

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: June 30, 2005
PTH

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Ultimate Nutrition, Inc.
v.
Absolute Nutrition, LLC

Opposition No. 91122634
to application Serial No. 75632217
filed on February 2, 1999

Frank J. Thompson of Ultimate Nutrition, Inc. for Ultimate
Nutrition, Inc.

Michael A. Painter of Isaacman, Kaufman & Painter for
Absolute Nutrition, LLC.

Before Hairston, Chapman and Grendel, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Applicant, Absolute Nutrition, LLC, seeks to register
the mark ABSOLUTE NUTRITION for "vitamins and dietary
supplements."¹

Ultimate Nutrition, Inc. opposed registration under
Section 2(d) of the Trademark Act on the ground that

¹ Application Serial No. 75632217 filed February 2, 1999,
alleging a bona fide intention to use the mark in commerce. The
word NUTRITION is disclaimed apart from the mark as shown.

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applicant's mark, if applied to applicant's goods, would so resemble opposer's previously used and registered mark ULTIMATE NUTRITION for "vitamins and nutritional food supplements,"² as to be likely to cause confusion.

Applicant, in its answer, admitted that opposer is the owner of the pleaded registration and that the registration is in force. Applicant denied the remaining allegations of the notice of opposition.

The record consists of the pleadings; the file of the involved application; the testimony deposition (with exhibits) of applicant's president Gregg Scully; and applicant's notice of reliance on third-party registrations of marks that contain the word "ULTIMATE." Opposer neither took testimony nor introduced any other evidence. Opposer and applicant filed briefs on the case. Applicant requested an oral hearing, but the request was subsequently withdrawn.

Because opposer did not take testimony or introduce any other evidence, we have no information about opposer.

Applicant took the testimony deposition of its president, Gregg Scully. Mr. Scully testified that applicant is in the business of formulating dietary

² Registration No. 1,541,169, issued May 30, 1989; Section 8 affidavit accepted; Section 15 affidavit received. Opposer did not properly make this registration of record in accordance with the provisions of Trademark Rule 2.122(d). However, in view of the admissions in applicant's answer, it was not necessary that opposer do so.

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supplements. The dietary supplements are manufactured by other companies to applicant's specifications and applicant then markets the dietary supplements to health food stores and mass merchandisers. Although an intent-to-use application, Mr. Sully testified that applicant first used the ABSOLUTE NUTRITION mark on October 18, 1998 and that the mark is used on labels applied to applicant's goods and in marketing materials. Applicant advertises its ABSOLUTE NUTRITION products in fitness magazines and the catalogs of health food retailers, and by way of point-of-purchase displays. Between 1998 and June 2004 applicant spent \$453,126 in advertising and promotional expenses, and during the same period, applicant's sales totaled \$2,980,702.

Mr. Scully testified that he was not aware of any instances of confusion.

As noted above, applicant admitted in its answer that opposer is the owner of pleaded Registration No. 1,151,169 for the mark ULTIMATE NUTRITION for vitamins and nutritional food supplements and that such registration is currently in force. Thus, priority is not in issue since the admissions

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establish the status and title of opposer's pleaded registration.³ See King Candy Co. v. Eunice King's Kitchen, Inc., 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Thus, the issue to be determined in this case is whether a likelihood of confusion exists. Our likelihood of confusion determination under Section 2(d) is based on an analysis of all the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (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 of the goods and the similarity of the marks.

Considering first the goods, applicant, at page 7 of its brief, "concedes that the goods identified in Opposer's Registration No. 1,541,169 for the mark ULTIMATE NUTRITION are, at the very least, highly related to the goods identified in the subject application." Not only are the goods highly related ("dietary food supplements" and "nutritional food supplements"), but they are identical in

³ A federal registration owned by a plaintiff will be deemed by the Board to be of record in an inter partes proceeding if the defendant's answer to the complaint contains admissions sufficient for the purpose. TBMP §704.03(b)(1).

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terms of "vitamins." Further, in the absence of any restrictions in opposer's registration and applicant's application, we must presume that opposer's and applicant's goods are sold in all of the normal channels of trade for goods of this type, e.g., health food stores; the pharmacy sections of mass merchandisers and supermarkets; and drug stores.

Next, we turn to a determination of what we find to be the key likelihood of confusion factor in this case, whether applicant's mark and opposer's mark, when considered in their entireties are similar or dissimilar in terms of sound, appearance, connotation, and commercial impression.

Opposer maintains that the marks are similar because each consists of a "two-word expression," and carries a superlative connotation. Also, opposer argues that the pronunciation and cadence of the marks is very similar. Opposer requests in its brief on the case that we judicially notice that "absolute" means "perfect in quality or nature; complete," and "ultimate" means "being last in a series, process or progression." The American Heritage Dictionary of the English Language (4th ed. 2000).⁴

⁴ We grant opposer's request. The Board may take judicial notice of dictionary definitions. See *University of Notre Dame du Lac v. J.C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

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Applicant, on the other hand, argues that the marks are dissimilar in sound, appearance, and connotation. With respect to connotation, in particular, applicant contends that the words "ultimate" and "absolute" are dissimilar in meaning. Further, applicant argues that marks containing the word ULTIMATE for dietary/nutritional supplements are weak marks, and therefore entitled to only a limited scope of protection. In this regard, applicant submitted copies of 22 third-party registrations of marks containing the word ULTIMATE for such goods. For example, ULTIMATE EXTRACT (EXTRACT disclaimed) for "dietary and nutritional supplements" (Registration No. 2,080,052); ULTIMATE NUTRIPLUS for "nutritional supplements" (Registration No. 2,136,011); ULTIMATE BALANCE for "nutritional and dietary supplements" (Registration No. 2,288,247); and ULTIMATE X-BURN for "dietary and nutritional supplements" (Registration No. 2,543,613).

After careful consideration of the parties' arguments and evidence of record, we find that the marks are dissimilar in terms of sound, appearance, connotation and commercial impression.

We recognize that the parties' marks end in the identical word NUTRITION. However, the word NUTRITION clearly is descriptive of the respective goods of the parties. Thus, its inclusion in both marks is not a proper

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basis for finding the marks in their entireties to be similar. The remaining parts of each mark are different from each other, and when these different components are combined with the word NUTRITION, the marks in their entireties are not so similar that they would be likely to cause confusion. The words ULTIMATE and ABSOLUTE are spelled differently and do not share the same sound. Moreover, although these words are in the nature of superlatives, the specific meanings of the words differ. The word ULTIMATE connotes the last or furthest whereas the word ABSOLUTE connotes perfection or completeness.

In any event, even assuming that the marks are similar in connotation, "the principle that similarity between marks in meaning or commercial significance alone may be sufficient to create a likelihood of confusion is applicable primarily to situations where marks are coined or arbitrary rather than highly suggestive." *Bost Bakery, Inc. v. Roland Industries, Inc.*, 216 USPQ 799, 801 (TTAB 1991). In this case, opposer's mark ULTIMATE NUTRITION is highly suggestive of opposer's goods and therefore is not entitled to a scope of protection which is so wide as to preclude registration of applicant's mark ABSOLUTE NUTRITION. As already noted, the word NUTRITION is descriptive of opposer's goods. In addition, as demonstrated by the definition of the word "ultimate" and the third-party registrations furnished by

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applicant, it is clear that such word is laudatory in nature and highly suggestive of dietary and nutritional supplements. Thus, opposer's ULTIMATE NUTRITION mark, as applied to vitamins and nutritional food supplements must be regarded, on this record, as a highly suggestive mark which merits only a narrow scope of protection.

In sum, we conclude that there is no likelihood of confusion in this case. That is, notwithstanding the fact that the parties' goods are identical and otherwise highly related, and are of type that would be marketed in the same channels of trade to the same purchasers, we find that the marks are too dissimilar to support a conclusion that confusion is likely. See *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998); *Kellogg Co. v. Pack'Em Enterprises Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991).

Decision: The opposition is dismissed.