

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: November 14, 2007

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Tampa Bay Nutraceutical Company, LLC

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Serial No. 78655765

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Garrett M. Weber of Lindquist & Vennum PLLP for Tampa Bay Nutraceutical Company, LLC.

Angela Micheli, Trademark Examining Attorney, Law Office 101 (Ronald R. Sussman, Managing Attorney).

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Before Quinn, Rogers and Cataldo,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Tampa Bay Nutraceutical Company LLC to register the mark NUTRACAL in standard character form on the Principal Register for "nutritional supplements" in International Class 5.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that

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<sup>1</sup> Application Serial No. 78655765 was filed on June 22, 2005, based upon applicant's assertion of its bona fide intent to use the mark in commerce.

applicant's mark, as intended to be used on or in connection with its identified goods, so resembles the mark NUTRI-CAL, previously registered on the Principal Register in typed or standard character form for "dietary supplements for veterinary use" in International Class 31,<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed briefs addressing the issue on appeal.

#### **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 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

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<sup>2</sup> Registration No. 0961908 issued on June 26, 1973. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

1976). See also *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We first consider the similarity of the marks. In this case, applicant's mark, NUTRACAL, is nearly identical to the cited mark, NUTRI-CAL, in appearance and sound. Both consist of three syllables, respectively, "NU-TRA-CAL" and "NU-TRI-CAL." The only differences between the marks is the substitution of the letter "A" in applicant's mark for the corresponding letter "I" in the marks' middle syllable and the absence from applicant's mark of the hyphen before the last syllable thereof. The difference of a single vowel in the middle of the marks and the absence of a hyphen from applicant's mark do little to distinguish applicant's mark from that of registrant in terms of appearance or sound. The marks thus are nearly identical in appearance and could easily be articulated the same by many speakers. Both marks appear to be coined terms with root elements connoting nutrition and calories and, when used on or in conjunction with the identified goods, the composites would both suggest products that provide nutritional enhancement of calories being ingested or expended. There is no evidence in the record that either mark has any recognized meaning. As a result, the marks do

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not only look and sound the same, but also have highly similar connotations and convey highly similar overall commercial impressions.

Applicant argues that NUTRI-CAL is a weak mark entitled to a narrow scope of protection. In support of its position, applicant submitted evidence from a private database of three third-party registrations for "NUTRA"-formative marks. These marks include NUTRACLUB for "herbal supplements" (Reg. No. 2622883); NUTRACHEW for "nutritional supplements for pets" (Reg. No. 2095158); and NUTRACELL for "oral dietary supplements" (Reg. No. 2080743). In addition, applicant notes that in the first Office action, the previous examining attorney also cited Reg. No. 0836366 for the mark NUTRI-CAL for "low calorie concentrated vitamin, mineral, and protein food for use as a weight-reducing diet sold to distributors for resale through door-to-door or neighborhood group sales campaigns" and prior pending application Serial No. 76549611 (which we note has subsequently registered) for the mark NATRACAL for "pharmaceutical products and dietetic substances adapted for medical use, namely, dietary food supplements including protein powders made from milk, milk products, and milk fractions" and "milk, powdered milk, cheeses, and butter."

Applicant's arguments and evidence are not persuasive. First, we note that submitting copies of third-party registrations obtained from private search companies is not sufficient to make them of record in a Board *ex parte* proceeding. See *In re Dos Padres Inc.*, 49 USPQ2d 1860, 1861 n.2 (TTAB 1998); and *In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1560 n.6 (TTAB 1996). Moreover, even if considered the proffered registrations are not evidence of use of the marks shown therein. Thus, they are not proof that consumers are familiar with such marks so as to be accustomed to the existence of the same or similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). We note in addition that while the mark NUTRI-CAL in Reg. No. 0836366 is identical to the mark in the cited registration, the goods and their specified channels of trade are less similar than the goods recited in either the cited registration or the application at issue. In addition, none of the marks in the remaining registrations made of record by applicant are as similar to registrant's NUTRI-CAL mark as applicant's NUTRACAL mark. Thus, even if we were to find, based on applicant's evidence, that registrant's NUTRI-CAL mark is weak and

entitled to a narrow scope of protection, the scope is still broad enough to prevent the registration of applicant's NUTRACAL mark for related goods. See *In re Farah Manufacturing Co., Inc.*, 435 F.2d 594, 168 USPQ 277, 278 (CCPA 1971).

Finally, each case must be decided on its own merits, and previous decisions by examining attorneys are not binding on the Office or the Board. See *In re Sunmarks Inc.*, 32 USPQ2d 1470 (TTAB 1994); and *In re National Novice Hockey League, Inc.*, 222 USPQ 638, 641 (TTAB 1984).

Thus, despite the slight difference between them, NUTRI-CAL and NUTRACAL, taken as a whole, are highly similar in appearance, sound, connotation and commercial impression. Accordingly, this *du Pont* factor favors a finding of likelihood of confusion.

The Goods and Their Channels of Trade

Turning next to the goods, applicant argues that there is no likelihood of confusion because its products are for human consumption and registrant's products are for pets. However, it is well settled that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than on the basis of what the record reveals the

goods to be. See *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991). Further, where the goods in an application or cited registration are broadly described, such that there are no restrictions as to trade channels and purchasers, it is presumed that the identification of goods encompasses not only all goods of the nature and type described therein, but that the identified goods are offered in all the normal channels of trade, and that they would be purchased by all the usual customers. See, e.g., *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

In this case, registrant's "dietary supplements..." as identified in the cited registration, are specifically "for veterinary use." However, because applicant's "nutritional supplements" are not limited to any particular type of use, we must assume that they encompass nutritional supplements suitable for use by humans and animals. Thus, for purposes of our likelihood of confusion analysis, the fields of use of applicant's goods are presumed to encompass those of registrant.

Furthermore, 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

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nutritional and dietary supplements intended for use by humans and animals. *See, for example:*

Registration No. 2685760 for food supplements for horses, veterinary use and humans;

Registration No. 2852648 for food/dietary supplement for human and veterinary use;

Registration No. 2846862 for vitamin and mineral supplements for human and veterinary use;

Registration No. 2808826 for food/dietary supplement for human and veterinary use;

Registration No. 3090417 for nutritional supplements for human and veterinary use;

and

Registration No. 3035331 for food and dietary supplement for human and veterinary use.

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 addition, the examining attorney submitted evidence from commercial Internet web sites suggesting that the same entities provide both applicant's and registrant's types of goods. The following samples are illustrative:

nutritional supplements for humans and pets  
([www.healthyplanetrx.com](http://www.healthyplanetrx.com));

dietary and nutritional supplements for humans and pets,  
(www.judyshealthcafe.com);

nutritional supplements for humans and pets,  
(www.kalahealth.com); and

nutritional supplements for humans and pets,  
(www.adampetsupplies.com).

In making our determination regarding the relatedness of the channels of trade in which parties' goods are encountered, we must again 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.") The goods as identified in the cited registration and involved application contain no restrictions as to their channels of

trade. 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 applicant's goods. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Based upon established law and the above evidence, we find that applicant's unrestricted identification of goods must be read to encompass the goods of registrant and both applicant's and registrant's goods presumptively move in the same channels of trade to overlapping classes of consumers. Accordingly, these *du Pont* factors also favor a finding of likelihood of confusion.

Neither applicant nor the examining attorney has discussed any of the remaining *du Pont* factors. We note, nonetheless, that none seems to require analysis, inasmuch as we have no evidence with respect to them.

In light of the foregoing, we conclude that consumers familiar with registrant's goods sold under its NUTRI-CAL mark would be likely to believe, upon encountering applicant's goods rendered under the mark, NUTRACAL, that the goods originate with or are somehow associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that

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doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

*Decision:* The refusal under Section 2(d) of the Act is affirmed.