

Paper No. 11

HRW

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB

OCT. 18, 99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Leiner Health Products Inc.

Serial No. 75/166,761

Michael A. Painter of Isaacman Kaufman & Painter
for Leiner Health Products Inc.

Barney L. Charlton, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hairston, Wendel and Bottorff, Administrative
Trademark Judges.

Opinion by Wendel, Administrative Trademark Judge:

Leiner Health Products Inc. has filed an application
to register the mark PHARMACEUTICAL GRADE for vitamins and
dietary food supplements.¹

Registration has been finally refused under Section
2(e)(1) of the Trademark Act on the ground of being merely
descriptive and under Section 2(d) on the ground of

likelihood of confusion with the registered mark PHARMA-
GRADE (stylized) for dietary food supplements.²

Applicant and the Examining Attorney have filed
briefs, but no oral hearing was requested.

A word or phrase is merely descriptive within the
meaning of Section 2(e)(1) if it immediately conveys
information about a characteristic, purpose, function or
feature of the goods with which it is being used. Whether
or not a mark is merely descriptive is not determined in
the abstract, but in relation to the goods or services for
which registration is being sought. In re Abcor
Development Corp., 588 F.2d 811, 200 USPQ 215 (CCPA 1978).

The Examining Attorney maintains that PHARMACEUTICAL
GRADE, when considered in relation to the vitamins and
dietary food supplements with which applicant is using the
term, is merely descriptive of the characteristic of the
goods of being of a standard of purity or quality required
in the production of pharmaceuticals. In support of this
position, the Examining Attorney relies upon both
dictionary definitions of the terms "pharmaceutical" and

¹ Serial No. 75/166,761, filed September 16, 1996, with claimed
first use dates of November 7, 1994.

² Reg. No. 1,356,190, issued August 27, 1985, with claimed first
use dates of August 22, 1984.

"grade"³ and Nexis excerpts demonstrating use of "pharmaceutical grade" as a term of art referring to a standard or level of purity in the pharmaceutical industry.

Applicant contends that its proposed mark PHARMACEUTICAL GRADE is no more than suggestive of its goods; that even if PHARMACEUTICAL GRADE is suggestive, it would be equally so for other types of goods and thus cannot be considered merely descriptive of applicant's particular products; and that the Nexis excerpts are only demonstrative of "inappropriate use of Applicant's mark."

We find the evidence relied upon by the Examining Attorney fully adequate to establish that PHARMACEUTICAL GRADE is merely descriptive of applicant's vitamins and dietary food supplements. The dictionary definition of the word "grade" alone as "an accepted level or standard" is sufficient to show that the recognized meaning for "pharmaceutical grade," as viewed by the ordinary purchaser, would be as an indication that the products with which it was being used were "of an accepted level" for pharmaceuticals in general. There is nothing suggestive about the term when used with applicant's particular

³ Although these definitions were not introduced by the Examining Attorney until his brief, the Board is free to take judicial notice of dictionary definitions on its own initiative. See *Marcal Paper Mills, Inc. v. American Can Co.*, 212 USPQ 852 (TTAB 1981).

products; it is a blanket indication of the level of purity of the goods. In fact, applicant's specimens even contain the additional statement that its products, in this particular instance a calcium supplement, are "[m]ade to U.S. Pharmacopeia (USP) quality, purity and potency standards." The fact that this indication of purity may also be made with respect to other products is irrelevant; the question of descriptiveness is determined in relation to the specific goods with which a term is being used.

If any doubt remains, the Nexis excerpts made of record by the Examining Attorney provide additional evidence that the term "pharmaceutical grade" is used throughout the pharmaceutical and related industries to indicate a requisite level of purity. As representative examples, we note the following:

Nutriceutical Resources is one of the first in the industry to manufacture nutritional supplements to pharmaceutical-grade standards ... (*Med Ad News*, November 1996);

Nutramax, a Baltimore company that sells a pharmaceutical-grade two-in-one supplement called Cosamin ... (*Newsweek*, Feb. 17, 1997);

Production and marketing clearance for a pharmaceutical grade of alpha interferon is being sought by Sumitomo Chemical Co... (*Mcgraw-Hill's Biotechnology Newswatch*, Mar. 5, 1984); and

...the researchers say it should be used only by participants in an approved research study, in which they receive pharmaceutical-grade DHEA and are closely

Ser No. 75/166,761

monitored for ill effects. (*The New York Times*, Feb. 3, 1998).

Moreover, we find no basis for applicant's argument that these are simply "inappropriate" uses of its mark. Not only do these excerpts show use of the term "pharmaceutical grade" both before and after applicant's alleged date of first use, they also make it obvious that the term is being used for its ordinary dictionary meaning, as an indication of a level of purity, and not as an impermissible appropriation of applicant's claimed mark.

Turning to the refusal under Section 2(d), we find the key factors in this case to be the similarity of the marks and the similarity of the goods. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

The registered mark PHARMA-GRADE and applicant's mark PHARMACEUTICAL GRADE are highly similar in appearance, sound and meaning. The fact that registrant uses a shortened form of the word "pharmaceutical" in its mark, and thus avoids the purely descriptive nature of applicant's mark, does not detract from the overall commercial impression of the mark. Both marks project the same connotation, i.e., that this product is of a pharmaceutical grade or level of quality.

Applicant argues that registrant's mark is weak, and thus presumably restricted to a limited scope of protection. Although it is clear that the registered mark

Ser No. 75/166,761

is highly suggestive and accordingly may be considered a weak mark, even a weak mark is entitled to protection against the subsequent registration by another of the same or a highly similar mark for similar goods. See *OPTOmechanisms, Inc. v. Optoelectronics, Inc.*, 175 USPQ 246 (TTAB 1972) and the cases cited therein. Here, when the marks are considered in their entirety, we find the overall commercial impressions are, without any doubt, the same.

As pointed out by the Examining Attorney, the goods upon which the two marks are being used are virtually identical and applicant has made no argument to the contrary. As a corollary, the channels of trade and class of purchasers would also be the same.

Accordingly, on the basis of the use of the highly similar marks PHARMA-GRADE and PHARMACEUTICAL GRADE on virtually identical goods, we find that confusion is likely.

Ser No. 75/166,761

Decision: The refusals under Section 2(e)(1) and 2(d) are affirmed.

P. T. Hairston

H. R. Wendel

C. M. Bottorff
Trademark Administrative Judges,
Trademark Trial and Appeal Board