Paper No. 17
JQ

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB 6/30/98

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Life Data Labs, Inc.
v.
Helfter Enterprises, Inc.

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Cancellation No. 24,398

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Adrienne L. White of Burns, Doane, Swecker & Mathis for Life Data Labs, Inc.

John E. Cepican of Henderson & Sturm for Helfter Enterprises, Inc.

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Before Simms, Cissel and Quinn, Administrative Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

Life Data Labs, Inc. has petitioned to cancel the registration owned by Helfter Enterprises, Inc., doing business as Advanced Biological Concepts, for the mark FARRIER'S CHOICE for "nutritional additives for livestock feed."[1]

As grounds for cancellation, petitioner asserts priority and likelihood of confusion under Section 2(d) of

[1] Registration No. 1,859,439, issued October 25, 1994.

the Trademark Act, contending that respondent's mark, when applied to respondent's goods, so resembles petitioner's previously used mark FARRIER'S FORMULA for nutritional supplements for animals as to be likely to cause confusion.

Respondent, in the answer, admitted that its first use of its mark occurred on November 2, 1993. Respondent otherwise denied the allegations relating to likelihood of confusion.

The record includes the pleadings; the file of the involved registration; trial testimony, with related exhibits, taken by petitioner; and the file history of petitioner's application serial no. 74/559,803, two third-party registrations and a certified copy of a corporation report issued by the Illinois Secretary of State, all introduced by way of petitioner's notice of reliance. Respondent neither took testimony nor offered any other evidence. Only petitioner filed a brief.

According to Linda Gravlee, petitioner's president, petitioner manufactures animal nutritional products. Petitioner has continuously used since 1985 the mark FARRIER'S FORMULA to identify nutritional supplements used in the equine industry. Petitioner typically sells about 100,000 pounds of this product each month, and annual sales generally exceed $1 million. The product is advertised in magazines, trade journals and at trade shows. Petitioner's

application to register its mark for "nutritional supplements for animals" has been refused registration pursuant to Section 2(d) on the basis of respondent's registration.

Our determination under Section 2(d) is based on an analysis of all of the probative factors 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.

We first turn our attention to the goods. Petitioner's nutritional supplements for animals and respondent's nutritional additives for livestock feed are, for purposes of our legal analysis, essentially identical. In point of fact, both products are intended specifically to improve the health of equine hoofs. The goods would appear to travel in the identical channels of trade to the same classes of purchasers. When marks are applied to identical goods, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed Cir. 1992).

With respect to the marks, we find that FARRIER'S FORMULA and FARRIER'S CHOICE, when applied to essentially identical goods, engender similar overall commercial impressions. Both marks begin with the same term "Farrier's," followed by terms which, when considered in the context of the goods, convey somewhat similar meanings. That is to say, both marks convey the idea that the nutritional additives or supplements consist of the formulation of choice among farriers (i.e., blacksmiths) or the trade. The connotation is that the product is the one preferred or used by farriers.

Petitioner contends that its mark is "well known" and "strong" and, indeed, petitioner has enjoyed success with the products sold under the mark FARRIER'S FORMULA. Further, the record is devoid of evidence of any third-party uses or registrations of similar marks for animal nutritional products. Although we are willing to accept the claim that its mark is well known and strong in the trade (a claim which is not disputed by respondent), we do not accord, however, the status of "famous mark" to the mark FARRIER'S FORMULA. Cf.: Kenner Parker Toys v. Rose Art Industries, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992).

Petitioner has introduced evidence of actual confusion. Ms. Gravlee testified regarding misdirected telephone calls,

some of which were documented in petitioner's business records (ex. nos. 61-63). Ms. Gravlee has handled some misdirected calls herself, indicating that "some of the customers are somewhat angry because they can't understand the fact that there are two products and they have such similar names." (dep., p. 35) Ms. Gravlee also testified that "distributors tell us that they can sell the Farrier's Choice easier than they can sell the Farrier's Formula because it is a cheaper product and people don't really know the difference in Farrier's Choice and Farrier's Formula because of the similarities in the name." (dep., p. 35) Further, there is a misdirected letter (ex. no. 64) and an e-mail message (ex. no. 65) wherein the writer asked "[i]s Farrier's Choice the same as Farrier's Formula?"

The applicable test here is likelihood of confusion, not actual confusion, and, as often stated, it is unnecessary to show actual confusion in establishing likelihood of confusion. See, e.g., Weiss Associates Inc. v. HRL Associates Inc., 902 F.2d 1546, 1549, 14 USPQ2d 1840, 1842-3 (Fed. Cir. 1990). Nonetheless, the evidence suggests that actual confusion has occurred in the marketplace, thereby buttressing our finding of a likelihood of confusion.

Lastly, petitioner has questioned the good faith adoption by respondent of its mark. The record reveals that

John Claudon is a former distributor of petitioner's FARRIER'S FORMULA brand products. Ms. Gravlee testified that this business relationship was terminated due to problems in collecting payment from Mr. Claudon, with the last sales to Mr. Claudon occurring in September 1993. Mr. Claudon went on to join with another manufacturer, respondent, in distributing nutritional supplements for animals under the involved mark FARRIER'S CHOICE. The date of first use set forth in the involved registration is November 2, 1993.

Although respondent's alleged first use follows closely on the heels of the events involving Mr. Claudon, the record falls short in establishing bad faith adoption by respondent. That is to say, there is nothing in the record to show specifically what respondent itself knew when the involved mark was adopted.

In view of the above, we conclude that purchasers familiar with petitioner's animal nutritional products sold under the mark FARRIER'S FORMULA would be likely to believe, upon encountering respondent's mark FARRIER'S CHOICE for nutritional additives for livestock feed, that the goods originated with or were somehow associated with or sponsored by the same entity.

Decision: The petition for cancellation is granted and Registration No. 1,859,439 will be canceled in due course.

R. L. Simms

R. F. Cissel

T. J. Quinn
Administrative Trademark
Judges, Trademark Trial
and Appeal Board