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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Miller Chemical & Fertilizer Corporation

Serial No. 76470083

Stanley B. Kita of Howson and Howson for Miller Chemical & Fertilizer Corporation.

Travis D. Wheatley, Trademark Examining Attorney, Law Office 115 (Tomas V. Vlcek, Managing Attorney).

Before Quinn, Hairston and Walsh, Administrative Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Miller Chemical & Fertilizer Corporation has filed an application to register the mark SUSTAIN for goods ultimately identified as "spreader-sticker adjuvants for use in the field of commercial agriculture and horticulture

in enhancing contact and adhesion of pesticides to plant surfaces.”¹

The trademark examining attorney² has finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant’s mark, when applied to the identified goods, so resembles the mark SUSTANE for “natural organic fertilizer,”³ as to be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or

¹ Application Serial No. 76470083, filed November 26, 2002, asserting first use and first use in commerce as of October 29, 2002.

² The current examining attorney was not the original examining attorney in this case.

³ Registration No. 1,516,929, issued December 20, 1988; Section 8 affidavit accepted, Section 15 affidavit filed.

services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

It is the examining attorney's position that the marks are phonetically identical and that similarity in this element alone is sufficient to find a likelihood of confusion.

Applicant, on the other hand, argues that the marks are not similar because SUSTAIN is a recognized word whereas SUSTANE is a coined term with no recognizable meaning.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side

comparison, but rather whether the marks are sufficiently similar in terms of their commercial impression that confusion as to the source of the goods and/or services offered under the respective marks is likely to result.

Considering then the marks SUSTAIN and SUSTANE, they are obviously identical in terms of sound. Further, they appear to have the same connotation as applied to the respective goods, namely, "to keep in existence; maintain; prolong."⁴ However, because SUSTAIN is a recognized word and SUSTANE is a coined term, the marks look different and have different commercial impressions. In view of the differences in the appearance and commercial impressions of the marks, we find that the marks SUSTAIN and SUSTANE are more dissimilar than similar. We acknowledge the examining attorney's point that in certain circumstances similarity in pronunciation alone is a sufficient basis to find likelihood of confusion. But in this case, similarity in pronunciation alone is not sufficient.

Turning next to the goods, it is the examining attorney's position that the goods are closely related.

⁴ We base this finding with respect to connotation on the definition of the word "sustain" in The American Heritage Dictionary of the English Language (New College Edition 1976). The Board may take judicial notice of dictionary definitions. *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 D.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

Specifically, the examining attorney maintains that adjuvants for pesticides, on the one hand, and fertilizers, on the other hand, are both used to promote the growth of agricultural crops and would be encountered in the same channels of trade by the same purchasers. In support of his position that the goods are closely related, the examining attorney submitted copies of third-party registrations for marks that cover adjuvants for pesticides, on the one hand, and fertilizers, on the other hand. In addition, the examining attorney submitted copies of third-party registrations for marks that cover adjuvants for use with both pesticides and fertilizers and Internet printouts which describe adjuvants for use with both pesticides and fertilizers.

Applicant argues that the respective goods are very different in nature and are not related. Applicant maintains that its adjuvants for pesticides are chemicals, whereas registrant's natural organic fertilizer is made from natural sources; and that consumers would not expect adjuvants for pesticides to emanate from a producer of natural organic fertilizer. Applicant submitted the declaration of its president, Charles H. Svec, who states that he has been involved in the commercial agriculture, chemical and fertilizer business for many years. According

to Mr. Svec, natural organic fertilizers generally originate from sewage sludge processors or animal waste product processors and not from chemical manufacturers; and adjuvants for pesticides are liquids, and are generally not mixed with natural organic fertilizers, which are customarily sold in particulate form. Further, Mr. Svec states that applicant's adjuvants for pesticides are used by commercial growers and farmers who are sophisticated purchasers, and that these growers and farmers exercise care to ensure the proper application of agricultural chemicals and products to their soil and plants.

Insofar as the evidence submitted by the examining attorney is concerned, applicant argues that there is no indication that the fertilizers or adjuvants for use with both pesticides and fertilizers listed in the third-party registrations or described in the Internet printouts are natural organic products. Thus, applicant argues that the examining attorney's evidence does not establish that companies market adjuvants for pesticides and natural organic fertilizers under a single mark.

It is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that

some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of each parties' goods or services. In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

In this case, the mere fact that applicant's and registrant's goods may both be used to promote the growth of agricultural products is an insufficient basis upon which to find that the goods are related for purposes of our likelihood of confusion analysis. Applicant's adjuvants for pesticides are chemicals which differ in nature from applicant's natural organic fertilizer, which is not likely produced with chemicals.⁵ Additionally, applicant's position that the respective goods generally would not be used together is supported by the Svec declaration. Moreover, it is common knowledge that the philosophy behind organic products is that such products

⁵ The word "organic" is defined as, inter alia: "Of, pertaining to, or derived from living organisms" and "Free from chemical injections or additives." The American Heritage Dictionary of the English Language (New College Edition 1976).

generally are chemical-free. Thus, it appears to us that it is highly unlikely that a farmer or grower would purchase and/or use applicant's adjuvants for pesticides and registrant's natural organic fertilizer together. In short, notwithstanding the evidence submitted by the examining attorney, we find that the specific goods involved herein are not sufficiently related to warrant a finding of likelihood of confusion.⁶

Insofar as trade channels and purchasers are concerned, because registrant's identification of goods contains no limitations, we must presume that registrant's natural organic fertilizer is marketed in all normal channels of trade for such goods to all normal classes of purchasers for such goods. However, we note that applicant's goods are identified as "for use in the field of commercial agriculture and horticulture." In view of this limitation with respect to the area of use of applicant's adjuvants for pesticides, this is not the type of product that would be marketed to the general public through lawn and garden stores. Thus, the only overlap as

⁶ We note that the adjuvants for use with both pesticides and fertilizers described in the Internet printouts submitted by the examining attorney are chemical products. Thus, as applicant argues, these printouts do not prove that companies market adjuvants for pesticides and natural organic fertilizers under a single mark.

to applicant's and registrant's goods in terms of trade channels is suppliers of commercial agricultural and horticultural products and in terms of purchasers is commercial growers and farmers. Commercial growers and farmers would be expected to exercise a high degree of care in the selection of products for use on their soil and plants and this would further obviate any likelihood of confusion.

In sum, given the differences in the commercial impressions of the marks, the differences in the specific nature of the respective goods, and the sophistication of the purchasers, contemporaneous use of the involved marks is not likely to cause confusion.

Decision: The refusal to register under Section 2(d) of the Act is reversed.