are recognizable differences between the assertedly conflicting product marks, or (2) when the alleged product marks are highly suggestive or merely descriptive or play upon commonly used or registered terms. [citations omitted]

See also: In re Bed & Breakfast Registry, 791 F.2d 157, 229 USPQ 818 (Fed. Cir. 1986); Rockwood Chocolate Co. v. Hoffman Candy Co., 372 F.2d 552, 152 USPQ 599 (CCPA 1967); and In re Merchandising Motivation, Inc., 184 USPQ 364 (TTAB 1974).

The present case falls within the second category of exceptions to the general rule. The disclaimers in the application and registration, coupled with the uses in the *Federal Register*, including the use by the industry itself, show the highly descriptive or generic nature of the letters "GMP" and "GOOD MANUFACTURING PRACTICE(S)" in the food/dietary supplement industry. Accordingly, the addition of the trade name letters "NNFA" to the highly descriptive or generic matter in applicant's mark is sufficient to avoid likelihood of confusion. Lastly, the

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differences between the design features of the marks,
although a very subordinate factor, nevertheless contribute
to our view that there is no likelihood of confusion.

Based on the record before us, we see the Examining
Attorney's view of the likelihood of confusion as amounting
to only a speculative, theoretical possibility, especially
in view of the fact that the commonality between the marks
consists of highly descriptive or generic words. Language
by our primary reviewing court is helpful in resolving the
likelihood of confusion issue in this case:

We are not concerned with mere
theoretical possibilities of confusion,
deception or mistake or with de minimis
situations but with the practicalities
of the commercial world, with which the
trademark laws deal.

Electronic Design & Sales Inc. v. Electronic Data Systems
Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992),
citing Witco Chemical Co. v. Whitfield Chemical Co., Inc.,
418 F.2d 1403, 1405, 164 USPQ 43, 44-45 (CCPA 1969), *aff'g*
153 USPQ 412 (TTAB 1967).

Decision: The refusal to register is reversed.