

8/16/02

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF  
THE TTAB

Paper No. 19  
DEB

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Seedbiotics, LLC

v.

Gustafson LLC

Cancellation No. 30,706

Ken J. Pedersen of Pedersen & Company, PLLC for Seedbiotics, LLC

Gary S. Kessler of Kessler & Collins, PC for Gustafson LLC

Before Quinn, Hohein and Bucher, Administrative Trademark Judges.

Opinion by Bucher, Administrative Trademark Judge:

Seedbiotics, LLC ("petitioner") has petitioned to cancel the registration owned by Gustafson LLC ("respondent") for the mark ENHANCE for "fortified inoculating bacteria for legume seeds," in International Class 1.<sup>1</sup>

As grounds for cancellation, petitioner alleges that it has filed an application for registration of the mark

<sup>1</sup> Registration No. 1,297,311 issued on September 25, 1984; Section 8 affidavit accepted and Section 15 affidavit acknowledged.

N-HANCE for services recited as "coating legume seeds with a seed polymer," which application<sup>2</sup> has been refused registration under Section 2(d) of the Act based upon the above registration [Pet. to Cancel ¶¶3, 5]. Petitioner claims that respondent has abandoned its mark due to discontinued use of the registered mark, and that respondent has, by its own course of conduct, caused the mark to lose its significance as a mark as registered, under the definition of "abandonment" contained in the Lanham Act at 15 U.S.C. §1127 [Pet. to Cancel ¶¶4(a) and 4(b)].

Respondent, in its answer, has denied all the salient allegations of the petition to cancel.

We learn from petitioner's brief that its abandonment theory rests upon an argument that, while the subject registration lists the covered goods as "fortified inoculating bacteria for legume seeds," respondent, by its own admission, now uses the mark ENHANCE in connection with "a fungicide product to protect wheat, barley and oats ...". Accordingly, petitioner argues that this represents a material change in the product, resulting in abandonment of the mark.

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<sup>2</sup> Application Serial No. 75/680,815, filed on April 12, 1999, based upon petitioner's allegation of a *bona fide* intention to use the mark in interstate commerce.

As an initial matter, each party has objected to the notice of reliance filed by the other. Respondent objects to petitioner's notice of reliance on the basis that the notice itself cited to the wrong section of the Trademark Rules. Petitioner, on the other hand, objects to respondent's notice of reliance on various trade inscriptions, referring to documents attached as exhibits to the declaration of Tim McArdle, for which declaration petitioner had not agreed under Trademark Rule 2.123(b).

First, we hold that respondent's objection to petitioner's notice of reliance is denied. While it is true that petitioner incorrectly cited to Rule 2.112(d) rather than to Rule 2.122(d), it was correctly captioned as a "Notice of Reliance," and clearly respondent was not prejudiced in this context by petitioner's repeated but insignificant typographical errors.

On the other hand, the three items that are the subject of this notice of reliance (i.e., the registration certificate of the subject mark, the subject registration file and respondent's answer) are already a part of this record without any action by the parties.<sup>3</sup> Accordingly,

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<sup>3</sup> Registration No. 1,297,311 is the subject of the instant *inter partes* proceeding, so the file of respondent's registration forms part of the record of this proceeding without any action by the parties. See 37 CFR §2.122(b)(1). Similarly, respondent's

petitioner's Notice of Reliance is superfluous, and respondent's objection is also denied as moot.

As to petitioner's objection to respondent's notice of reliance on various trade inscriptions, respondent did submit as testimony during its testimony period the declaration of Tim McArdle, general manager for Trace Chemicals (a subsidiary of respondent). Attached to the declaration were product brochures, technical information, product labels and product descriptions. However, petitioner argues that this notice does not comply with the procedural requirements of Rule 2.123(b) in that petitioner had not stipulated to this declaration. We agree with petitioner, and have not considered the declaration or the attached exhibits. Furthermore, these particular documents are not the type of official records admissible by notice of reliance under the provisions of 37 CFR §2.122(e).

In view of the above determinations on the parties' notices of reliance, the record consists merely of the parties' pleadings and the USPTO registration file. The parties have each submitted a trial brief but an oral hearing was not requested.

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answer is also automatically made part of the record without the need of petitioner's notice of reliance.

In its brief, respondent contends that petitioner has failed to submit any evidence during its testimony period and has provided no evidence in support of the factual claim that "fortified inoculating bacteria for legume seeds" and "a fungicide product to protect wheat, barley and oats" are wholly different products. According to respondent, petitioner's brief consists of "wholly unsupported conclusions." By contrast, in its brief, petitioner points to the fact that "... registrant has admitted in its Answer to a current use of the mark that is substantially different than the use recited in the Registration."

However, we find that respondent's answer clearly contained no admission that its current use of the mark was substantially different than the use listed in the registration. Furthermore, we agree with respondent's charge that petitioner has failed to offer any testimony or other evidence in support of its allegations, whether it be in support of petitioner's standing or in support of the charge that there has been a material change in the goods with which respondent's mark ENHANCE is now used. Thus, petitioner has failed to meet its burden of proof in this case, and it is adjudged that the petition must fail.

Decision: The petition for cancellation is dismissed.