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GDH/gdh

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re *Nutri-Ject Systems, Inc.*

Serial No. 75/712,360

James C. Nemmers, Esq. and Douglas J. Stilwell, Esq. for Nutri-Ject Systems, Inc.

*Brett M. Tolpin, Trademark Examining Attorney, Law Office 107
(Thomas Lamone, Managing Attorney).*

Before *Seeherman, Hohein and Holtzman*, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Nutri-Ject Systems, Inc. has filed an application to



register the mark "NUTRI JECT" and design, as shown below,

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for "environmental remediation services, namely, soil, waste and/or water treatment services."¹

Registration has been 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 its services, so resembles the mark "NUTRI-JECT," which is registered for "liquid nutrients for trees sold as a component of a hand-operated injection device,"² as to be likely to cause confusion, mistake or deception.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We reverse the refusal to register.

The determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (CCPA 1973). However, as indicated in Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976), in any likelihood of

¹ Ser. No. 75/712,360, filed on June 24, 1999, which alleges dates of first use anywhere and in commerce of April 1985.

² Reg. No. 1,773,328, issued on May 25, 1993, which sets forth a date of first use of May 1, 1992 and a date of first use in commerce of May 29, 1992; combined affidavit §§8 and 15.

confusion analysis, two key considerations are the similarity of the goods and/or services and the similarity of the marks.³

Turning first to consideration of the respective marks, we concur with the Examining Attorney that the literal portions thereof, "NUTRI JECT" and "NUTRI-JECT," are identical in sound and, given the fact that registrant's mark is in typed form and, thus, the display thereof could include the same stylized lettering as utilized by applicant in its mark, are substantially identical in appearance. See Phillips Petroleum Co. v. C. J. Webb, Inc. 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971) [a mark registered in typed format is not limited to the depiction thereof in any special form]. Nevertheless, as applicant contends, due to the presence of the corn plant design in its mark and the nature of the environmental remediation services with which such mark is used, the connotation suggested by the "NUTRI JECT" portion of its mark is neither the same as nor substantially similar to that of registrant's "NUTRI-JECT" mark, which as used in connection with "liquid nutrients for trees sold as a component of a hand-operated injection device," plainly suggests nutrient injection. As a consequence thereof,

³ The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods [and/or services] and differences in the marks."

there is a difference in the respective marks in their overall commercial impressions.

Turning the focus of our inquiry to the similarities and dissimilarities in the respective services and goods, it is applicant's position that such services and goods "are distinct in character, in market, and in scale" and that "all of these distinctions are inherent in the identifications" of the services and goods. Registrant's goods, applicant insists, are narrowly identified as "liquid nutrients for trees sold as a component of a hand-operated injection device," whereas the services rendered by applicant are specifically recited as "environmental remediation services, namely, soil, waste and/or water treatment services." According to applicant (*italics in original*):

Environmental remediation services are provided by scientists, engineers, technicians, laborers, and equipment operators. The term environmental remediation is applied to services that are provided to remediate (clean, restore, improve) specific sites or samples from the environment. Municipal and industrial treatment facilities exist to remediate or clean wastewater for release into the environment or to remediate or clean other sources for human use and consumption. These remediation processes all produce end products (cleaned soil and water) and by-products (useful organic matter, harmful toxins, liquids, gasses, and solids). It is common in the commercial world to refer to the direct provision of these services and the support of these services (treatment

plant sludge handling, soil disposal, waste steam management) as remediation services. It is not common usage in the commercial world to refer to mowing your yard, tilling your garden, watering your plants, raking your leaves, filtering your drinking water, flushing your toilet, or *hand applying nutrients to trees* as "environmental remediation."

Therefore, it is submitted that Applicant's remediation services and the registrant's tree nutrients for hand application are wholly diverse. In light of the dissimilarities described herein, and in light of the fact that the prior registration contains a very narrow description of goods not entitled to an expansive reading, it is submitted that the diverse goods and services at issue ... are directed to diverse consumers, not likely to [be] encountered by the same consumers, not likely to be offered through the same channels of trade, and certainly not *likely* to be confused with one another as to sources.

Applicant's advertising literature and the excerpt from its website, which are of record, confirm the distinct contrasts in its services as compared to registrant's goods. Such promotional matter indicates among other things that applicant "is the largest biosolids contracting firm in the upper Midwest"; that applicant "specialize[s] in removal and land application of solids from wastewater and water treatment facilities"; that applicant "encourages the recycling of biosolids because of it's [sic] rich nutrient value on agricultural land"; that applicant "provide[s] ... clients in

the best methods available for managing biosolids and cost-effective strategies for the use of biosolids"; that applicant's services under its subject mark include dredging, digester cleaning, land application of biosolids and water plant residual sludges (including "[s]ubsurface injection, surface application, umbilical cord application, and dry cake spreading of biosolids / sludges / residuals"), and transportation with semi-tanker trailer units of liquid biosolids; that applicant has "applicators capable of applying up to 500,000 gallons of liquid biosolids per day or 300-500 wet tons of dry biosolids per day" and that applicant's "applicators are mounted on track vehicles and floater type vehicles."

According to applicant, the sole "similarity identified and relied upon by the examining attorney is that, at a most broad level of generality, the registrant's goods and Applicant's services are both used to provide nutrients to plants. Applicant contends, however, that merely because the goods and services at issue find use in the same broad field is not sufficient to demonstrate that a likelihood of confusion exists. Instead, applicant asserts that "[b]road groupings and generalized categories fail to give proper recognition to the different levels of consumer sophistication within such broad categories."

The Examining Attorney, however, urges that the record contains "evidence that effectively illustrates that registrant's goods and applicant's services are very closely related" and that confusion as to their origin or affiliation consequently is likely. In particular, the Examining Attorney relies upon various excerpts from a search of the "NEXIS" database, the most relevant of which are the following (**emphasis added**):

"Fueling the opposition in Milford was a recent plan by Republican Senator David K. Wheeler, who lives there, to spread paper mill and sewage **sludge** on his 14-acre Christmas **tree farm**.

....
[P]ressure has been building for months on the agency to better regulate **sludge**. It is normally landfilled or burned, but since it **contains organic nutrients** there has been an interest nationwide in using **sludge as fertilizer**.

....
[S]hort paper fibers have been used successfully in other states and is [sic] the same sort of **sludge** that Wheeler wants to spread on his Milford Christmas **tree farm**." -- Boston Globe, March 22, 1998;

"Sewage **sludge** is the de-watered muck remaining after wastewater has been separated, treated to Clean Water Act standards, and discharged. At King County's Biosolids Program, using **sludge for fertilizer** is the peak of environmental correctness. Officials tout the benefits, and the popularity, of recycling the sewage stream's minerals and **nutrients** to enhance soil structure and boost plant and **tree** growth. 'Farmers are beating on our doors

for it,' says Biosolids Program manager Peter Machno. 'The demand is much greater than the supply.'

....

Machno says King County began [sic] **fertilizing forests with sludge** in 1972, and started supplying Eastern Washington **farms** with it in the late 1980s." -- Seattle Weekly, August 27, 1997; and

"Most **sludge** is used for livestock feed crops, turf, seed crops, **tree farms** and landscaping. The EPA requires that **biosolids** be applied at a rate that matches plant uptake, so that nitrogen and metals do not build up in the soil." -- Sacramento Bee, September 11, 1995.

Such evidence, the Examining Attorney argues, "establishes that it is common practice for farmers and tree harvesters to use sludge or biosolids instead of commercial fertilizer to lower the cost of promoting crop and tree growth." Because "[b]oth biosolids, a product from sludge, as well as commercial fertilizer, are nutrient additives to soil" and thus, among other things, "are used to promote tree growth for tree harvesting," the Examining Attorney urges that applicant's services and registrant's goods are closely related in a commercially significant sense. Furthermore, the Examining Attorney insists that "[t]he record strongly supports that, in many facets of the services rendered, the applicant and the registrant are either competitors or operating within the natural zone of business expansion of the other" inasmuch as "[i]t is reasonable to presume that a registrant that sells

liquid nutrients for trees as a component of a hand-operated injection device could very easily expand into the business of applying those liquid nutrients for customers." Thus, according to the Examining Attorney, "[i]n either case consumer confusion as to the origin of the applicants [sic] services or registrants [sic] goods is likely."

With respect to applicant's assertion that customers for the respective services and goods "would not use a provider of environmental remediation services to hand apply nutrients to trees," the Examining Attorney "suggests that the applicant is capitalizing on the goodwill accumulated by registrant" in that "[t]echnological progress has enabled the applicant to use machines to do what has historically been, and in many parts of the country still is[,] done manually." The Examining Attorney consequently insists that:

It's simply a question of scale. Nothing in the registrant's identification of goods states that the liquid nutrient sold is not used for commercial or large scale use. Farmers, tree harvesters, cities, counties and other consumers of applicants [sic] services and registrant's goods may choose manual or mechanical means of enriching soil. Furthermore, whether mechanically or manually operated, the consumer ultimately wants liquid nutrients to treat soil in order to produce better trees, crops and plants.

Finally, as to applicant's contention that customers for its environmental remediation services are careful and

sophisticated purchasers, the Examining Attorney indicates that he "agrees that some of applicant's customers *should* be sophisticated, because of the potential health, safety and environmental liability associated with exceeding certain metal levels or other hazardous waste within the sludge." However, the Examining Attorney observes that "[n]either the applicant or registrant has limited the scope of who purchases their [services or] products within their identification[s]" and that "[t]he same entities that the applicant alleges purchases [sic] its services can, and likely do, purchase registrants [sic] goods." Moreover, the Examining Attorney points out that even though purchasers may be knowledgeable or sophisticated in a particular field does not necessarily mean that they are knowledgeable or discriminating in the field of trademarks or immune from source confusion.

We concur with applicant, however, that on this record confusion as to the source or sponsorship of the respective services and goods has not been shown to be likely to occur. In particular, we agree with applicant that, inherent in the respective identifications of services and goods, applicant's "environmental remediation services, namely, soil, waste and/or water treatment services" are distinctly different in character, scale and marketing from registrant's "liquid nutrients for trees sold as a component of a hand-operated injection device."

By their very nature, applicant's services involve, inter alia, large-scale collection, transport and application of treated environmental waste products, such as liquefied sludge, to extensive acreage of agricultural land and forest preserves through the use of heavy duty machinery, including semi-tanker trailer units and track-mounted applicator vehicles, while registrant's goods, being liquid tree nutrients sold as a component of a hand-operated injection device, necessarily are utilized for smaller scale individualized applications typically involving, for instance, nurseries, landscaping companies or even homeowners. Admittedly, both applicant's services and registrant's goods provide nutrients for tree growing and thus, for example, could be sold to commercial Christmas tree growers and managers of forests. However, it seems unlikely that a user needing the enormous volume of nutrients supplied by applicant's services would also have a significant need for the liquid nutrients supplied by registrant through the sale of its hand-operated injection device and vice versa.

Equally important, there simply is no evidence to support the Examining Attorney's speculation that facets of the respective services and goods are so similar that applicant and registrant "are either competitors or operating within the natural zone of business expansion of the other." Applicant's environmental remediation services are not just fertilization

services or the supplying of nutrients to farmers and tree growers. Instead, given the sheer volume of waste materials involved and the need to contract for sources of nutrients from producers of treated biosolids, such as municipal sewage plants, and to arrange for the disposal of those products in an environmentally acceptable manner, it appears unreasonable to assume, as argued by the Examining Attorney, "that a registrant that sells *liquid nutrients* for trees as a component of a hand-operated injection device could very easily expand into the business of applying those liquid nutrients for customers," especially on the large scale necessarily rendered in the provision of environmental remediation services.

As a final consideration, it is unquestionably the case that, given the nature of environmental remediation services, purchasers thereof are highly knowledgeable and sophisticated, and would exercise considerable care and discrimination in their selection of nutrient suppliers. "Contracting for the operation of heavy machinery for the removal of biosolids, or for the large scale application of biosolids and the transportation of same along with analytical reports, evaluation and design of storage facilities, and other services" which constitute its environmental remediation services, "necessarily demands contact," as applicant stresses in its brief, "with trained professionals and does not involve

the purchase of items from a catalog or off a shelf." Thus, unlike registrant's liquid tree nutrients sold as a component of a hand-operated injection device, environmental remediation services such as those provided by applicant are likely, as applicant persuasively argues, to be "provided on a contract basis under terms and conditions defined by the particular application at hand." The result thereof, as applicant emphasizes, is that "customers who procure the provision of such services do so through a technique that clearly communicates the source of goods and services to the consumer." Although some overlap nonetheless could occur among customers, such as Christmas tree farmers, for applicant's services and registrant's goods, our principal reviewing court has cautioned that:

We are not concerned with mere theoretical possibilities of confusion, deception, or mistake or with de minimis situations but with the practicalities of the commercial world, with which the trademark laws deal.

Electronic Design & Sales, Inc. v. Electronic Data Systems Corp., 954 F.2d 713, 21 USPQ2d 1388, 1391 (Fed. Cir. 1992), quoting from Witco Chemical Co., Inc. v. Whitfield Chemical Co., Inc., 418 F.2d 1403, 164 USPQ 43, 44-45 (CCPA 1969).

Accordingly, we conclude on this record that, in light of the difference in the commercial impression of the respective marks, the differences in the character, scale and marketing of

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the services and goods at issue, and the sophistication of the purchasers and potential customers therefor, confusion as to origin or affiliation is not likely to occur from the contemporaneous use of the mark "NUTRI JECT" and design by applicant for "environmental remediation services, namely, soil, waste and/or water treatment services" and the mark "NUTRI-JECT" by registrant for "liquid nutrients for trees sold as a component of a hand-operated injection device."

Decision: The refusal under Section 2(d) is reversed.