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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Longevity Network, Ltd.
v.
Joel D. Wallach

Cancellation No. 92030340

Michael F. Maschio of Cowan, Liebowitz & Latman, P.C. for
Longevity Network, Ltd.

Michael A. Painter of Isaacman, Kaufman & Painter for Joel
D. Wallach.

Before Simms, Bottorff, and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

On April 21, 1998, the Patent and Trademark Office
issued Registration No. 2,152,309 to respondent, Joel D.
Wallach, for the mark AMERICAN LONGEVITY (typed) for goods
identified as "nutritional supplements for people" in
International Class 5. The registration contains an
allegation of a date of first use and a date of first use in
commerce of April 1997 and a disclaimer of the word
AMERICAN.

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On December 11, 2000, petitioner (Longevity Network, Ltd.) filed a petition to cancel respondent's registration on the ground that "since as early as March 1994 and since long prior to any first use date upon which Registrant can rely, [petitioner] adopted and continuously used the mark LONGEVITY for nutritional supplements, health and beauty aids and video and audio cassettes in the field of health." Petition at 2. Petitioner alleges that respondent's registration "will cloud Petitioner's title in and to the LONGEVITY mark." Id. Respondent denied the salient allegations of the petition to cancel.¹

The Record

The record consists of the following items: the file of the involved registration; the trial testimony deposition of petitioner's Chief Executive Officer, James Song, with accompanying exhibits; the trial testimony deposition of an independent distributor of petitioner, Len Clemens, with accompanying exhibits; the trial testimony deposition of respondent's "Chief Executive Officer,"² Stephan Rhodes Wallach, with accompanying exhibits; the trial testimony deposition of respondent, with accompanying exhibits; the discovery deposition of James Song, with accompanying

¹ An oral hearing was held on November 12, 2003.

² The witness described his position as: "I don't have an official title because this is a family-owned company, but essentially I would be like the CEO of the company." S. Wallach dep. at 10.

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exhibits, submitted by respondent under a notice of reliance; and copies of responses to interrogatories, requests for admissions, and respondent's third-party registrations submitted by the parties under notices of reliance.

Priority

A party petitioning to cancel a federally registered trademark must plead and prove that it has standing and that there is a valid ground for the cancellation of the registration. Young v. AGB Corp., 152 F.3d 1377, 47 USPQ2d 1752, 1754 (Fed. Cir. 1998) ("Section 14 has been interpreted as requiring a cancellation petitioner to show (1) that it possesses standing to challenge the continued presence on the register of the subject registration and (2) that there is a valid ground why the registrant is not entitled under law to maintain the registration") (internal quotation marks omitted).

For standing, petitioner asserts its ownership of common law trademarks and trade names.

Under the rule of Otto Roth, a party opposing registration of a trademark due to a likelihood of confusion with his own unregistered term cannot prevail unless he shows that his term is distinctive of his goods, whether inherently or through the acquisition of secondary meaning or through "whatever other type of use may have developed a trade identity." Otto Roth & Co. v. Universal Foods Corp., 640 F.2d 1317, 209 USPQ 40, 43 (CCPA 1981). The Otto Roth rule is applicable to trademark registration cancellation proceedings as well.

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Towers v. Advent Software Inc., 913 F.2d 942, 16 USPQ2d 1039, 1041 (Fed. Cir. 1990) (full citation added).

While we find that there is evidence that petitioner's mark or trade name LONGEVITY has a suggestive connotation in relation to dietary supplements, the evidence does not support a finding that the mark is merely descriptive. Therefore, petitioner has shown that it has standing and it has set out a valid ground for cancellation, i.e., likelihood of confusion. Therefore, we proceed to the discussion of priority.

Petitioner relies on its common law rights in the mark and trade name LONGEVITY for nutritional supplements, health and beauty aids and video and audio cassettes in the field of health. Respondent's registration is presumed valid, and a petitioner seeking to cancel a registration must rebut this presumption by a preponderance of the evidence.

Cerveceria Centroamericana S.A. v. Cerveceria India Inc., 892 F.2d 1021, 13 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[I]n a [trademark registration] cancellation for abandonment, as for any other ground, the petitioner bears the burden of proof. Moreover, the petitioner's burden is to establish the case for cancellation by a preponderance of the evidence"); Martahus v. Video Duplication Services Inc., 3 F.3d 417, 27 USPQ2d 1846, 1850 (Fed. Cir. 1993).

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The application that matured into respondent's registration was filed on April 2, 1997. That date is significant because respondent can rely on this date for his priority, and in order to prevail on priority, petitioner would have to establish an earlier date. 15 U.S.C. § 1057(c). Intersat Corp. v. International Telecommunications Satellite Organization, 226 USPQ 154, 156 n. 5 (TTAB 1985) ("The earliest date of first use upon which Intelsat can rely in the absence of testimony or evidence is the filing date of its application").

Initially, petitioner submitted evidence of its use of the mark and trade name LONGEVITY NETWORK. See LONGEVITY NETWORK'S COTURA™ COLLECTION Skin, Body & Hair Care Catalog" with a copyright date of 1994. Song Ex. 3, Song dep. at 29-31. Other 1994 brochures (Song. Ex. 4, Song dep. at 36; Song Ex. 5 and Song dep. at 39) contain the heading "LONGEVITY NETWORK Making Positive Changes in People's Lives" and "People helping each other succeed - that's Longevity Network." Opposer has also included a copy of its 1994 "Longevity Network's Nutritional Products Catalog." Song Ex. 8, Song dep. at 43.

The evidence clearly establishes that petitioner was using its mark LONGEVITY NETWORK prior to respondent's priority date of April 2, 1997.

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However, in this case, petitioner seeks to cancel respondent's registration based on its claim that it has used the mark LONGEVITY alone prior to respondent's priority date. In the petition to cancel (p. 2), petitioner alleges that it has used its LONGEVITY mark since at least as early as March 1994. Petitioner has submitted the following evidence to show its use of the mark LONGEVITY. On page 4 of its brochure (Song Ex. 6), in a testimonial about petitioner, a person is quoted as saying: "You look and pray a lifetime for a company with the qualities that Longevity has. Longevity compares to most other companies the way a Mercedes compares to a Hyundai." Song dep. at 40 (Brochure distributed in 1994). In a 1995 edition of its "Longevity Network News" (Song Ex. 10 at 106), a caption refers to "Longevity CEO Jim Song") and (120) an ad refers to "Longevity's Enhanced Compensation Plan: The Power to Strive in '95." The October/November 1995 edition of *MLM Insider Magazine* (Song Ex. 14 at 4) lists petitioner as "Longevity" in a list of "The Best Companies in Network Marketing for 1995."

There is other evidence of the use of the term "Longevity" alone to refer to petitioner. For example, an advertising brochure prepared by Len Clemens, a distributor of Longevity Network with its approval (Clemens dep. at 96) reads: "The *FreeStyles Network* and *Longevity* have combined

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forces to create one of the most dynamic and lucrative opportunities in years." Clemens Ex. 41 (emphasis in original). The brochure also contains the following statements: "Longevity delivers many of the most popular products...", "Each product was designed and formulated exclusively by Longevity," and "The friendly, professional team at LONGEVITY (headquartered in Henderson and Las Vegas, Nevada) stands ready to assist you." Clemens Ex. 41. This brochure was created in 1995. Clemens dep. at 96. Clemens dep. at 96.

Another exhibit from 1995 was an advertisement of petitioner "Introducing Longevity's VoiceLink™ Communication Center" which is "Longevity's quickest channel of communication" and it requested interested parties to "fill in the subscription form below and send it to Longevity via Fax..." Clemens dep. at 99 and Ex. 42. Additionally in 1995, an advertising newspaper entitled *Millionaires in the Making* contained the following headline and statements: "Longevity unveils 'Devastating' Multi-Match(SM) system," "Through Longevity, a generous slice of it can be yours," "Fill out section 'A' of the Longevity Quick Start Application Form," and "Longevity Product Line." Clemens dep. at 101 and Ex. 43). Another *Millionaires in the Making* from 1996 contains such statements as "Yes the Longevity Business Opportunity sounds excellent," "Impressive Longevity Product Line,"

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"recorded message from Longevity CEO & President," and "For more detailed information on the Longevity compensation plan..." Clemens dep. at 103 and Ex. 44.

Petitioner also submitted evidence that it marketed dietary supplements products under the mark LONGEVITY'S. Song dep. at 87 and Ex. 19; See also Song Ex. 23. However, we are not persuaded by this evidence. These products were named VITAMIN PLUS, CARDIOGEVITY, RAINFOREST DUET, and COLLODIAL VERA. Id. While Exhibit 19 indicates that the brochures of record were "Rev. 9/97," Mr. Song testified "that was the way the products were labeled" and that "was the way it was sold during that period." Song dep. at 87. See also dep. at 97. The period that Mr. Song referred to was the introduction of Vitamin Plus in 1995, Cardiogevity in 1994, Rainforest Duet in 1995, and Colloidal Vera in 1994 or 1996. Id. Mr. Song testified that its products were sold in the United States and Korea (dep. at 87 and 97). While this testimony during direct examination was straightforward, on cross-examination, the witness was less certain. Referring to Exhibit 23, the witness was asked: "Q. When did you start using that style. A. I believe in '96. Q. '96? A. Or '97. I'm not sure." Song dep. at 157.

Also, on cross-examination, the witness was asked:

Q. Can you identify any exhibit that you produced today which shows use of that trademark that is Longevity, the possessive form of it, prior to 1997?

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- A. I think we've seen "longevity" in its various forms used throughout the exhibits that we showed since we launched the company in '94. That's basically what we did this morning.

Song dep. at 158.

When the witness was asked if there was "anything that you produced today which shows a package which bears the Longevity's trademark and used prior to 1997," his response was very general ("I believe throughout the exhibits, we've shown use of 'Longevity' in its various forms"). Song Dep. at 159.

"[O]ral testimony, if sufficiently probative, is normally satisfactory to establish priority of use in a trademark proceeding." Powermatics, Inc. v. Globe Roofing Products Co., 341 F.2d 127, 144 USPQ 430, 432 (CCPA 1965). However, such testimony should "not be characterized by contradictions, inconsistencies and indefiniteness but should carry with it conviction of its accuracy and applicability." B.R. Baker Co. v. Lebow Bros., 150 F.2d 580, 66 USPQ 232, 236 (CCPA 1945). In this case, the testimony regarding the use of the mark on its goods prior to 1997 is too equivocal to meet this test.

Therefore, the final question concerning priority is whether petitioner has demonstrated trade name use or use analogous to trademark use prior to respondent's priority date. At this point, we consider evidence of petitioner's use of the term "Longevity" to refer to itself and whether

others use the term to refer to petitioner. See National Cable Television Association Inc. v. American Cinema Editors Inc., 937 F.2d 1572, 19 USPQ2d 1424, 1428 (Fed. Cir. 1991) (“The evidence is profuse that Editors has publicly been known as ACE since prior to 1979, as attested to by members of Editors, as well as shown by newspaper articles and third party correspondence where the name American Cinema Editors has routinely been shortened to ACE”). Furthermore, we can consider that “abbreviations and nicknames of trademarks or names used *only* by the public [can] give rise to protectable rights in the owners of the trade name or mark which the public modified.” Id. (emphasis in original).

The evidence of the use of the term “Longevity” in petitioner’s advertising, in promotional literature by its distributor, and in testimonials discussed above convinces us that it has established priority of use of the word LONGEVITY in relation to its business involving dietary supplements and related products prior to 1997.

Likelihood of Confusion

The next question is whether there is a likelihood of confusion. In a case involving a refusal under Section 2(d), we analyze the facts as they relate to the relevant factors set out in In re Majestic Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). See also In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563,

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567 (CCPA 1973); and Recot, Inc. v. Becton, 214 F.3d 1322, 54 USPQ2d 1894, 1896 (Fed. Cir. 2000).

The first factor we consider is the similarities or dissimilarities in the marks. We have already determined that petitioner has shown that it has priority regarding its trade name LONGEVITY. Respondent's registration is for the mark AMERICAN LONGEVITY. Respondent has disclaimed the word AMERICAN. The addition of a geographic term to another term does not normally avoid a likelihood of confusion. Wella Corp. v. California Concept Corp., 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design likely to be confused with CONCEPT for hair care products); Surf Line Hawaii Ltd. v. Ahakuelo, 13 USPQ2d 1975, 1979 (D. Haw. 1989) (JAMS and HAWAIIAN JAMS, both for T-shirts, held to be confusingly similar); Harry Siegal Co. v. M & R International Mfg. Co., 4 USPQ2d 1154, 1161 (TTAB 1987) (Despite finding that "the term 'CHIC' is commonly used as a descriptive term... 'L.A. CHIC' does not so differ from the mark 'CHIC' as to preclude likelihood of confusion").

In another case, the board was faced with a similar issue of whether the marks GUARDIAN and SCOTT GUARDIAN were confusingly similar for various, medical, hospital and sickroom supplies. Guardian Products Company v. Scott Paper Company, 200 USPQ 738 (TTAB 1978). The board found that "'Guardian' is no doubt a laudatory and hence a suggestive

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term that is or may border on the category of 'weak' marks."

200 USPQ at 740.

Applicant has incorporated within its mark the entire mark of opposer, namely, "GUARDIAN" and merely added the name "SCOTT" which is nothing more than a house mark of applicant. While such house mark cannot be ignored in evaluating applicant's mark, we cannot lose sight of the fact that marks generally identify an anonymous source, and the resemblance between "SCOTT GUARDIAN" and "GUARDIAN" is such that to those who notice the term "SCOTT," the association may carry over to opposer's mark as well as that of applicant. Thus, we conclude that applicant's mark "SCOTT GUARDIAN" is confusingly similar to opposer's mark "GUARDIAN."

200 USPQ at 740.

In this case, the term "longevity" is not without meaning in the field of dietary supplements. See Petitioner's brief at 33 ("Longevity's name and mark is 'suggestive' when used in connection with supplements and beauty products"); Song Ex. 22, p262 (*Prescription for Longevity: Eating right for a long life*), Song Ex. 25, P437 ("Because Longevity is about all the right things and because you decide the long-term success of your business and your family. We invite you to contact us to start your longevity in health, family, and business") (emphasis omitted); Clemens dep. at 122 ("Q. Does the word [Longevity] have any relevance to a feature or characteristic of nutritional supplements? A. Yes. They help you live a long, healthy life"); and S. Wallach Ex. 7 at 1 ("American Longevity ... These are the products of the 21st century - The

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products that will help you achieve your potential for maximum longevity").

Although we agree with respondent that the word "longevity" is hardly a unique or arbitrary term when used with nutritional supplements, we do not find that the term is without any trademark significance. As the cases above indicate, while a mark may not be strong, a junior party normally cannot appropriate another party's mark, add disclaimed matter to it, and avoid a finding that the marks are similar. Therefore, we conclude that the marks are similar.

Next, we consider whether the goods of the parties are related. The goods in respondent's registration are identified as simply "nutritional supplements for people." Petitioner also markets nutritional supplements for people in association with its trade name. Song Dep. at 17 ("[W]e launched out products in early 1994 ... approximately 40 to 50 products, nutritional supplements ...). We, therefore, consider that both petitioner and respondent are in the nutritional supplement business.

While the similarity of the marks and the relatedness of the goods are important factors, we now consider other factors that the parties have raised regarding the question of likelihood of confusion. Here, respondent argues that "Petitioner's trademark is a weak mark which is entitled to

only limited protection." Respondent's Brief at 38.

Respondent supports his argument by relying on copies of third-party registrations that contain the word "longevity" and evidence of other nutritional supplements or health-related products that respondent's witness purchased that use the word "longevity." Respondent points to several products distributed by a company called Soaring Eagle Ventures. Respondent's witness, S. Wallach, identified himself as a former distributor for this company.³ The advertising brochure promoted a product called LONGEVITY RICH - The Missing Link to Beautiful Hair & Skin.⁴ The brochure was apparently distributed at least by 1995.

S. Wallach Ex. 2.⁵ Another brochure distributed "preventive health & personal care products" under the mark OXYRICH with the slogan "The Missing Longevity Link." S. Wallach, Ex. 3.

A third product distributed by Soaring Eagle Ventures was marketed under the slogan "The Missing Longevity Link" at least as early as 1995 for a product called RAINFOREST TODDY, a dietary mineral supplement. S. Wallach dep. at 20, Ex. 4. This product also contained the slogan "Achieving your genetic potential for Good Health & Longevity." Yet

³ The witness also testified that "now I'm a board member of them, I guess." S. Wallach dep. at 95.

⁴ Soaring Eagle Ventures apparently owns Registration No. 2,111,266 for LONGEVITY RICH and design for mineral-based natural cosmetics. Respondent's Notice of Reliance, Paper No. 28.

⁵ The witness arrived at this date because the brochure listed the witness's business with an Oregon address. The witness

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another product, SPORTS TODDY, a dietary mineral supplement, was marketed with a brochure that contained the slogans "The Missing Sports Longevity Link" and "The Ultimate Longevity Fuel." S. Wallach Ex. 5. See also S. Wallach Exhibits 38 and 39 (Longevity Rich conditioner and hand and body lotion).⁶

In its Reply Brief (page 1), petitioner argues that the "Soaring Eagle Company's use of the term Longevity is distinguishable as the term is not used as a source identifier." We cannot agree that none of the Soaring Eagle uses are source identifiers. Even if they were not source identifiers, the fact that other parties use the term to describe nutritional supplements and other products that petitioner claims it markets is relevant in assessing whether petitioner's mark is a strong and distinctive term.

Respondent has also submitted status and title copies of numerous registrations for various marks containing the word "Longevity." See Registration No. 1,985,718 (EVERY MAN II FACTORS FOR LONGEVITY for dietary supplements); No. 1,986,810 (E'OLA SMART LONGEVITY and design for health food supplement); No. 2,091,072 (MEN'S LONGEVITY for dietary and nutritional supplements); No. 2,102,291 (LONGEVITY SCIENCE for dietary supplements); No. 2,172,909 (WOMEN'S LONGEVITY

operated his business in Oregon until he moved by 1996.
S. Wallach dep. at 18.

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for dietary and nutritional supplements); No. 2,197,549 (SECRET OF LONGEVITY for dietary supplements); No. 2,198,858 (LONGEVITY CRYSTAL for herbal extract dietary supplements); No. 2,242,040 (BODYONICS LONGEVITY for dietary and nutritional supplements); No. 2,258,810 (LONGEVITY SPA for vitamins and nutritional food supplements); and Nos. 2,341,135 and 2,341,136 (LIQUID LONGEVITY and LIQUID LONGEVITY PLUS for nutritional supplements). While we agree that third-party registrations cannot be used to prove that a mark is weak and to justify the registration of another confusingly similar mark, third-party registrations can be used as a form of dictionary to illustrate how the term is perceived in the trade or industry. In re J.M. Originals Inc., 6 USPQ2d 1393, 1394 (TTAB 1987) (“[T]hird party registrations are of use only if they tend to demonstrate that a mark or a portion thereof is suggestive or descriptive of certain goods and hence is entitled to a narrow scope of protection. Used in this proper, limited manner, ‘third party registrations are similar to dictionaries showing how language is generally used.’ 1 McCarthy, *Trademarks and Unfair Competition*, § 11:26 at p. 516 (2d ed. 1984)”).

Respondent also included numerous exhibits of various dietary or nutritional supplements and other products that

⁶ These products are still being sold. See S. Wallach dep. at

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use the word "longevity" on the label. See S. Wallach Exhibits 25 and 27 (Oasis Longevity Signal A.M. and Oasis Longevity Signal P.M. dietary supplements); Exhibits 28, 29, 30, and 31 (Longevity 4 dietary supplement); Ex. 32 (Super Nutrition Longevity Easy to Swallow Multi-Vitamin); Ex. 33 (Longevity 2000 nutrition program⁷); Ex. 34 (Voyager Imperial Q1 Longevity Elixir); and Exhibits 35 and 36 (MDR Longevity Antioxidants⁸).

The witness, Stephan Wallach, purchased these products after searching "longevity and nutrition" or "longevity and minerals and vitamins" on the Internet. S. Wallach dep. at 72. Finally, petitioner acknowledges that "there are other companies in the nutritional field that use the word Longevity on their product labels." Reply Brief at 1, n.1.

Petitioner argues that its mark is strong because it has 50,000 distributors⁹ and it "has achieved substantial success and received substantial attention in the industry publications." Petitioner's Brief at 28. We cannot agree that petitioner's mark is a particularly strong mark or name. First, most of the evidence of record relates to the mark LONGEVITY NETWORK. Petitioner has not pleaded this

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⁷ This product contained, inter alia, a liquid mineral dietary supplement. S. Wallach dep. at 74.

⁸ This product formulation included, inter alia, antioxidants, vitamins, and minerals. S. Wallach dep. at 77.

⁹ Petitioner sells its products "through the industry of network market[ing]. And network marketing is a form of distribution

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mark in its petition to cancel. However, when we balance petitioner's evidence of strength and respondent's evidence of weakness, we conclude that it is not entitled to a presumption that it is either a particularly strong or weak mark. While we have evidence that products using the term "Longevity" are sold on the Internet, we have no evidence of the nature and volume of these sales. The mere fact that there are other uses of a mark does not per se make the mark under consideration a weak mark. Carl Karcher Enterprises Inc. v. Stars Restaurants Corp., 35 USPQ2d 1125, 1131 (TTAB 1995) ("[T]he pictures of these restaurants tend to indicate that the operations are small and local in nature").

Petitioner also argues that both petitioner and respondent use their marks on nutritional supplements that are distributed through network marketing. Reply Brief at 4. Certainly, respondent's identification of goods, nutritional supplements for people, would include "nutritional supplements for people distributed through network marketing." Obviously, we must consider the goods as they are identified in the registration. In re Dixie Restaurants, Inc., 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997) (punctuation in original), quoting, Canadian Imperial Bank of Commerce v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1816 (Fed. Cir. 1987) ("Likelihood of

that uses word-of-mouth advertising to get out information about

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confusion must be determined based on an analysis of the mark applied to the ... services recited in applicant's application vis-à-vis the ... services recited in [a] ... registration, rather than what the evidence shows the ... services to be'"); Paula Payne Products v. Johnson Publishing Co., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). We also consider that the goods are sold in all normal channels of trade. Schieffelin & Co. v. Molson Companies Ltd., 9 USPQ2d 2069, 2073 (TTAB 1989) ("[M]oreover, since there are no restrictions with respect to channels of trade in either applicant's application or opposer's registrations, we must assume that the respective products travel in all normal channels of trade for those alcoholic beverages"). Here, petitioner and respondent do distribute their products by means of independent distributors. Song dep. at 13 ("Longevity sells through the industry of network market[ing]"); S. Wallach Ex. 8, p. 29 (Building your own American Longevity Business should be fun ... Our distributors are referred to as 'Team Members' or 'Associates'"). The mere fact that both petitioner and respondent distribute their products by means of network marketing does not make the other evidence of Longevity uses

our products." Song dep. at 13.

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irrelevant. Respondent's registration is not limited to distributing its goods by means of network marketing. However, the fact that petitioner's and respondent's products are actually distributed in the same channel of trade (multi-level marketing) emphasizes that the overlapping channels of trade are not theoretical in this case.

Petitioner also argues that respondent's "bad faith disregard of Petitioner's prior rights and attempt to trade on the good [will] associated with Petitioner's LONGEVITY mark compels a finding of likelihood of confusion." Reply Brief at 8. We note that when petitioner's counsel sent a "cease and desist" letter on May 12, 1997, it did not refer to a "Longevity" mark. The letter referred only to Longevity Network. Song Ex. 28. Petitioner's argument that respondent is guilty of bad faith by using his mark AMERICAN LONGEVITY is undercut by the fact that petitioner only informed respondent of its mark LONGEVITY NETWORK not LONGEVITY.

Petitioner also argues that there has been actual confusion between petitioner's and respondent's marks. It submitted evidence of a "survey" conducted by Mr. Clemens "with a total of 873 respondents through his network marketing company website, which found that there was great confusion as to whether Joel Wallach, the Registrant and

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owner of American Longevity, was associated with Longevity or American Longevity." Petitioner's Brief at 35.

Respondent objects to this testimony on numerous grounds including that Mr. Clemens is unqualified to render an expert opinion, the methodology of the survey is flawed, and the results are unreliable. We agree with respondent to the extent that we can give the survey little, if any, weight. Mr. Clemens "works almost exclusively as a distributor for Longevity Network." Clemens Ex. 33 at 3. He has "a two-year degree from what was called Heald Business College" and he has taken a course in Probability in Statistics. Clemens dep. at 127-28. The witness indicated that he had no training or background in developing consumer surveys in likelihood of confusion cases. Clemens dep. at 130-35; See, e.g., 135 ("Q. Do you have any understanding of the standards which are generally required to be met by a consumer survey in order to be considered as evidence on the issue of likelihood of confusion in trademarks? A. No").

The "survey" petitioner has submitted was really an Internet poll or "what I call a network marketing IQ test or MLM IQ test." Clemens dep. at 66. Participants were instructed that: "If you don't know an answer to a question you are better off just taking your best guess and quickly moving on." Clemens Ex. 35. Anyone who visited the witness's website could take the test and there was no

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attempt made to exclude participants who were not potential purchasers of nutritional supplements. Even more damaging to the survey's persuasiveness is a review of the critical question on which petitioner relies (#25):

Which of the following companies was founded by "Doc Wallach?"

- A. Youngevity
- B. American Longevity
- C. Biogevity
- D. Longevity Network
- E. None of the above

Clemens Ex. 40.

The results of the poll were A. 13.4%, B. 14.2%, C. 11.8%, D. 27.5%, and E. 4.1%. Id. The question simply asks what company an individual started. It does not use the trade name petitioner has pled "Longevity" and it does not compare the marks, but it simply tries to determine what company was founded by a particular individual. Almost equal percentages of respondents (13.4% and 11.8%) indicated that they thought Youngevity and Biogevity were founded by Doc Wallach as thought American Longevity (14.2%) was. Because of the lack of screening of participants and the vagueness of the question, among other things, this survey offers little support for petitioner.

Petitioner's other evidence of actual confusion consists of Mr. Clemens' summary of a statement by the owner of a radio station. Song. Ex. 30 and Clemens dep. at 48-52. The statement is hearsay and it does not meet the

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requirements of a business record. We add that, even if it were considered, it simply indicates that two callers, after hearing a radio advertisement that included a toll free number for one company, inexplicably called another number for a different company.

Mr. Clemens did testify that he spoke with one caller who thought that American Longevity products were available from Longevity Network. Clemens. dep. at 52-55. If it is otherwise reliable, employee testimony on the subject of misdirected calls can be admissible. Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 217 USPQ 145, 149 n. 10 (5th Cir. 1982) (Testimony of plaintiff's employees about purchasers attempting to reach defendant admissible because it was either not used "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)) or was relevant under the state of mind exception (Fed. R. Evid. 803(3))); CCBN.com Inc. v. c-call.com Inc., 53 USPQ2d 1132, 1137 (D.C. Mass. 1999) ("[S]tatements of customer confusion in the trademark context fall under the 'state of mind exception' to the hearsay rule. See Fed. R. Evid. 803(3)"). Therefore, we will consider Mr. Clemens' testimony of a misdirected phone call that he received. However, we will not consider Mr. Clemens' vague testimony concerning general discussions

he had with people he was trying to recruit to be network marketers. Clemens dep. at 56-57.¹⁰

Regarding the sophistication of purchasers, petitioner, who had previously argued that its products are sold only through independent distributors in the much more limited network marketing area through its independent distributors,¹¹ now argues that the "average consumer would exercise as much care in purchasing the nutritional supplement goods as they would in selecting a snack food. Moreover, the low price would make it likely that consumers would buy Longevity's and registrant's goods on an impulse." Brief at 32. A review of petitioner's and registrant's catalogs (Song Exhibits 8 and 29) hardly supports a finding that potential purchasers make impulse purchases.¹² Respondent argues that the "ultimate consumers of products designated by AMERICAN LONGEVITY trademark include all members of the public who purchase nutritional supplements and personal care products at conventional retail outlets" (Respondent's Brief at 13). Respondent maintains that these

¹⁰ Song Ex. 31 consisting of letters in foreign characters (Korean distributors according to Song. Dep. at 144; Japanese according to the Reply Brief at 11) is simply irrelevant. Whether there is confusion of the marks in other countries is not relevant to this proceeding.

¹¹ Indeed, petitioner maintains that it "is not concerned with products sold through conventional retail channels, as those products do not compete with Longevity's products." Petitioner's Brief at 17.

¹² Normally, sales of items by catalog would seem to be a more thoughtful process than purchasing a snack item at a convenience store.

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consumers would be discriminating purchasers. Purchasers of dietary supplements would unlikely be impulse purchasers. Accord Stouffer Corp. v. Health Valley Natural Foods Inc., 1 USPQ2d 1900, 1902 ((TTAB 1986) (“[E]ven in the hustle and bustle atmosphere of a supermarket, diet-conscious purchasers of these prepared entrees are a special class of purchasers who may be expected, at least, to examine the front of the packages in order to determine what kind of entree is contained therein and its caloric content”). While there is no direct evidence on the sophistication of the consumers, there is no basis to conclude that these purchasers would be unsophisticated or impulse purchasers.

We now must balance the facts on the issue of likelihood of confusion. We start with the mark and trade name, and, as we have previously noted, they are similar. They both contain the same word, *Longevity*, to which respondent has added the disclaimed word, *American*. Concerning the goods, respondent’s goods are nutritional supplements for people while petitioner’s trade name is also associated with similar and identical goods. Therefore, the goods and trade name use are related. We have also found that petitioner’s trade name is neither a particularly strong or weak mark. In addition, there have been only a

few isolated instances that might be considered actual confusion.¹³

When we consider all of the factors in this case, we conclude that petitioner has met its burden by a preponderance of the evidence. When terms as similar as LONGEVITY and AMERICAN LONGEVITY are used with or associated with nutritional supplements, confusion is likely.

Decision: The petition to cancel is granted.

¹³ While the parties have co-existed for several years, we cannot make any contrary assumption that this supports a finding that confusion is not likely because we do not have much evidence of the extent of respondent's presence in the market place. The excerpt (S. Wallach dep. at 147-48) from the testimony of respondent's "CEO" is illustrative.

Q. When American Longevity began its operations in 1997, how many associates did it have?

A. I don't know.

Q. How about in 1998, how many associates were there?

A. If you are talking about associates, specific, apart from preferred customers -

Q. Yes.

A. - I don't know.

Q. Do you know how many preferred customers it had in 1998?

A. No.

Q. How about in 1999?

A. I have no way of knowing.

Q. But you were able to give an estimate of how many associates there are today; is that correct?

A. Only an estimate of, an approximation of percentagewise.