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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nexense, Ltd.

Serial No. 78465875

Kenneth W. Farak of Renner, Otto, Boisselle & Sklar for
Nexense, Ltd.

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110 (Chris A. F. Pedersen, Managing Attorney)

Before Drost, Cataldo and Bergsman,
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Nexense, Ltd. to register
on the Principal Register the mark NEXAVER in standard
character form for the following goods, as amended:
"Medical devices, namely respiration sensors, pulse
sensors, blood pressure sensors" in International Class 10.¹

¹ Application Serial No. 78465875 was filed on August 11, 2004,
based on applicant's assertion of its bona fide intent to use the
mark in commerce in connection with the goods, and claiming
priority under Section 44(d) of the Trademark Act. Applicant
subsequently perfected a Section 44(e) basis for application by
submitting a copy of its foreign registration.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its goods, so resembles the mark NEXAVAR, previously registered on the Principal Register in typed or standard character form for "pharmaceutical preparations for the treatment of cardiovascular diseases, central nervous system diseases, cancer, respiratory and infectious diseases, diagnostic reagents adapted for medical use" in International Class 5,² as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal. In addition, applicant filed a reply brief.

Likelihood of Confusion

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. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). See also *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of

² Registration No. 2745627 issued on August 5, 2003.

confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We first consider whether applicant's mark and registrant's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In this case, applicant's mark, NEXAVER, is nearly identical in appearance and sound to the registered mark NEXAVAR. The marks differ by a single vowel that forms the penultimate letter of each mark. Such difference does little to diminish the otherwise identical appearance of the marks. As to sound, the substitution of the letter "e" in applicant's mark for the letter "a" in that of registrant does not necessarily mean that the marks will be pronounced differently. It is well settled that there is no correct pronunciation of a trademark. See *In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969) and *Interlego AG v.*

Abrams/Gentile Entertainment Inc., 63 USPQ2d 1862 (TTAB 2002). See also *In re Microsoft Corp.*, 68 USPQ2d 1195 (TTAB 2003) (it is not possible to control how consumers will vocalize marks). Particularly in cases such as this in which neither mark is a recognized term having an accepted pronunciation, it is possible that consumers will pronounce applicant's mark in an identical manner to that of registrant's mark. In view of the nearly identical nature of NEXAVER and NEXAVAR in terms of appearance and sound, the marks convey highly similar commercial impressions.

We are not persuaded by applicant's argument that because its NEXAVER mark "is the combination of Applicant's name and the word 'saver' as in life saver" (brief, p. 7) the mark when viewed in relation to its goods "creates the connotation that Applicant's sensors save lives" (*Id*). Applicant simply provides no evidence that consumers encountering its mark on its identified goods would derive either that or any other connotation therefor. Neither does applicant provide any evidence to support its suggestion that "NEX" in registrant's NEXAVAR mark suggests the word "next" or that registrant's goods connote "a 'next

generation' drug for treating diseases" (brief, p. 8).³ In short, applicant's assertions regarding the connotations of its mark and that of registrant are speculative and unsupported by the record in this case. Due to the nearly identical nature of the NEXAVER and NEXAVAR marks, we find that to the extent the marks convey a particular connotation, those connotations are likely to be highly similar.

Finally, there is no evidence of record that NEXAVAR is anything but a strong, distinctive mark that is entitled to a broad scope of protection.

Thus, despite the minor difference in spelling, the marks NEXAVER and NEXAVAR are nearly identical in appearance, sound, connotation and commercial impression. Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

The Goods

Turning now to our consideration of the recited goods, we must determine whether consumers are likely to mistakenly believe that they emanate from a common source. It is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of

³ We note, for instance, that neither mark appears to have an accepted definition or meaning.

trade, to support a holding of likelihood of confusion. It is sufficient instead that the respective goods are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. See *In re International Telephone & Telegraph Corp.*, 197 USPQ 910, 911 (TTAB 1978).

In this case, applicant's goods include sensors used to measure respiration, pulse and blood pressure. Registrant's goods include pharmaceutical preparations used, *inter alia*, to treat cardiovascular disease and respiratory disease. "Cardiovascular" is defined as "of, pertaining to, or affecting the heart and blood vessels."⁴ "Respiratory" is defined as "pertaining to or serving for respiration."⁵ We hereby take judicial notice of these definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co.*, 213 USPQ 594, 596 (TTAB 1982); *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983). Pulse and blood pressure are, of course, cardiovascular functions. Thus, as identified both applicant's and

⁴ Random House Unabridged Dictionary, © Random House, Inc. 2006.

⁵ *Id.*

registrant's goods are used in the fields of cardiovascular and respiratory care. Specifically, applicant's sensors may be used to measure the same respiratory, pulse and blood pressure values that are affected by registrant's cardiovascular and respiratory medicines. As such, applicant's goods as identified are related to those of registrant.

In addition, the examining attorney has made of record a number of use-based third-party registrations which show that various entities have adopted a single mark for both pharmaceutical preparations used to treat various conditions as well as medical devices used to address the same conditions. *See, for example:*

Registration No. 2639224 for, *inter alia*, pharmaceutical preparations and formulations for the treatment of respiratory disorders and medical apparatus and devices, namely, finger control adapter for medical nebulizers, nebulizer sets comprised of a nebulizer, a tee, a mouthpiece, a flexible tube, and a two-meter connection tube sold as a unit for medical use;

Registration No. 1902350 for, pharmaceutical preparations, namely, inhalant decongestants and electric vaporizers for the inhalation of medicaments, and electyrically [sic] activated heating pads for medical purposes;

Registration No. 2505787 for, pharmaceutical preparations, namely, respiratory medications and insulin and medical and healthcare supplies, namely, respiratory medication delivery devices, glucometers, lancets, blood hemoglobin testing

supplied, namely blood hemoglobin testing kits;
and

Registration No. 2843548 for, pharmaceutical preparations, namely, analgesics, hormones, psychotropics, anti-infectives, anti-inflammatory, and anti-cancer agents for use in the treatment of disease via application to the lungs and medical apparatus, namely, electronically-based devices used to deliver drugs and biologics to the lungs.

Third-party registrations which individually cover a number of different items and which are based on use in commerce serve to suggest that the listed goods and/or services are of a type which may emanate from a single source. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). In this case, the evidence of record supports a finding that the same marks are used to identify both pharmaceutical preparations and medical devices in numerous fields.

The identification of applicant's goods as well as those of registrant and the above evidence demonstrate the related nature of the goods at issue, and this *du Pont* factor also favors a finding of likelihood of confusion.

Channels of Trade

Furthermore, it is settled that in making our determination regarding the relatedness of the parties' goods, we must look to the goods as identified in the involved application and cited registration. See *Octocom*

Systems, Inc. v. Houston Computers Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.") See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.") In this case, there are no restrictions in either applicant's or registrant's identification of goods as to the channels of trade in which the goods may be encountered, or type or class of customer to which the services are marketed. Accordingly, both applicant's and registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including consumers of each others' goods. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). In addition, the examining attorney has introduced evidence in the form of "screen shots" from Internet web sites suggesting that both pharmaceutical

preparations and medical devices move in the same channels of trade and are available from the same retail outlets.

Conditions of Sale

Another *du Pont* factor discussed by applicant and the examining attorney is that of the conditions of sale. Applicant asserts that both its goods and those of registrant "are administered under highly controlled conditions" (brief, p. 10) by physicians and pharmacists, who are careful and sophisticated professionals. However, the marks NEXAVER and NEXAVAR are so similar that even careful purchasers are likely to assume that the marks identify goods emanating from a single source. Even sophisticated purchasers are not necessarily knowledgeable in the field of trademarks or immune from source confusion. See *In re Decombe*, 9 USPQ2d 1812, 1814-1815 (TTAB 1988).

Finally, applicant argues that the failure of the owner of the cited registration, a European company, to oppose registration of applicant's foreign registration, "is a strong indicator that confusion is not likely" (brief, p. 11). However, applicant cites to no authority, nor are we aware of any, to support its contention that the actions of the owner of a registration cited as a bar to registration under Section 2(d) with regard to an applicant's foreign registration has any bearing on our

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determination of likelihood of confusion in an ex parte appeal.

In light of the foregoing, and resolving any doubt as we must in favor of the prior registrant, we find that a likelihood of confusion exists between the applied-for NEXAVER mark and the NEXAVAR mark in the cited registration. See *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988).

Decision: The refusal of registration is affirmed.