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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Arrowhead Mills, Inc.
v.
Good Health Natural Foods, Inc.

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Opposition No. 91118502
to application Serial No. 75488382
filed on May 20, 1998

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David W. Opderbeck of McCarter & English for Arrowhead Mills, Inc.

Eric D. Paulsrud of Leonard, Street and Deinard for Good Health Natural Foods, Inc.

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Before Quinn, Bucher and Holtzman, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application was filed by Good Health Natural Foods, Inc. to register the mark GARDEN CHIPS ("CHIPS" disclaimed) for "vegetable-based snack foods."[1]

Registration was opposed by Arrowhead Mills, Inc. under

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[1] Application Serial No. 75488382, filed May 20, 1998, alleging a bona fide intention to use the mark in commerce. Applicant is the owner of Registration No. 2,768,509, issued September 20, 2003, for the mark GARDEN STICKS ("STICKS" disclaimed) for "vegetable-based snack foods."

Section 2(d) of the Trademark Act on the ground that applicant's mark, if applied to applicant's goods, would so resemble opposer's previously used and registered marks, as to be likely to cause confusion. Opposer pleaded ownership of the following registered marks: GARDEN GRAINS ("GRAINS" disclaimed) for "grain based snack food;"[2] GARDEN OF EATIN' and the mark shown below

for "natural food products, namely, corn chips, tortillas and bread;"[3] and the mark shown below

for "bean dip" (in International Class 29) and "natural food products, namely, corn chips, tortillas, bread and salsa" (in International Class 30).[4]

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[2] Registration No. 2,300,846, issued December 14, 1999.
[3] Registration No. 1, 711,976, issued September 1, 1992, renewed, and Registration No. 1,726,002, issued October 20, 1992, renewal pending, respectively.
[4] Registration No. 1,900,789, issued June 20, 1995; combined Sections 8 and 15 affidavit filed.

Applicant, in its answer, denied the salient allegations in the notice of opposition.

The record consists of the pleadings; the file of the involved application; trial testimony, with related exhibits, taken by opposer; portions of a discovery deposition of applicant's president and one of the exhibits introduced therein, and applicant's answer to one of opposer's interrogatories, all made of record by way of opposer's notice of reliance; and over 170 third-party registrations of marks incorporating the term "GARDEN" in the food industry, all introduced in applicant's notice of reliance. Both parties filed briefs. An oral hearing was not requested.

According to the testimony of Adam Levit, a vice president of marketing, snack foods division, opposer and its predecessor have been using the GARDEN OF EATIN' marks since 1972, and the mark GARDEN GRAINS since 1998. Sales of food products under the GARDEN OF EATIN' marks were $37 million for the last two years, and total $55-$65 million over the last five years. Sales of snack food products under the mark GARDEN GRAINS total $350,000 for the last two years. In the past two years, opposer has spent approximately $6 million on advertising goods sold under the GARDEN OF EATIN' marks, and in excess of $50,000 on advertising goods sold under the mark GARDEN GRAINS.

Opposer's food products are sold throughout the United States in natural food stores (stores selling natural and organic products), grocery stores and supermarkets.

Francois Bograng, applicant's president, testifying in a discovery deposition, indicated that applicant intends to use the mark GARDEN CHIPS in connection with "primarily potato-based snacks with a small percentage of vegetable." Mr. Bograng agreed that opposer's food products are sold through the same channels of trade as applicant's goods are intended to be sold, such as natural food stores and grocery stores.

Because opposer has made its pleaded registrations of record, priority is not an issue in this case with respect to the mark and goods identified therein. See: King Candy Co., Inc. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974). Further, applicant conceded opposer's priority. (brief, p. 18). Accordingly, the only issue to be decided is whether opposer has established that a likelihood of confusion exists between its pleaded marks and the mark applicant seeks to register.

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 between the marks and the similarities between the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

With respect to the goods, applicant attempts to distinguish its "vegetable-based snack foods" from opposer's "grain based snack food." Applicant contends that while the products may all fall into the broad category of snack foods, corn-based snack foods and potato-based snack foods are distinct product lines, differing in formula and category. Applicant asserts that a consumer seeking to buy a corn-based tortilla chip would not mistakenly buy a potato chip, and vice versa.

It is well established that the goods of the parties need not be similar or competitive, or even move in the same channels of trade, to support a holding of likelihood of confusion. It is sufficient that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. See In re International Telephone & Telephone Corp., 197 USPQ 910, 911 (TTAB 1978).

Further, the inquiry is whether purchasers are likely to confuse the source of the goods, not the goods themselves.

We find that, for purposes of comparing the goods in our likelihood of confusion analysis, opposer's grain based snack foods and natural corn chips and applicant's vegetable based snack foods are closely related. Both products are snack foods, albeit different in a basic ingredient.

It is also clear that the products are sold in the same trade channels to the same classes of purchasers. As the record demonstrates, opposer's snack foods are sold in natural food stores, grocery stores and supermarkets, the very same stores in which applicant intends to sell its snack food. Indeed, Mr. Bograng admitted that the trade channels for the parties' snack foods are identical.[5]

Further, the same classes of consumers would purchase both types of snack products. These snack foods are relatively inexpensive items, and often would be purchased on impulse.

The parties debate the level of sophistication of purchasers of natural or organic food items. Applicant, drawing on the testimony of Mr. Levit, asserts that consumers for natural and organic snack foods are more health-conscious and sophisticated than are the consumers

[5] Applicant, in its brief, admits that the parties market their goods in the same channels of trade. (brief, p. 27).

for ordinary snack foods.

It is common knowledge that purchasers today spend more time looking at food labeling (such as ingredients, grams of fat and carbohydrates, etc.) in their quest for a healthier diet. While the purchasing decision may be more informed in recent years, that does not mean that purchases are made with a high degree of sophistication. The products involved herein are inexpensive snack foods, and we find that the purchasers for these products would exercise nothing more than ordinary care in making their selections.

That the goods are closely related, that purchasers and trade channels overlap, and that the snack foods are inexpensive are factors that weigh in favor of opposer in our duPont analysis.

The crux of this case, however, turns on a comparison of the parties' marks which, as noted above, is another key issue in likelihood of confusion cases.

Although opposer lumps the pleaded marks together as its "GARDEN marks," we find that opposer's mark GARDEN GRAINS and opposer's GARDEN OF EATIN' marks are different in significant respects and require separate analysis in comparing these marks with applicant's mark GARDEN CHIPS.

We first direct our attention to opposer's GARDEN OF EATIN' marks. The only common element between these marks of opposer and applicant's mark GARDEN CHIPS is the presence

of the term "GARDEN." When considered in their entireties, opposer's GARDEN OF EATIN' marks and applicant's mark GARDEN CHIPS are different in sound, appearance and, most significantly, in meaning and overall commercial impression. Opposer's GARDEN OF EATIN' marks evoke images of the Garden of Eden, a natural place untouched by man's chemicals. The design features shown in opposer's Registration No. 1,726,002 reinforce this image. The design shows what might be seen as a pictorial representation of the Garden of Eden, including a path winding through trees. Lest there be any doubt, the apple at the front of the design makes it clear about the Garden of Eden connotation of the mark as a whole. Mr. Levit acknowledged that "certainly the biblical term Garden of Eden does come to mind when you put those three words next to each other." (Levit dep., p. 28). This connotation is not even vaguely suggested by applicant's mark; rather, applicant's mark suggests that its snack food chips are fresh or natural. Simply put, the unitary phrase GARDEN OF EATIN' creates an entirely different commercial impression than the one created by GARDEN CHIPS. The significant differences in meaning and overall commercial impression between opposer's GARDEN OF EATIN' marks and applicant's mark clearly outweigh the commonality of the term "GARDEN" in the marks (see discussion, <u>infra</u>, regarding use of the term "garden" in the food industry).

We next turn to compare applicant's mark GARDEN CHIPS with opposer's mark GARDEN GRAINS. When it comes to this mark, the issue of likelihood of confusion is not so clear. Once again, the marks share the common, highly suggestive element "GARDEN," but this time the marks are also similarly constructed, with the common element being followed by a highly descriptive/generic term which has been disclaimed.

Of particular significance when comparing these marks is the evidence of over 170 third-party registrations of marks which include the term "GARDEN" covering food products. The registrations cover a wide range of food items, some of which are identified as "processed." Of the over 170 registrations, the Board has identified five registrations which specifically cover snack foods.[6] Applicant contends that the mere existence of the term "GARDEN" in its mark cannot be the basis for finding likelihood of confusion herein.

Third-party registrations, without evidence of actual use, are of very limited value in the determination of the question of likelihood of confusion. Nevertheless, third-party registrations are entitled to some weight when they are offered to show the sense in which a term, word, prefix

[6] Registration No. 2,492,412 for the mark HADLEY DATE GARDENS; Registration No. 2,156,948 for the mark SUN GARDEN; Registration No. 1,507,387 for GARDEN PATCH; Registration No. 1,890,044 for FOOD GARDEN; and Registration No. 1,739,179 for HARRY'S GARDEN.

or other feature of a mark is used in ordinary parlance. They may show that a particular term has descriptive or suggestive significance as applied to certain goods. Stated somewhat differently, third-party registrations are entitled to weight to show the meaning of a mark in the same way that dictionaries are used. Tektronix, Inc. v. Daktronics, Inc., 534 F.2d 915, 189 USPQ 693 (CCPA 1976); General Mill Inc. v. Health Valley Foods, 24 USPQ2d 1270 (TTAB 1992); and United Foods Inc. v. J.R. Simplot Co., 4 USPQ2d 1172 (TTAB 1987).

In this case, with or without the third-party registrations, it is clear that the term "GARDEN," as used in connection with food items, including snack foods, is a highly suggestive term indicating that the food item is fresh or natural, and comes from the garden. The existence of these numerous third-party registrations in the food field for marks which include "GARDEN" as a portion thereof supports this conclusion and the registrations are entitled to some weight for that purpose.

While opposer's mark GARDEN GRAINS and applicant's mark GARDEN CHIPS both suggest that the snack foods are natural or garden fresh, we do not view the common "GARDEN" element as sufficient to warrant a finding of likelihood of confusion. This is so because, in this case, the common element "GARDEN" is a highly suggestive term which has been adopted by others as part of their mark in the food field.

Further, the marks GARDEN GRAINS and GARDEN CHIPS look and sound different. We find these marks to be extremely weak and highly suggestive. See: Sure-Fit Products Co. v. Saltzson Drapery Co., 117 USPQ 295 (CCPA 1958) [no likelihood of confusion between RITE-FIT and SURE-FIT for slip covers--"Assuming arguendo that the marks RITE-FIT and SURE-FIT are similar in meaning, we are of the opinion that they are so distinct in sound and appearance as to overcome such similarity in meaning."]; Burns Philip Food Inc. v. Modern Products Inc., 24 USPQ2d 1157 (TTAB 1992), *aff'd*, 28 USPQ2d 1687 (Fed. Cir. 1993)(unpublished) [confusion is unlikely between SPICE GARDEN and SPICE ISLANDS, both for spices]; and United Foods Inc. v. J.R. Simplot Co., supra [no likelihood of confusion between QUICK 'N CRISPY ("CRISPY" disclaimed) for frozen vegetables and QUICK 'N CHEESY ("CHEESY" disclaimed), QUICK 'N BUTTERY ("BUTTERY" disclaimed) and QUICK 'N SAUCY ("SAUCY" disclaimed) for frozen vegetables]. Given the highly suggestive nature of the common element "GARDEN," the addition of the term "CHIPS" to applicant's mark is sufficient to distinguish it from any and all of opposer's marks, including the mark GARDEN GRAINS, notwithstanding the fact that the distinguishing portions of the marks, "GRAINS" and "CHIPS," have been disclaimed. Sure-Fit Products Co. v. Saltzson Drapery Co., supra at 297 ["It seems both logical and

obvious to us that where a party chooses a trademark which is inherently weak, he will not enjoy the wide latitude of protection afforded the owners of strong trademarks. Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights. The essence of all we have said is that in the former case there is not the possibility of confusion that exists in the latter case."].

In considering the third-party registrations, we note that evidence of fame may outweigh the registration evidence. In discussing its mark, opposer asserts that its "GARDEN Marks have gained wide recognition through extensive use throughout the United States for many years....the only conclusion that can be drawn from [the record] is that Opposer's GARDEN Marks are extremely well-known and command a high degree of recognition among purchasers of snack foods." (Brief, pp. 17-18).

With respect to its GARDEN OF EATIN' marks, we recognize that use dates back to 1972; that over the last five years, sales under the marks totaled between $55 million and $65 million; and that advertising expenditures during the same period have been between $9 million and $10 million. As to the mark GARDEN GRAINS, first use occurred four years ago; sales under this mark in the last two years

total approximately $350,000; and advertising expenditures in the last two years have been $350,000.

Although the record demonstrates that opposer has enjoyed success with its products, the sales and advertising figures, standing alone, fall short in establishing fame of the marks as contemplated by that duPont factor. This is surely the case with opposer's mark GARDEN GRAINS under which extent of use, sales and advertising have been far less. There is no evidence regarding market share, brand awareness or any other evidence shedding light on the effects of the sales and advertising on the perceptions of the purchasing public. Compare: Recot Inc. v. M.C. Becton, 214 F.3d 1322, 54 USPQ2d 1894 (Fed. Cir. 2000); and Kenner Parker Toys, Inc. v. Rose Art Industries, Inc., 963 F.2d 350, 22 USPQ2d 1453 (Fed. Cir. 1992).

In view of the above, we conclude that opposer's GARDEN OF EATIN' marks and GARDEN GRAINS mark, when considered in their entireties, do not so resemble applicant's GARDEN CHIPS mark as to result in likelihood of confusion when used in connection with snack foods.

Decision: The opposition is dismissed.