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Mailed: September 26, 2007
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Bluebonnet Nutrition Corp.

Serial No. 78587872

John S. Egbert of Egbert Law Offices for Bluebonnet
Nutrition Corp.

Karen Bracey, Trademark Examining Attorney, Law Office 116
(Michael Baird, Managing Attorney).

Before Hairston, Walters and Walsh, Administrative
Trademark Judges.

Opinion by Hairston, Administrative Trademark Judge:

Bluebonnet Nutrition Corp. has filed an application to
register on the Principal Register the mark GREEN UTOPIA
(in standard character form) for "nutritional supplements"
in International Class 5.¹

Registration has been finally refused under Section

¹ Serial No. 78587872, filed on March 15, 2005, which is based on
an allegation of a bona fide intention to use the mark in
commerce.

2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that applicant's mark, when applied to the identified goods, so resembles the mark UTOPIA, which is registered for a "dietary supplement,"² as to be likely to cause confusion.

Applicant has appealed and briefs have been filed. We affirm the refusal to register.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, 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).

Considering first the similarity of the goods, applicant does not dispute that its identified "nutritional supplements" are legally identical to the "dietary

² Registration No. 2926406, issued February 15, 2005.

supplement" in the cited registration. This du Pont factor therefore favors a likelihood of confusion. Further, because nutritional supplements and a dietary supplement are legally identical, the channels of trade and purchasers are legally identical. Thus, the du Pont factors of similarity of trade channels and purchasers also favor a likelihood of confusion.

Considering next the marks, the examining attorney contends that applicant's mark GREEN UTOPIA is similar to registrant's mark UTOPIA due to the shared term UTOPIA. The examining attorney argues that the additional term GREEN is not sufficient to distinguish the marks because it will be viewed by purchasers as simply indicating that applicant's particular nutritional supplements contain nutrients from green vegetables. In support of her position, the examining attorney submitted a definition of the word "green" meaning "[m]ade with green or leafy vegetables."³

Applicant, on the other hand, contends that the addition of the word GREEN to the word UTOPIA is sufficient to distinguish applicant's mark from registrant's mark when the marks are viewed side-by-side; and that marks

³ The American Heritage Dictionary of the English Language (3rd ed. 1992).

consisting of or containing the word UTOPIA are weak marks which are therefore entitled to only a limited scope of protection.

With respect to the marks, we must determine whether applicant's mark and registrant's mark, when compared in their entireties, are similar or dissimilar in terms of sound, appearance, connotation and commercial impression. Although the marks must be considered in their entireties, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985). Furthermore, the test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Finally, "[w]hen marks would appear on virtually identical goods or services, the degree of

similarity necessary to support a conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applying these principles in this case, we find that applicant's mark is similar to registrant's mark in sound, appearance, connotation and commercial impression. The marks involved here share the common word UTOPIA, with applicant simply adding the word GREEN thereto. This difference in the marks does not serve to distinguish the marks. Due to the shared term UTOPIA, there are consequent similarities in sound, appearance and connotation in applicant's and registrant's marks. With respect to connotation, in particular, applicant argues that its GREEN UTOPIA mark invokes a "special meaning" of "green vegetables creating harmony in the body," while registrant's UTOPIA mark suggests "perfect harmony. (Applicant's brief at 4). We recognize that the addition of the term GREEN in applicant's mark gives this mark an extra connotation that is not present in the registrant's mark. However, we find that this point of difference is not sufficient to distinguish the marks. Rather, when applicant's mark and registrant's mark are considered in their entireties, the marks engender sufficiently similar

commercial impressions that if the identical goods involved in this case are offered thereunder, confusion as to source would be likely to occur among consumers. Consumers familiar with registrant's UTOPIA dietary supplement are likely to view GREEN UTOPIA as identifying a new line of nutritional supplements made with dried/dehydrated green vegetables originating from registrant. We find this especially to be the case with the current focus on the health benefits of green vegetables. Thus, the du Pont factor of the similarity of the marks favors a likelihood of confusion.

Applicant contends that marks consisting of or containing the word UTOPIA are weak marks which are therefore entitled to a limited scope of protection. Specifically, applicant maintains that the term UTOPIA is so frequently used in marks that even slight differences between the marks may be deemed sufficient to avoid a finding that confusion is likely. While applicant states that a search of the USPTO TESS database retrieved approximately 200 UTOPIA registrations and applications, applicant failed to make any of these registrations or applications of record. Thus, we are unable to give meaningful consideration to applicant's argument. In particular, there is no evidence that UTOPIA marks have

been so commonly adopted for their asserted suggestive significance in the field of dietary/nutritional supplements that purchasers would be expected to look to other portions of such marks as the distinguishing elements thereof. In any event, even if marks which consist of or contain the word UTOPIA are considered to be weak, due to an assertedly high degree of suggestiveness conveyed by such term, even weak marks are entitled to protection where confusion is likely. Here, notwithstanding any alleged weakness in the term UTOPIA, for the reasons discussed, applicant's mark is still similar in sound, appearance, connotation and commercial impression to registrant's mark.

Finally, applicant argues that confusion is unlikely because consumers exercise greater care when purchasing health products such as dietary/nutritional supplements. The fact that consumers are conscious of health and nutritional matters, however, does not necessarily mean that they are immune from source confusion, particularly where as here, identical goods would be offered under similar marks. In re Decombe, 9 USPQ2d 1812 (TTAB 1988).

In view of the foregoing, we conclude that purchasers and prospective customers, familiar with the registered mark UTOPIA for a dietary supplement, would be likely to believe, upon encountering the similar mark GREEN UTOPIA

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for applicant's nutritional supplements, that such identical goods emanate from or are associated with or sponsored by the same source.

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