

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Oral Hearing:  
September 24, 2014

Mailed:  
October 22, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Mannatech, Incorporated*

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Serial No. 85558774

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Sanford E. Warren Jr. of Warren Rhoades LLP for Mannatech, Incorporated.

Tamara Frazier, Trademark Examining Attorney, Law Office 116 (Michael W. Baird, Managing Attorney).<sup>1</sup>

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Before Quinn, Kuhlke and Adlin, Administrative Trademark Judges.

Opinion by Kuhlke, Administrative Trademark Judge:

Applicant, Mannatech, Incorporated, filed an application to register on the Principal Register the standard character mark NUTRIVERUS for goods identified as “dietary and nutritional supplements,” in International Class 5.<sup>2</sup>

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<sup>1</sup> Michael W. Baird represented the USPTO at the oral hearing.

<sup>2</sup> Application Serial No. 85558774, filed on March 2, 2012, based on an allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On March 4, 2014, contemporaneously with its reply brief, Applicant filed an Amendment to Allege Use. Applicant alleges use since April 12, 2012 and we have taken that allegation into consideration in our determination.

Registration has been refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used with the identified goods, so resembles the mark shown below registered on the Principal Register for "liquid nutritional supplement; nutritional supplements; vitamin and mineral supplements" in International Class 5,<sup>3</sup> as to be likely to cause confusion, mistake or deception.



The cited registration includes the following description of the mark and color claim:

The mark consists of the wording "NU" in green. The word "VERUS" is below the wording "NU", in the color white. The design of a mortar and pestle in the color green is to the left of the wording "NU VERUS", all on a black background.

The color(s) green, white and black is/are claimed as a feature of the mark.

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<sup>3</sup> Registration No. 3774292, issued on April 13, 2010. The registration also includes goods identified as "energy drinks; fruit juice" in International Class 32. The additional refusal under Section 2(d) based on Registration No. 3309214 for the mark VERUS PHARMACEUTICALS and design for "pharmaceutical products primarily intended for pediatric use for treating asthma, allergies and related respiratory diseases and conditions; auto-injectors containing epinephrine for treatment of anaphylactic reactions" is now moot in view of the cancellation of that registration on May 16, 2014.

When the refusal was made final, Applicant appealed, and Applicant and the Examining Attorney filed briefs. An oral hearing was held on September 24, 2014. We affirm the refusal to register.

When the question is likelihood of confusion, we analyze the facts as they relate to the relevant factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (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, two key considerations are the similarities between the marks and the similarities between the goods or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

#### **SIMILARITY OF THE GOODS/CHANNELS OF TRADE/CONSUMERS**

We first consider the goods, channels of trade and classes of consumers. We must make our determinations under these factors based on the goods as they are identified in the registration and application. *See In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); and *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Applicant's "nutritional supplements" are identical to Registrant's "nutritional supplements," and Applicant's "dietary and nutritional supplements"

encompass Registrant's "liquid nutritional supplement" and "vitamin and mineral supplements."<sup>4</sup>

Considering the channels of trade and classes of purchasers, because the goods are in part identical and otherwise legally identical, and there are no limitations as to channels of trade or classes of consumers in the application or cited registration, we must presume that Applicant's and Registrant's goods will be offered in the same channels of trade to the same classes of consumers. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 62 USPQ2d at 1005; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Genesco Inc. v. Martz*, 66 USPQ2d 1260, 1268 (TTAB 2003) and *In re Smith and Mehaffey*, 31 USPQ2d 1531 (TTAB 1994). Applicant's arguments regarding the differences in the channels of trade and marketing are not persuasive inasmuch as we must make our determination based on the goods as identified, and here, the identifications of goods in the registration and application are not limited by channels of trade or marketing. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

In view of the above, the *du Pont* factors of the similarity of the goods, the channels of trade and classes of purchasers favor a finding of likelihood of confusion.

With regard to the conditions of sale, Applicant argues that its "goods are specifically designed for sale by independent distributors in a multi-level marketing

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<sup>4</sup> See [http://en.wikipedia.org/wiki/Dietary\\_supplement](http://en.wikipedia.org/wiki/Dietary_supplement), attached to Applicant's October 24, 2012 Response "A dietary supplement ... is a preparation intended to supplement the diet and provide nutrients, such as vitamins, minerals" and may come "in pill, capsule, tablet, powder or liquid form."

program.” App. Br. p. 12. However, as noted above, we must make our determination based on the identification in the application and registration and there is no such limitation as to marketing methods or the type of purchaser. Therefore, the standard of care for our analysis is that of the least sophisticated purchaser. *Alfacell Corp. v. Anticancer, Inc.*, 71 USPQ2d 1301, 1306 (TTAB 2004). There is nothing in the record to support a finding that the average purchasers of nutritional supplements possess specialized knowledge. Applicant argues that “the decision to purchase these goods is not made in haste, as a consumer is evaluating and purchasing for their own health needs.” App. Br. p. 12. While purchasers of nutritional supplements may take greater care purchasing such goods, the record does not support a finding that such care outweighs the other *du Pont* factors.

### **SIMILARITY OF THE MARKS**

We next consider the marks NUTRIVERUS and NU VERUS and design and compare them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) *quoting du Pont*, 177 USPQ at 567. We must also keep in mind that “when 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, 1701 (Fed. Cir. 1992). When we consider the marks, we do so based on the average purchaser, who retains a general rather than specific impression of trademarks. *L’Oreal S.A. v. Marcon*, 102 USPQ2d

1434, 1438 (TTAB 2012); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

The Examining Attorney argues that the word portion in Registrant's mark dominates over the design in that it may be more likely to be impressed upon a purchaser's memory and to be used when requesting the goods. Therefore, the design element "does not overcome a likelihood of confusion because the word portions (NUVERUS v. NUTRIVERUS) are similar." Ex. Att. Br. p. 10. In addition, the Examining Attorney argues that the marks are confusingly similar "because both marks begin with 'NU' and end with 'VERUS'" and the addition of the letters TRI to Applicant's mark is not sufficient to distinguish the marks." Ex. Att. Br. p. 11.

With regard to its mark Applicant argues that:

...the Examiner improperly dissected Applicant's mark claiming that the dominant portion of both marks is "VERUS" and that the addition of "NUTRI" to Applicant's mark did not alleviate the source of confusion. However, the Examiner has no right to dissect Applicant's mark into two terms "NUTRI" and "VERUS" when the mark itself forms a new word and should be viewed as a whole. NUTRIVERUS is a suggestive mark forming a new word. NUTRIVERUS is not merely made up of generic or descriptive terms that would allow the examiner to assert that "VERUS is the dominant portion of the mark. "NUTRI" cannot be viewed as generic and must not be ignored. The prefix "NUTRI" means "nourishment." "Nourishment" is merely suggestive of the goods described. Thus, the mark must be viewed as a whole and cannot be dissected when in comparison for likelihood of confusion.

App. Br. p. 7.

In distinguishing Registrant's mark Applicant argues:

The NUVERUS & Design mark is registered to distinguish source of goods tied to the specific colors green, black and the design. Applicant submits that the pictorial representation as a whole of NUVERUS & Design is so highly stylized, both in color and design, that it would not readily evoke in a purchaser's mind the word "NUVERUS". The word "NU" clearly stands out and is attached to a design of a mortar and pestle, whereas the word "VERUS" is independent and in much smaller lettering. Consumers view the green word "NU" with the green mortar and pestle design. "VERUS" becomes an afterthought. ... Applicant's mark also contains "NUTRI" which adds a syllable to the pronunciation of the mark and also makes the overall impression of the mark a new word "NUTRIVERUS".

App. Br. p. 8.

The mortar and pestle design element and color claim in Registrant's mark is not sufficiently prominent or distinctive to overcome the dominance of the wording NU VERUS. *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (verbal portion of mark most likely to indicate origin of the goods). *See also Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1431 (TTAB 2013), *citing In re Dakin's Miniatures, Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999). Moreover, because Applicant seeks registration in standard characters, its mark is not limited to any particular depiction. The rights associated with a mark in standard characters reside in the wording and not in any particular display. *In re RSI Systems, LLC*, 88 USPQ2d 1445 (TTAB 2008); *In re Pollio Dairy Products Corp.*, 8 USPQ2d 2012, 2015 (TTAB 1988). Thus, the stylization in Registrant's mark cannot serve to distinguish the marks, inasmuch as we must consider Applicant's mark "regardless of font style, size, or color." *Citigroup Inc. v. Capital*

*City Bank Group Inc.*, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011). *See also In re Viterra Inc.*, 101 USPQ2d at 1908.

The addition of the letters TRI is not sufficient to distinguish the marks in this case. *See Crocker Nat'l Bank. V Canadian Imperial Bank of Commerce*, 228 USPQ 689 (TTAB 1986), *aff'd sub nom. Canadian Imperial Bank of Commerce v. Wells Fargo Bank, Nat'l Ass'n*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). While Applicant argues that its mark is a new single word, because it is in standard characters we must consider all possible presentations including the possibility that NUTRI may be presented as a prefix or somewhat distinct from VERUS. Applicant's

label illustrates such usage.



Moreover, the first part of Applicant's mark NUTRIVERUS is the root of the word "nutrition" which, in the context of Applicant's goods, nutritional supplements, indicates nutrition and, as such, at a minimum is highly suggestive of the goods. By comparison, VERUS<sup>6</sup> is arbitrary in connection with nutritional supplements and carries a stronger source-identifying significance. Registrant's mark whether perceived as one word NUVERUS or two words NU VERUS has a similar structure; a prefix beginning with NU and the second portion of the word VERUS is identical to Applicant's second portion, VERUS. The connotation and commercial impression

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<sup>5</sup> Applicant's October 24, 2012 Response. *See also* Applicant's specimen of use filed with the Amendment to Allege Use.

<sup>6</sup> Verus was apparently a gladiator during the reigns of the Emperors Vespasian and Titus. [http://en.wikipedia.org/wiki/Verus\\_\(gladiator\)](http://en.wikipedia.org/wiki/Verus_(gladiator)), attached to Applicant's March 25, 2013 Response.



of VERUS is the same for both marks used on identical goods. If the consumer detects the difference in the prefixes, NUTRI and NU, they would likely perceive them as part of the same line, NU being a shortened form of NUTRI or indicating a NU or “new” line of goods.

We find that the similarities between the marks in appearance, sound, meaning and commercial impression, outweigh the dissimilarities. In view thereof, the *du Pont* factor of the similarity of the marks also favors a finding of likelihood of confusion.

### ACTUAL CONFUSION

Finally, Applicant argues that the coexistence of three registrations containing the marks VERUS and VERUS PHARMACEUTICALS (owned by the same registrant) for pharmaceuticals and NU VERUS for supplements supports a finding of no likely confusion. The three registrations comprise the current cited registration and two other cited registrations that were cancelled during the prosecution of the application. Applicant further argues that it is has been using its mark in the market since April 12, 2012, without confusion.

It is well-established that the Board is not bound by prior decisions in examination, each case must be decided on its own merits based on the evidence of record, and “the issuance of a registration(s) by an Examining Attorney cannot control the result of another case.” *In re Sunmarks, Inc.*, 32 USPQ2d 1470, 1472 (TTAB 1994). *See also In re Davey Products Pty Ltd.*, 92 USPQ2d 1198, 1206 (TTAB 2009) *quoting In re Thomas* 79 USPQ2d 1021, 1028 (TTAB 2006) (“[W]e will not

compound the problem of the registration of a confusingly similar mark by permitting such a mark to register again.”).

With regard to Applicant’s assertion of no known instances of actual confusion, we first observe that while a showing of actual confusion would be highly probative, the lack thereof is not. “The lack of evidence of actual confusion carries little weight, especially in an ex parte context.” *Majestic Distilling Co., Inc.*, 65 USPQ2d at 1205 (internal citations omitted) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”). *See also In re Bisset-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). In any event, the record is devoid of probative evidence relating to whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000); and *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). Furthermore, Applicant’s description of its actual use in a very specific trade channel supports the possibility that there have not been meaningful opportunities for confusion to occur. Accordingly, the *du Pont* factor of the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion is considered neutral.

In conclusion, because the marks are similar, the goods are identical in part, and the channels of trade and consumers overlap, confusion is likely between



Applicant's mark NUTRIVERUS and the mark in the cited registration.

**Decision:** The refusal to register based on a likelihood of confusion under Section 2(d) of the Trademark Act is affirmed.<sup>7</sup>

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<sup>7</sup> In view of the determination the Amendment to Allege Use is moot.