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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re The Tetra Corp.

Serial No. 76617366

Alan E. Schiavelli of Antonelli, Terry, Stout & Kraus, LLP for The Tetra Corp.

Ronald McMorrow, Trademark Examining Attorney, Law Office 105 (Thomas G. Howell, Managing Attorney).

Before Hohein, Grendel and Kuhlke, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

The Tetra Corp. has filed an application to register the mark "PsoriaStat" in standard character form on the Principal Register for an "anti-fungal solution for medical use, namely, anti-fungal solution for treatment of fungal conditions associated with psoriasis" in International Class 5.[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 goods, so resembles the

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[1] Ser. No. 7617366, filed on October 22, 2004, which is based on an allegation of a bona fide intention to use the mark in commerce.

mark "PsoriastatPE2," which is registered in the special form shown below

PsoriastatPE$_2$

on the Principal Register for a "natural pharmaceutical preparation for the treatment of psoriasis and eczema" in International Class 5,[2] as to be likely to cause confusion, or to cause mistake, or to deceive.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

Our 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 confusion analysis, two key considerations are the similarity or dissimilarity in the goods or services at issue and the similarity or dissimilarity of the respective marks in their entireties.[3]

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[2] Reg. No. 2,689,045, issued on February 18, 2003, which sets forth a date of first use of the mark anywhere and in commerce of October 2000.

[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 differences in the marks." 192 USPQ at 29.

Applicant contends in its brief that confusion is not likely, arguing that:

> In comparing the respective marks for similarities in appearance, sound, contention [sic; connotation] and commercial impression, the Examining Attorney has alleged Appellant to have merely deleted the PE_2 of the Registrant's mark. However, in comparing the marks, one must compare the marks as a whole. The "PE_2" portion of the registrant's mark is [a] very unique part of the mark and it[s] use, in combination with the word Psoriastat, creates a separate commercial impression from Appellant's mark. Moreover, Appellant's mark is in stylized form with a capital "S" in the middle of the mark. Registrant's mark has a corresponding "s" in lower case form. Because of these differences, the respective marks, as a whole, create a separate commercial impression.
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> Comparing the respective goods, the registered mark is used for a "natural pharmaceutical preparation for the treatment of psoriasis and eczema." Appellant's mark, as more specifically indicated ... , is for treatment of fungal conditions that may be associated with psoriasis, not for the treatment of psoriasis itself. Accordingly, confusion is unlikely.

We agree with the Examining Attorney, however, that there is a likelihood of confusion. As persuasively pointed out in his brief, the Examining Attorney observes that:

> The applicant's mark, *PsoriaStat* in stylized form, is highly similar to the registrant's mark, *PsoriastatPE2* in stylized form. The applicant has merely deleted the PE2 portion of the registrant's mark. .... Applicant's mark does not create a distinct commercial impression because it contains the same common wording as registrant's mark, and there is no other wording to distinguish it from registrant's mark. Applicant has argued that the capitalization of the letter S in its mark gives it a separate and distinct commercial impression when compared to the [r]egistrant's mark in which the [letter] s appears in lower case form. However, this

> minimal difference in stylization clearly does not obviate the similarity between the marks. ....
>
> The marks are compared in their entireties under a Section 2(d) analysis. Nevertheless, one feature of a mark may be recognized as more significant in creating a commercial impression. Greater weight is given to that dominant feature in determining whether there is a likelihood of confusion. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985); TMEP §1207.01(b)(viii). The registrant's mark is comprised of the coined term *Psoriastat* which suggests a product that will treat psoriasis quickly combined with the suggestive term PE2 which indicates that the product will be effective in treating both psoriasis and eczema. Because it is the foremost term Psoriastat is clearly the dominant portion of the registrant's mark. Furthermore, the applicant's mark is comprised entirely of the dominant portion of the registrant's mark, thus rendering the marks similar in appearance, sound, connotation and overall commercial impression.

Moreover, as the Examining Attorney also properly notes in his brief, "courts and scholarly authorities have long recognized a 'doctrine of greater care' in pharmaceutical cases," citing Schering Corp. v. Alza Corp., 207 USPQ 504, 509 (TTAB 1980), for the proposition that, "[b]ecause of the potential danger associated with mistaking one pharmaceutical product for another, courts have allowed a lower threshold of proof of confusing similarity for drugs and medicinal preparations." Thus, not only is it a general proposition that when marks would appear in connection with the same or virtually identical goods, the degree of similarity between the marks necessary to support a conclusion of a likelihood of confusion declines, see, e.g., Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d

874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992), *cert. denied*, 506 U.S. 1034 (1994), but in cases involving a determination of whether there is a likelihood of confusion between marks used in connection with pharmaceutical or other medicinal preparations, Professor McCarthy has observed that (footnotes omitted):

> The tests of confusing similarity are modified when the goods involved are medicinal products. Confusion of source or product between medicinal products may produce physically harmful results to purchasers and greater protection is required than in the ordinary case. If the goods involved are medicinal products each with different effects and designed for even subtly different uses, confusion among the products caused by similar marks could have disastrous effects. For these reasons, it is proper to require a lesser quantum of proof of confusing similarity for drugs and medicinal preparations. ....

3 J. McCarthy, McCarthy on Trademarks & Unfair Competition (4th ed. 2006) at §23:32. See also, Glenwood Laboratories, Inc. v. American Home Products Corp., 455 F.2d 1384, 173 USPQ 19, 21 (CCPA 1972); and American Home Products Corp. v. USV Pharmaceutical Corp., 190 USPQ 357, 360 (TTAB 1976).

We find, in view of the above, that when considered in their entireties, applicant's "PsoriaStat" mark is substantially identical to registrant's "PsoriastatPE2" mark in sound, appearance, connotation and overall commercial impression, inasmuch as the first and dominant feature of registrant's mark is the term "Psoriastat," which is the same as applicant's mark except for the exceedingly minor difference of the absence of the second letter "s" in registrant's mark being capitalized. Both marks clearly suggest a fast acting medication for use in

treatment of psoriasis or fungal conditions associated therewith. Consequently, if such marks were to be used in connection with related medicinal products, confusion as to the source or sponsorship thereof would be likely.

Turning, then, to the respective goods, it is well settled that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978); and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

In this case, the Examining Attorney argues that "[t]he relatedness of the goods is evidenced by the respective identifications of goods." We concur that it is self-evident that applicant's "anti-fungal solution for medical use, namely, anti-fungal solution for treatment of fungal conditions associated with psoriasis" is closely related to registrant's "natural pharmaceutical preparation for the treatment of psoriasis and eczema." As the Examining Attorney properly observes, the fact that applicant's goods are identified as being used for treatment of fungal conditions that may be associated with psoriasis rather than for the treatment of psoriasis itself,

as is the case with registrant's goods, is not a meaningful difference because, inasmuch as "the respective goods are used to treat psoriasis or conditions associated with the disease, they are also likely to be applied by the same class of consumer sequentially or perhaps even simultaneously." Clearly, the same patient with psoriasis could receive a recommendation from his or her physician to use registrant's "PsoriastatPE2" natural pharmaceutical preparation to treat the disease itself while also being medically advised to use applicant's "PsoriaStat" anti-fungal solution for treatment of any fungal conditions associated with such disease.

We accordingly conclude that patients, as well as physicians, who are familiar or acquainted with registrant's "PsoriastatPE2" mark for its "natural pharmaceutical preparation for the treatment of psoriasis and eczema" would be likely to believe, upon encountering applicant's substantially identical "PsoriaStat" mark for its "anti-fungal solution for medical use, namely, anti-fungal solution for treatment of fungal conditions associated with psoriasis," that such closely related medicinal products emanate from, or are sponsored by or associated with, the same source. In particular, even if the slight differences between the respective marks were to be noticed, both patients and physicians would be likely to view the corresponding goods as a line of medical preparations, from the same source, for use in treating psoriasis and fungal conditions associated therewith.

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