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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bioneurix Corporation

Serial No. 78325106

John Alunit, Patel & Alunit, P.C.¹

Kathleen M. Vanston, Trademark Examining Attorney, Law
Office 103 (Michael Hamilton, Managing Attorney).

Before Seeherman, Bucher and Zervas, Administrative
Trademark Judges.

Opinion by Zervas, Administrative Trademark Judge:

Bioneurix Corporation filed, on November 7, 2003, an
application to register on the Principal Register the mark

¹ Three individuals have filed papers in connection with the application involved in this appeal. Specifically, Benjamin Burack, identified as applicant's President and CEO, filed the original application, John Alunit, Esq. filed the response to the first Office action and Erik Pelton, Esq. filed all succeeding papers, including applicant's appeal and appeal brief. The response filed by Mr. Alunit includes a request that the correspondence address be changed to Mr. Alunit's address and the Board has not located any instruction to further change the correspondence address to Mr. Pelton. In view thereof, Mr. Alunit remains as applicant's attorney of record in this application, but a courtesy copy of this decision is also being mailed to Mr. Pelton and Mr. Burack.

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AMORYN (in standard character form) for "nutraceuticals for use as a dietary supplement, namely, a dietary supplement for depression and anxiety" in International Class 5.²

Registration has been finally refused under Section 2(d) of the Trademark Act, 15 U.S.C. §1052(d), in view of the previously registered mark AMORIN (also in standard character form) for "nutritional supplements for enhancement of libido and sexual performance" in International Class 5.³

Applicant has appealed the final refusal. Both applicant and the examining attorney have filed briefs. Applicant requested an oral hearing, but later informed the Board that it would not attend the oral hearing. Accordingly, the Board cancelled the oral hearing. We have resolved this appeal based on the written record and the arguments presented in the briefs.

Our determination of the examining attorney's refusal to register the mark under Section 2(d) of the Trademark Act is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood

² Application Serial No. 78325106, claiming first use anywhere and first use in commerce on June 1, 2003.

³ Registration No. 2744406, issued July 29, 2003.

of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). See also, *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997).

We turn initially to the first *du Pont* factor, i.e., whether applicant's mark and the cited registered mark are similar or dissimilar when compared in their entireties in terms of appearance, sound, connotation and commercial impression. In comparing the marks, we take into account the fallible memories of consumers, who retain general impressions of marks and cannot be presumed to have the luxury of being able to compare applicant's and registrant's marks side-by-side. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735 (TTAB 1991), *aff'd*. No. 92-1086 (Fed. Cir. June 5, 1992).

In this case, five of the six letters in the two marks are identical and in the same letter order; the only difference in the lettering of the marks is that

applicant's mark includes a "y" as the fifth letter while registrant's mark includes an "i" as the fifth letter. Because the letters "i" and "y" may be pronounced identically, the marks too may be pronounced identically. In terms of appearance, the marks are highly similar, differing only by one letter. Further, as to connotation, applicant has offered no meaning for its mark, and it is quite likely, given the similarities in appearance, that prospective purchasers will view the marks as having similar, if not identical connotations. Also, because the marks only differ by one letter and may be pronounced identically, we find that the commercial impression of the marks is highly similar, if not the same.⁴ The first *du Pont* factor is hence resolved against applicant.

We next turn to the second and third *du Pont* factors, i.e., the similarity or dissimilarity of the goods and the trade channels. It is well settled that goods need not be similar or competitive in nature to support a finding of

⁴ We note that applicant itself has confused the marks. Applicant states at unmarked p. 9 of its brief:

The proposed mark of the Applicant is AMORIN. The mark of the Registrant is AMORYN. The two marks are spelled different[ly] as a result of the "I" in Applicant's mark. The two marks also have very different appearances due to the distinctiveness of the "Y" in Registrant's mark.

Applicant's mark is not AMORIN - it is AMORYN.

likelihood of confusion. See *Helene Curtis Industries Inc. v. Suave Shoe Corp.*, 13 USPQ2d 1618 (TTAB 1989). It is sufficient if the respective goods are related in some manner and/or that the conditions surrounding their marketing are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source. See *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ 910 (TTAB 1978). Also, it is well established that when the marks at issue are the same or nearly so, the goods in question do not have to be identical to find that confusion is likely. See *In re Concordia International Forwarding Corp.*, 222 USPQ 352, 356 (TTAB 1983) ("... the greater the degree of similarity in the marks, the lesser the degree of similarity that is required of the products or services on which they are being used in order to support a holding of likelihood of confusion.").

Applicant maintains that applicant's and registrant's goods are dissimilar because the goods have different purposes - while applicant's food supplements are for reducing depression and anxiety, registrant's food

supplements are for enhancing libido and sexual performance. Applicant states:

Here, the Registrant's goods are used for a purpose - sexual performance - which is completely different from the use for Applicant's goods - treatment of anxiety and depression. These goods are not likely to be sold, marketed or purchased together. The ingredients making up Registrant's and Applicant's supplements, in addition [sic] to the supplements' intended uses, are very different. Anxiety/depression and sexual performance have very different symptoms, causes, and treatments. Registrant's goods are likely to be marketed and sold alongside prophylactics, lubricants and other items used in connection with sexual performance. Applicant's supplements are likely to be marketed and sold in connection with other herbal alternatives to prescription medications for the treatment of depression and other mental health conditions. As a result, the goods of the Applicant and the Registrant are quite different.

The examining attorney, however, contends that both applicant and registrant are using their marks on dietary or nutritional supplements, and that the evidence of record submitted with applicant's September 27, 2004 Office action "demonstrates that the same party may provide nutritional supplements for libido enhancement and for relief of anxiety." Brief at p. 4. The evidence of record comprises printouts of several web pages from two web sites. The first web page is from www.medicalhomeproducts.com, which shows "natural supplements" with different functions such

as "Libido Enhancers" and "Stress Aids"⁵ that may be purchased through the web site.⁶ The remaining web pages⁷ are evidently from the web site of an Internet retailer named "All-Vita NorthWest" and provide information about a product named "Maca Root Liquid Extract," that may be purchased from the Internet retailer for \$14.95 per bottle. The description of "Maca Root Liquid Extract" states that it may be used for treatment of libido ("Maca helps to create more vigor for sexual activity"), for sexual dysfunction ("Maca also helps in having more satisfactory sexual activity") and as an anxiety reducer ("responsibilities are higher than ever ... increasing our anxiety Maka has proven to be an excellent natural stress reducer."). Based on this evidence, the examining attorney concludes that "a wide variety of supplements in general and the supplements of the kind made by registrant

⁵ The description of "Stress Aids" states: "'Stress Relief' offers you a safe, natural way to get relief from anxiety with a potent formula of nature's most powerful mood-lifting ingredients."

⁶ The examining attorney contends, "the majority of the supplements identified at www.medicalhomeproducts.com come from one provider - DBS Labs." Brief at p. 4. Because it is not readily apparent from the printout from www.medicalhomeproducts.com that "the majority of the supplements identified ... come from one provider - DBS Labs," we give the examining attorney's contention no consideration.

⁷ The Internet address of the second web site is not apparent from the printout in the record and the examining attorney has not provided the Internet address.

and applicant in particular may come from the same source"; and that "it would be reasonable for a prospective purchaser to assume that nutritional supplements for libido enhancement and for anxiety relief marketed under virtually identical names emanate from the same source." *Id.*

We find that applicant's "dietary supplements" and registrant's "nutritional supplements" are related goods. Even though they have different functions, the dietary supplements and nutritional supplements are both food supplements. There is no indication in the record that the two are mutually exclusive in use, i.e., that if the ultimate consumer takes one supplement, he will not or cannot take the other supplement. Thus, the consumer may seek to purchase food supplements for both anxiety and sexual/libido disorders at the same time, and/or may have such supplements in his or her cupboard at the same time.

Further, the conditions surrounding the marketing of the goods are such that they would be encountered by the same persons. The identifications of goods in the application and the registration do not contain any limitations with regard to classes of purchasers or channels of trade. We therefore presume that applicant's and registrant's goods encompass all goods of the type described, that the goods move in all normal channels of

trade, and that the goods are available to all potential customers of such products. *In re Elbaum*, 211 USPQ 639 (TTAB 1981). Applicant's and registrant's trade channels therefore include retail supermarkets, food and nutrition stores and the Internet, and the purchasers of such goods include the general consuming public. While the possibility that the respective goods may be sold in different sections of a store would be a factor to consider in determining the relationship between the goods, there is no evidence in the record establishing that applicant's and registrant's goods would be sold in different sections of a store and we will not presume it to be the case. Thus, the conditions surrounding the marketing of applicant's and registrant's goods are such that they would be encountered by the same persons under circumstances that could, because of the similarity of the marks used thereon, give rise to the mistaken belief that they emanate from or are associated with, the same source.

Applicant has also raised a point regarding the evidence of record, which we now address. Specifically, applicant contends that the evidence relied on by the examining attorney *only* consists of "printouts of two supplement websites"; and that "[o]f the millions of web pages in the field of supplements, two websites can hardly

be considered conclusive evidence of the fact that products are sold or marketed together." Brief at unmarked p. 7.

While we have taken into consideration that the amount of website evidence submitted by the examining attorney is rather limited, we find it to be sufficient, in the circumstances of this case, to demonstrate the relatedness of the goods.

The second and third *du Pont* factors hence are also resolved against applicant.

Next, we turn to the fourth *du Pont* factor, i.e., the conditions under which and buyers to whom sales are made, i.e., impulse versus careful, sophisticated purchasing, and applicant's contention that consumers are likely to exhibit a great degree of care when selecting goods of the type involved herein. Applicant maintains that because its products "are for treatment of mental health conditions ... customers are not likely to purchase these supplements without researching their decision ... [and] Registrant's products are for use in connection with sexual performance and similarly are not likely to be purchased in a quick or spur-of-the-moment decision." Brief at unmarked p. 5. Further, applicant maintains, "the ingredients making up Applicant's and Registrant's products are completely

different and further differentiate the products among sophisticated consumers." *Id.*

Applicant's and the registrant's products are sold off-the-shelf, to the public at large. Even if we were to accept applicant's argument that consumers would exercise care in the purchase of these supplements, the marks are so similar that even careful purchasers could miss the fact that one mark has an "i" and the other mark has a "y," and instead see the marks as being identical. As for applicant's argument that the ingredients of the respective products are different, whether or not consumers could, upon investigation of the ingredients, determine that the products are different is not the point. The question is not whether consumers would view the products as being the same, but whether they would see the source of the products as being the same. The fourth *du Pont* factor is resolved against applicant in our likelihood of confusion determination.

In view of the foregoing, we conclude that applicant's mark AMORYN for "nutraceuticals for use as a dietary supplement, namely, a dietary supplement for depression and anxiety" is likely to cause source confusion among purchasers with the registered mark AMORIN for "nutritional

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supplements for enhancement of libido and sexual performance."

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