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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Ultimate Health, Inc.

Serial No. 75/390,255

Daniel A. Scola, Jr. of Hoffman & Baron, LLP
for Ultimate Health, Inc.

John E. Michos, Trademark Examining Attorney, Law Office
105 (Thomas G. Howell, Managing Attorney).

Before Hanak, Hairston and Wendel, Administrative Trademark
Judges.

Opinion by Wendel, Administrative Trademark Judge:

Ultimate Health, Inc. has filed an application to
register the mark NUTRX NATURAL THERAPIES and design, as
depicted below, for "vitamin supplements."¹

¹ Serial No. 75/390,255, filed November 14, 1997, based on an
allegation of a bona fide intention to use the mark in commerce.

Registration has been finally refused under Section 2(d) of the Trademark Act on the ground of likelihood of confusion with the mark NUTRX NUTRITION PRESCRIPTION registered in typed drawing form for "nutritional counseling, namely, preventative and therapeutic nutritional medicine including vitamin and mineral prescriptions as related to medical diagnosis, prognosis, laboratory analysis, nutritional assessment and pharmaceutical and nutraceutical interaction."²

The final refusal was appealed and both applicant and the Examining Attorney have filed briefs. An oral hearing was not requested.

We make our determination of likelihood of confusion on the basis of those of the *du Pont* factors³ which are relevant under the circumstances at hand and for which evidence is of record. See *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842 (Fed. Cir. 2000). Two key considerations in any analysis are the similarity or dissimilarity of the respective marks and the similarity or dissimilarity of the goods or services with which the marks are being used, or are intended to be used. See *In re*

² Registration No. 2,167,617, issued June 23, 1998. A disclaimer has been made with respect to the word NUTRITION. The assignment of this registration to Nutrx, Inc. has been recorded by the Assignment Branch at Reel 1886, Frame 0230.

Azteca Restaurant Enterprises, Inc., 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

As for the present marks, the Examining Attorney maintains that the term NUTRX is the dominant portion of both applicant's and registrant's marks. In support of this position, he points out that applicant has disclaimed the remainder of the wording in its mark, whereas registrant has disclaimed the word NUTRITION and used a term, namely, PRESCRIPTION, which is highly suggestive of registrant's services. The mortar and pestle design in applicant's mark is said to be "widely recognized as a symbol for pharmaceutical and therapeutic preparations." In addition, the Examining Attorney makes the argument that the coined designation NUTRX is the dominant part of each mark in that it is the first literal element in each mark and thus the portion most likely to be remembered by purchasers.

Applicant contends that both marks are compound word marks which must be considered in their entirety; that the word NUTRX is not the dominant feature of either mark. Applicant asserts that the term NUTRX is either descriptive or highly suggestive of both applicant's goods and

³ See *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973).

registrant's services, in that consumers would associate the term with nutritional products. Thus, according to applicant, NUTRX does not serve as the source-indicating feature of the compound marks. Applicant argues that use by others of phonetically similar terms such as NUTREX, NATREX, NATURX and NUTRAMEDIX in the field of nutrition or nutritional supplements (as evidenced by the copies of third-party registrations attached to its brief) has made the term NUTRX and similar terms highly suggestive for such products and thus only entitled to a narrow scope of protection. Because of this alleged "weak" nature of the only common term in the two marks, applicant insists that the marks as a whole, being otherwise composed of different and distinguishable words, would not be confused. Applicant also points to the "fanciful" design features of its mark as differences between the two marks.

While marks must be considered in their entirety in determining likelihood of confusion, it is well established that there is nothing improper in giving more or less weight to a particular portion of a mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Although disclaimed matter cannot be ignored, the fact remains that consumers are more likely to rely on the non-descriptive portion of the mark as an indication of

source. See *Hilson Research Inc. v. Society for Human Resource Management*, 27 USPQ2d 1423 (TTAB 1993). Moreover, if the word portion of a mark, rather than any design feature, is more likely to be remembered and relied upon by purchasers in referring to the goods or services, it is the word portion which will be accorded more weight. See *Ceccato v. Manifattura Lane Gaetano Marzotto & Figli S.p.A.*, 32 USPQ2d 1191 (TTAB 1994); *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

We agree with the Examining Attorney that the term NUTRX dominates both applicant's and registrant's marks. The wording NATURAL THERAPIES as used by applicant in connection with its vitamin supplements is obviously descriptive of the products and has been acknowledged as such by applicant's disclaimer thereof. The role which this descriptive wording plays as a source identifier is minimal. Although there are several design features in applicant's mark, including the mortar and pestle, the lettering style, and the umlaut over the "U," we do not find these features to be so distinctive as to diminish the significance of the term NUTRX as the primary indication of origin.

Similarly, in registrant's mark the additional wording

NUTRITION PRESCRIPTION is of lesser significance in the mark as a whole than the term NUTRX. The word NUTRITION has been disclaimed and the word PRESCRIPTION is clearly suggestive of a nutrition counseling service which includes the provision of vitamin and mineral prescriptions. Here also the term NUTRX plays the major role as the source-indicator.

We do not agree with applicant that the term NUTRX is so highly suggestive or even descriptive of nutritional products that it cannot serve as the source-indicating feature of either of the marks at hand. In the first place, we do not believe that applicant seriously wishes to contend that its entire word mark is descriptive, so as to make registrability dependent upon the design features alone. Furthermore, applicant has failed to establish that the term NUTRX is so frequently used in connection with products of this nature that it is only entitled to a limited scope of protection. As shown by the dictionary definition introduced by applicant, "nutrx" is not a word in the English language.⁴ In addition, while the cited

⁴ Applicant relies upon this dictionary definition to show that the word "nutritious" stems from the Latin word "Nutrix" or "Nutric." Contrary to applicant's argument, we do not find this evidence that the average purchaser of nutritional products would be familiar with this derivation or with the Latin stem word "Nutrix".

third-party registrations cover two or three marks which might be considered phonetically similar,⁵ we do not consider that this evidence by any means establishes that the term "nutrx" has been used frequently by others in the nutritional products field. Furthermore, the registrations in themselves do not even constitute evidence of use of the marks, or that the public is familiar therewith. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992).

Thus, we find the term NUTRX, as used in both applicant's and registrant's mark, to be the dominant feature and the feature most likely to be remembered by purchasers. Despite the obvious differences in the appearance and sound of the marks as a whole, the common presence of the term apparently coined by registrant, i.e., NUTRX, in each results in a similar overall commercial impression for the two marks. We do not consider the additional descriptive or highly suggestive words of

⁵ The Examining Attorney has objected to applicant's attachment of copies of these third-party registrations to its brief as untimely. We note, however, that applicant previously submitted a list of these and other registrations in its response of December 17, 1998 and that the Examining Attorney failed to either object to this list as being improper in form or to respond to this evidence on the merits. Accordingly, we consider that the Examining Attorney has waived his right to object to the submission of proper copies of the same registrations as part of applicant's brief and we have taken the registrations under consideration.

sufficient import to render the marks as a whole readily distinguishable. In fact, the additional wording might well be viewed as referring to the particular goods or services being offered by the same entity under a NUTRX mark.

Looking to the respective goods and services, the Examining Attorney argues that a complementary relationship exists between registrant's services, which include counseling as to vitamin and mineral prescriptions, as well as other preventative and therapeutic nutritional medicine, and applicant's vitamin supplements. In support of this argument, he has made of record several third-party registrations in which both dietary and nutritional supplements, including vitamins, and nutritional counseling services are being marketed by the same entity under the same mark. Thus, the Examining Attorney argues, purchasers are accustomed to the offering of both vitamin supplements and nutritional counseling services from the same source and would be likely to similarly conclude that applicant's vitamin supplements originate from registrant.

Applicant contends that registrant's services are limited to nutritional counseling and do not involve vitamin supplements per se. Applicant further argues that the channels of trade are different, in that applicant's

goods are purchased by doctors, pharmacies and patients, whereas registrant's services are provided directly to individuals.

We find the evidence made of record by the Examining Attorney fully adequate to establish that the same source might offer both vitamin supplements similar to applicant's and nutritional counseling services such as registrant's. Although third-party registrations are not sufficient to prove use of the marks in commerce, they are adequate to suggest that these are goods and services which may be offered by a single entity. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988). Thus, a viable relationship has been shown to exist between the goods of applicant and registrant's counseling services.

Applicant's further argument as to differing channels of trade is to no avail. In the first place, there are no restrictions as to channels of trade in either the application or the registration. Thus, it must be assumed that the goods and services travel in all the normal channels of trade for goods or services of this nature and be encountered by the normal purchasers therefor. See *Kangol Ltd. v. KangaROOS U.S.A.*, 974 F.2d 161, 23 USPQ2d 1945 (Fed. Cir. 1992). Furthermore, whether or not

applicant's vitamin supplements may initially be purchased by doctors or pharmacies, the same ordinary purchaser who avails himself of registrant's counseling services will be the ultimate consumer of applicant's vitamin supplements. Applicant also argues that purchasers of applicant's vitamins are sophisticated purchasers who would be less likely to be confused by similar marks. We have no reason, however, to conclude that the purchasers of registrant's nutritional counseling services would be other than the same class of purchasers, and that although they would be equally careful in their purchase of these services, the similarity of the marks would be likely to lead to confusion.

Accordingly, in view of the similar commercial impressions created by the respective marks and the relationship found to exist between registrant's nutritional counseling services and the vitamin supplements upon which applicant intends to use its mark, we find confusion likely.

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

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