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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nutrinova Nutrition Specialties & Food Ingredients GmbH

Serial No. 76/250,413

Marilyn Matthes Brogan of Frommer Lawrence & Haug LLP for Nutrinova Nutrition Specialties & Food Ingredients GmbH.

Karen M. Strzyz, Trademark Examining Attorney, Law Office 111 (Craig Taylor, Managing Attorney).

Before Quinn, Hohein and Bottorff, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Nutrinova Nutrition Specialties & Food Ingredients GmbH has filed an application to register the mark "GLUCAMAX" for "nutritional additives, namely, dietary fibers for use in animal feed, [and] nutritional food additives, namely, dietary

fiber for use in foodstuffs" in International Class 5; "food additives for non-nutritional purposes, namely, dietary fibers for use as flavoring, ingredients or fillers in foodstuffs" in International Class 30; and "animal feed additives for non-nutritional purposes, namely, dietary fibers for use as flavoring, ingredients or fillers in animal foods" in International Class 31.[1]

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), on the ground that applicant's mark, when applied to its goods, so resembles the mark "GLUCO MAX," which is registered for "nutritional products for livestock, namely, nutritional additives for livestock feed, nutritional supplements, dietary supplements, and animal feed additives for use as a nutritional supplement" in International Class 5,"[2] as to be likely to cause confusion, or mistake or to deceive.

Applicant has appealed. Briefs have been filed, but an oral hearing was not requested. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence which are relevant to

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[1] Ser. No. 76/250,413, filed on May 1, 2001, which is based on an allegation of a bona fide intention to use such mark in commerce.

[2] Reg. No. 2,261,627, issued on July 13, 1999, which sets forth July 1998 as a date of both first use anywhere and first use in commerce.

the factors bearing on the issue of whether there is a likelihood of confusion. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563, 568 (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.[3]

Turning first to consideration of the respective marks, applicant maintains that "the differences between the marks are readily apparent." Specifically, applicant notes that unlike its mark "GLUCAMAX," the registrant's mark "has a different prefix [and] ... is not a unitary mark; [instead,] it appears in two segments, spaced: i.e., GLUCO MAX." Such differences, according to applicant, distinguish the respective marks and serve to preclude a likelihood of confusion. In addition, applicant asserts that various third-party registrations "containing the formative GLUCO (or GLUCA) and/or MAX also mitigate against the likelihood of confusion" because, "when the common element of a conflicting mark is weak, the likelihood of confusion is reduced."[4]

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[3] The court, in particular, pointed out that: "The fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."

[4] The Examining Attorney accurately observes in her brief that applicant "has submitted [only] a list of third[-]party registrations

Although the differences in the respective marks are apparent on the basis of a side-by-side comparison thereof, the proper test for determining likelihood of confusion is not whether the marks at issue are distinguishable on such a basis, but whether they create basically the same overall commercial impression. The reason therefor is that a side-by-side comparison is ordinarily not the way that customers will be exposed to the marks. Instead, it is the similarity of the general overall commercial impression engendered by the marks which must determine, due to the fallibility of memory and the concomitant lack of perfect recall, whether confusion as to source or sponsorship is likely. The proper emphasis is thus on the recollection of the average purchaser, who normally retains only a general rather than a specific impression of marks. See, e.g., Grandpa Pidgeon's of Missouri, Inc. v. Borgsmiller, 477 F.2d 586, 177 USPQ 573, 574 (CCPA 1973); Envirotech Corp. v.

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in support of this argument." Citing, *inter alia*, In re Hungry Pelican, Inc., 219 USPQ 1202, 1204 at n. 5 (TTAB 1983); In re Delbar Products, Inc., 217 USPQ 859, 861 (TTAB 1981); and In re Duofold Inc., 184 USPQ 638, 640 (TTAB 1974), she urges that "[s]ince copies were not provided, these registrations are not part of the record" and therefore should not be considered. Such objection, however, has been waived with respect to the list of seven third-party registrations for marks containing the prefixes "GLUCO-" and "GLUCA-" inasmuch as applicant, as part of its response to the initial Office action, submitted such list and the Examining Attorney formerly in charge of the application (which was transferred to the current Examining Attorney after applicant filed its brief) considered the information furnished by applicant and never raised any objection to the lack of copies of the registrations.

Solaron Corp., 211 USPQ 724, 733 (TTAB 1981); and Sealed Air Corp. v. Scott Paper Co., 190 USPQ 106, 108 (TTAB 1975).

With the foregoing in mind, we agree with the Examining Attorney that, when considered in their entireties, the marks "GLUCAMAX" and "GLUCO MAX" are so substantially similar that, if used in connection with the same or closely related goods, confusion as to source or sponsorship would be likely to occur. While we disagree with the Examining Attorney's contention that the marks at issue "are phonetically equivalent," we concur with her view that applicant's use of the letter "A" instead of the letter "O" "does little to distinguish applicant's mark from that of the registrant's [mark]." We also agree with her position that "[t]he separation of the registrant's mark into two segments ... fails to distinguish the two marks." As accurately pointed out by the Examining Attorney, the respective marks "are confusingly similar in both sight and sound" due to the fact that, "[b]ut for one vowel and a space between the two syllables in registrant's mark, the marks are spelled in an identical manner." We find, in addition, that overall the respective marks are essentially identical in connotation and engender basically the same commercial impression.

Moreover, as to the asserted weakness of marks which contain the terms "GLUCO," "GLUCA" or "MAX," the Examining

Attorney counters by noting that applicant's mark "consist[s] of more than just one of these terms" and that, in fact, such mark "is the only mark, in addition to the registered mark, containing both GLUC and MAX, for arguably identical goods." Furthermore, it is pointed out that the information provided by applicant with respect to certain third-party registrations[5] simply does not constitute proof of actual use of the registered marks and that the purchasing public, having become conditioned to encountering various products under marks which include the prefixes "GLUCO-" or "GLUCA-" or the suffix "-MAX," is therefore able to distinguish the source thereof based upon differences in such marks. See, e.g., AMF Inc. v. American Leisure Products, Inc., 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973) and In re Hub Distributing, Inc., 218 USPQ 284, 285-86 (TTAB 1983). Thus, the

[5] Applicant, in this regard, has listed by registration number and date of issuance the following third-party marks and associated goods: "GLUCOTAIN," which is registered for "pharmaceutical preparations for the prevention and treatment of diabetes and complications thereof"; "GLUCTRANZ," which is registered for "dietary supplements"; "GLUCOTREX," which is registered for a "topical analgesic preparation"; "GLUCOTIZE," which is registered for "pharmaceutical preparations and dietary supplements for use in treating and managing diabetes"; "GLUCO-NORM," which is registered for "dietary supplements"; "GLUCOSAFLEX," which is registered for "non-prescription dietary supplements"; and "GLUCAGEN," which is registered for "genetically produced glucagon preparations." Although applicant also contends that, "[l]ikewise, the formative MAX appears in numerous marks," applicant has not provided copies of any third-party registrations for such marks or other information with respect thereto and it is settled that the Board does not take judicial notice of registrations issued by the United States Patent and Trademark Office. See, e.g., In re Duofold Inc., supra.

number and nature of similar marks in use on similar goods is not a relevant *du Pont* factor in this appeal.

Turning, then, to consideration of the respective goods, applicant argues that its various goods are "significantly different from the goods listed in the cited registration." In particular, applicant insists that an investigation has revealed that registrant's "nutritional products for livestock, namely, nutritional additives for livestock feed, nutritional supplements, dietary supplements, and animal feed additives for use as a nutritional supplement" are limited to "nutritional additives which are glucosamine and related products which are used in horses." Applicant contends, in view thereof, that:

> Applicant's goods and those in the cited registration therefor have different purposes, attract different customers, and consequently do not compete for sales. It is therefore submitted that the differences between the parties' goods support a finding of no likelihood of confusion.
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> Additionally, the parties' respective goods move through different trade channels. The goods of the Applicant are offered to companies involved in the manufacture of foodstuffs for humans and food for animals--the end user, i.e., the individual who purchases the food product would not be aware of Applicant or its trademark.
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> In contrast, the goods of the cited registration would be offered to users requiring supplements, such as glucosamine and related products, for horses. These

> goods are therefore directed to very different types of consumers from the foodstuff manufacturer to whom Applicant will direct its products.

Applicant further contends that because the respective goods are purchased with care and deliberation by sophisticated purchasers, confusion is not likely. Specifically, applicant asserts that:

> [T]he goods recited in this application and in the cited registration are not products that are generally bought on impulse and are purchased only after close consideration. Companies that seek dietary fibers are highly sophisticated entities such as food processing companies, which seek such goods only after thoughtful contemplation and careful consideration of their particular needs. Thus, the recipients of such goods are generally knowledgeable about their field and have expertise in their trade.
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> Moreover, it is submitted that a customer who seeks a glucosamine type product for valuable livestock such as horses, will do so only after careful consideration.
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> Thus, the parties' respective goods are not generally ordered on a whim, but rather after careful and deliberate consideration on the part of the purchaser/customer.

We agree with the Examining Attorney, however, that as identified in applicant's application and the cited registration, the goods at issue are so closely related that, if marketed under the substantially similar marks "GLUCAMAX" and "GLUCO MAX," confusion as to the source or sponsorship thereof

is likely to take place. As the Examining Attorney correctly points out, it is well settled that the issue of likelihood of confusion must be determined on the basis of the goods as they are set forth in the involved application and the cited registration, and not in light of what such goods are shown or asserted to actually be. See, e.g., Octocom Systems Inc. v. Houston Computer Services Inc., 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815-16 (Fed. Cir. 1987); CBS Inc. v. Morrow, 708 F.2d 1579, 218 USPQ 198, 199 (Fed. Cir. 1983); Squirtco v. Tomy Corp., 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983); and Paula Payne Products Co. v. Johnson Publishing Co., Inc., 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973). Thus, where applicant's and registrant's goods are broadly described as to their nature and type, it is presumed in each instance that in scope the application and registration encompass not only all goods of the nature and type described therein, but that the identified goods move in all channels of trade which would be normal for those goods and that they would be purchased by all potential buyers thereof. See, e.g., In re Elbaum, 211 USPQ 639, 640 (TTAB 1981).

As the Examining Attorney, in light of the above, persuasively argues in her brief:

> In this case, the goods of both parties are identified absent any qualifying language regarding their type, channels of trade, or class of purchasers. Applicant's identification is not limited to goods "for use in the manufacture of" other goods. "For use in" does not necessarily mean "for use in the manufacture of." The registrant's identification is not limited to use for horses. Based on the current identifications the goods appear to be identical. Animal feed includes livestock feed. Applicant's "nutritional additives, namely, dietary fibers for use in animal feed" includes registrant's "nutritional additives for livestock feed." Thus, both marks will be used on nutritional additives for livestock feed.
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> Even if applicant's identification were limited to nutritional additives "for use in the manufacture of" other goods confusion is still likely. The registrant offers nutritional additives for livestock feed. These goods could also be used as in [sic] ingredient in the manufacture of livestock feed[,] thus being consumed by the same purchaser of applicant's goods.

Moreover, we note that it is well established that goods need not be identical or even competitive in nature in order to support a finding of likelihood of confusion. It is sufficient, instead, that the goods are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under situations that would give rise, because of the marks employed in connection therewith, to the mistaken belief that they originate from or are in some way associated with the

same producer or provider. See, e.g., Monsanto Co. v. Enviro-Chem Corp., 199 USPQ 590, 595-96 (TTAB 1978) and In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978).

Here, besides encompassing registrant's goods in part, the record includes evidence that applicant's goods are otherwise closely related thereto in a commercial sense. Specifically, copies of five use-based third-party registrations (two of which are owned by the same registrant) are of record for marks which are registered, *inter alia*, for either various food additives (which explicitly or implicitly include those for non-nutritional purposes) or animal feed additives for non-nutritional purposes, on the one hand, and nutritional products for livestock, on the other (*e.g.*, dietary food additives and animal feed additives; animal feed additives for non-nutritional purposes for use as flavoring, ingredient or filler and nutritional additives for animal feed; animal food additives for non-nutritional purposes for use as flavoring, ingredient or filler and animal feed additives for use as nutritional supplements; feed additives for non-nutritional purposes for use as flavoring, ingredient or filler for animals and nutritional additives for livestock; non-nutritional food additives for use as flavoring and to impart predetermined flavors to food products and nutritional additives for pet foods). While such

registrations are admittedly not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have some probative value to the extent that they serve to suggest that the goods listed therein are of the kinds which may emanate from a single source. See, e.g., In re Albert Trostel & Sons Co., 29 USPQ2d 1783, 1785-86 (TTAB 1993) and In re Mucky Duck Mustard Co. Inc., 6 USPQ2d 1467, 1470 (TTAB 1988) at n. 6.

Finally, it would indeed appear to be the case that, particularly with respect to applicant's non-nutritional food additives--namely, dietary fibers for use as flavoring, ingredients or fillers in foodstuffs and its non-nutritional animal feed additives--namely, dietary fibers for use as flavoring, ingredients or fillers in animal foods, the buyers thereof would typically be knowledgeable and discriminating customers, such as purchasing agents for companies involved in the manufacture or processing of foodstuffs for humans and/or food for animals. Likewise, many of the customers for applicant's nutritional additives and the buyers of registrant's nutritional products for livestock would be knowledgeable and discriminating purchasers of those products. However, the sophistication and care exercised by such buyers in their selection of applicant's and registrant's goods "does not necessarily preclude their mistaking one trademark for another"

or demonstrate that they otherwise are entirely immune from confusion as to source or sponsorship. Wincharger Corp. v. Rinco, Inc., 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962). See also In re Decombe, 9 USPQ2d 1812, 1814-15 (TTAB 1988); and In re Pellerin Milnor Corp., 221 USPQ 558, 560 (TTAB 1983).

Accordingly, we conclude that customers who are familiar or acquainted with registrant's mark "GLUCO MAX" for its "nutritional products for livestock, namely, nutritional additives for livestock feed, nutritional supplements, dietary supplements, and animal feed additives for use as a nutritional supplement" would be likely to believe, upon encountering applicant's substantially similar mark "GLUCAMAX" for its "nutritional additives, namely, dietary fibers for use in animal feed, nutritional food additives, namely, dietary fiber for use in foodstuffs," "food additives for non-nutritional purposes, namely, dietary fibers for use as flavoring, ingredients or fillers in foodstuffs" and/or "animal feed additives for non-nutritional purposes, namely, dietary fibers for use as flavoring, ingredients or fillers in animal foods," that such identical in part and otherwise closely related goods emanate from, or are sponsored by or associated with, the same source.

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