

**THIS OPINION IS NOT A  
PRECEDENT OF  
THE T.T.A.B.**

Mailed: February 25, 2014

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**Trademark Trial and Appeal Board**

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In re Ultimate Nutrition, Inc.

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Serial No. 85707822

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William C. Wright of Epstein Drangel LLP for Ultimate Nutrition, Inc.

Dominick J. Salemi, Trademark Examining Attorney, Law Office 106 (Mary Sparrow, Managing Attorney).

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Before Cataldo, Bergsman and Hightower,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Ultimate Nutrition, Inc. ("applicant") to register on the Principal Register the mark PLATINUM SERIES (standard characters) for "dietary supplements," in International Class 5.<sup>1</sup>

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground of

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<sup>1</sup> Application Serial No. 85707822 was filed on August 20, 2012 under Section 1(a) of the Trademark Act, based upon applicant's assertion of December 31, 1999 as a date of first use of the mark anywhere and in commerce. "SERIES" is disclaimed.

likelihood of confusion with eleven registrations previously registered on the Principal Register by Platinum Performance, Inc., including the following:

PLATINUM PERFORMANCE (typed or standard characters)<sup>2</sup> for "nutritional supplements for use by humans and performance animals," in International Class 5;<sup>3</sup>

PLATINUM POWER (typed or standard characters) for "nutritional supplements for use by humans and animals," in International Class 5;<sup>4</sup>

PLATINUM POTENCY (standard characters) for "nutritional supplements," in International Class 5;<sup>5</sup> and

PLATINUM PAK (standard characters, "PACK" disclaimed) for "nutritional supplements," in International Class 5.<sup>6</sup>

When the refusal was made final, applicant appealed. Applicant and the examining attorney have filed main briefs

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<sup>2</sup> Effective November 2, 2003, Trademark Rule 2.52, 37 C.F.R. §2.52, was amended to replace the term "typed" drawing with "standard character" drawing. A mark depicted as a typed drawing is the legal equivalent of a standard character mark.

<sup>3</sup> Registration No. 2132598 issued on January 27, 1998. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

<sup>4</sup> Registration No. 2737157 issued on July 15, 2003. Section 8 affidavit accepted; Section 15 affidavit acknowledged. Renewed.

<sup>5</sup> Registration No. 3435403 issued on May 27, 2008. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

<sup>6</sup> Registration No. 3309212 issued on October 9, 2007. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

on the matter under appeal, and applicant filed a reply brief.

### **Likelihood of Confusion**

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, two key, though not exclusive, considerations are the similarities between the marks and the similarities between the goods and/or services. 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).

#### Family of Marks Asserted by Examining Attorney

In his brief on appeal (p. 3), the examining attorney referred to the cited registrations as a "family," stating: "the registrations of registrant in this case clearly show that it has registered the term PLATINUM as a 'family of marks.'" Applicant, in its reply brief, objected to the examining attorney's assertion that the cited registrations comprise a "family" of marks.

A "family of marks" may be established *in an inter partes proceeding* where there is evidence that a group of marks having a shared characteristic are advertised and promoted together. *See J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889, 1891 (Fed. Cir. 1991). *See also* 4 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 23.61 (4<sup>th</sup> ed. 2013). The mere existence of similar registrations, in this case, the cited registrations containing the common term "PLATINUM," does not per se establish a family. Rather there must be recognition by the public that the shared characteristic (or "family surname") is indicative of a common origin. *Id.* It is settled, however, that an examining attorney, lacking the resources to establish a "family of marks," should refrain from advancing such an argument during ex parte prosecution. *See In re Hitachi High-Technologies Corp.*, \_\_ USPQ2d \_\_ (TTAB 2014); and *In re Mobay Chem. Co.*, 166 USPQ 218, 219 (TTAB 1970). *See also* TMEP § 1207.01(d)(xi) (Oct. 2013 ed.).

Accordingly, the examining attorney's assertion that the marks in the cited registrations comprise a family of marks will be given no further consideration. "Each cited registration must stand on its own as a basis for refusal under Section 2(d)." *See Hitachi*, \_\_ USPQ2d at \_\_.

Registration No. 3309212

For purposes of our analysis of the *du Pont* factors as they apply to the instant refusal to register, we will concentrate our discussion on cited Registration No. 3309212 for the mark PLATINUM PAK (standard characters, "PACK" disclaimed) for "nutritional supplements," in International Class 5. We find this registration to be the most relevant for our *du Pont* analysis, and we proceed accordingly. Since this is the most relevant registration, if we find a likelihood of confusion, we need not find it as to the others. On the other hand, if we don't reach that conclusion, we would not find it as to the other cited registrations either. See *In re Max Capital Group Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

The Goods

We begin by comparing applicant's goods with those of registrant. In making our determination under the second *du Pont* factor, we look to the goods as identified in the involved application and cited registration. See *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application

regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). See also *Paula Payne Products v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.").

In this case, applicant's goods are identified as "dietary supplements" and registrant's goods are identified as "nutritional supplements." We hereby take judicial notice<sup>7</sup> of the following definitions of "dietary supplement": "something added to complete a diet or to make up for a dietary deficiency;"<sup>8</sup> and "the wide assortment of minerals, vitamins, and sundry herbs that are taken as nutritional supplements to regular food."<sup>9</sup> We further take judicial notice of the following definition of "nutritional supplement":

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<sup>7</sup> The Board may take judicial notice of dictionary definitions, including those in online dictionaries which exist in printed format. *In re Premiere Distillery, LLC*, 103 USPQ2d 1483, 1484 (TTAB 2012); and *University of Notre Dame du Lac v. J. C. Gourmet Food Imports Co., Inc.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

<sup>8</sup> WordNet® 3.0 2006 by Princeton University.

<sup>9</sup> The American Heritage New Dictionary of Cultural Literacy, 3<sup>rd</sup> Ed. 2005 Houghton Mifflin Co.

in foods, any vitamin or mineral added during processing to improve nutritive value and sometimes to provide specific nutrients in which populations are deficient. ....<sup>10</sup>

Thus, as defined, applicant's "dietary supplements" are minerals, vitamins and herbs added as nutritional supplements to a regular food diet, while registrant's "nutritional supplements" are vitamins and minerals added to regular food during processing to improve its nutritional value. Thus, applicant's goods are very similar to those of registrant inasmuch as both provide additional vitamins, minerals and other nutrients to food. Based upon these definitions, we find that applicant's goods are highly similar to those provided by registrant, the sole distinction between them appearing to be that a dietary supplement is taken in addition to food and a nutritional supplement is added to food prior to consumption. We find this distinction does not create a significant difference between the otherwise closely related goods. We note in addition that applicant does not argue that its goods are dissimilar to those of registrant. The similarity of the goods is a factor that weighs in favor of a finding of likelihood of confusion.

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<sup>10</sup> Encyclopedia Britannica 2008.

Channels of Trade and Classes of Consumers

In this case, neither applicant's nor registrant's identification of goods recites any limitations on the channels of trade in which the goods may be encountered or the classes of consumers to whom they may be marketed. Thus, absent any restrictions in the identifications of goods, registrant's goods are presumed to move in all normal channels of trade and be available to all classes of potential consumers, including the trade channels in which applicant's goods may be encountered. See *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Furthermore, given evidence of the close relationship between "dietary supplements" and "nutritional supplements" as identified, potential consumers would include anyone seeking to complete or compensate for a deficiency in their food diets.

The similar trade channels and classes of purchasers are factors that further weigh in favor of a finding of likelihood of confusion.

Strength of Registrant's Mark

Prior to our consideration the involved marks, we will consider applicant's arguments that the term PLATINUM in registrant's PLATINUM PAK mark is weak as a result of third-party registration of similar marks for related goods. In support of its argument, applicant has made of



record copies of internet web pages displaying approximately twenty third-party uses of PLATINUM-formative marks for various supplements, of which the following are illustrative:

VITAFUSION PLATINUM 50+ MULTIVITAMIN DIETARY  
SUPPLEMENT GUMMIES PEACH  
(walgreens.com);

HERBAL BALANCE-PLATINUM 200  
(nashuanutrition.com);

GNC SOLOTRON PLATINUM, DIETARY SUPPLEMENTS  
(bbasupplements.com);

TRACE MINERALS RESEARCH ACTIVJOINT PLATINUM  
(vitacost.com); and

LIQUID MULTIPLE VITAMINS PLATINUM  
(nutrasource.com).

The probative value of this evidence is limited because we cannot determine therefrom how many relevant customers may have encountered the various third-party uses. *See Penguin Books Ltd. v. Eberhard*, 48 USPQ2d 1280, 1284 n.5 (TTAB 1998) (white pages listings do not show that the public is aware of the companies); *but see In re Broadway Chicken Inc.*, 38 USPQ2d 1559, 1565 n.16 (TTAB 1996) ("the magnitude of applicant's evidentiary record is such that even allowing for these possibilities [some of the entities are out of business, are small enterprises, are in remote locations, or have reached only a miniscule portion of the relevant public], there is still a

significant body of evidence of third-party use"). While the evidence of third-party use is limited, the Internet websites on their face "show that the public may have been exposed to those internet websites and therefore may be aware of the advertisements contained therein." *Rocket Trademarks Pty Ltd. v. Phard S.p.A.*, 98 USPQ2d 1066, 1072 (TTAB 2011).

In addition, applicant has made of record copies of approximately thirty third-party registrations from the United States Patent and Trademark Office's (USPTO) Trademark Electronic Search System (TESS) database. The following are illustrative:

Registration No. 2782119 for the mark PLATINUM for health club services;

Registration No. 3321107 for the mark PLATINUM GLOVES for entertainment in the nature of boxing contests;

Registration No. 4226112 for the mark PLATINUM for gin and vodka;

Registration No. 3587106 for the mark PLATINUM for fishing rods and reels; and

Registration No. 4306733 for the mark PLATINUM for yeast.

With regard to these third-party registrations, we first note that such registrations are not evidence of use

of the marks shown therein and, therefore, are not proof that consumers are familiar with said marks so as to be accustomed to the existence of similar marks in the marketplace. See *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462 (CCPA 1973); and *Richardson-Vicks, Inc. v. Franklin Mint Corp.*, 216 USPQ 989 (TTAB 1982). Second, these registrations identify goods which are not as closely related to those in the cited registration as applicant's recited goods. As such, they have very limited probative value for purposes of demonstrating the asserted weakness of registrant's PLATINUM PAK mark for "nutritional supplements."

On the record in this case, we find insufficient support for applicant's argument that the PLATINUM PAK mark in the cited registration is weak in the field of dietary and nutritional supplements and entitled to only a narrow scope of protection. See *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1740 (TTAB 1991), *aff'd unpublished.*, (No. 92-1086 Fed. Cir. (June 5, 1992)). Cf. *In re Broadway Chicken, Inc.*, 38 USPQ2d at 1565.

#### The Marks

We turn then to the first *du Pont* factor, i.e., whether applicant's PLATINUM SERIES mark and registrant's PLATINUM PAK mark are similar or dissimilar when viewed in

their entireties in terms of appearance, sound, connotation and overall commercial impression. See *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). We note initially that the test under the first *du Pont* factor 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 or services 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).

In this case, applicant's PLATINUM SERIES mark is similar to registrant's PLATINUM PAK mark to the extent that both share the identical term "PLATINUM" as the first word thereof. We observe that "SERIES" is disclaimed in applicant's mark and "PACK" is disclaimed in registrant's mark,<sup>11</sup> and both appear to be, at best, suggestive of the goods recited in the application and registration. Furthermore, the significance of the word "PLATINUM" is

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<sup>11</sup> See TMEP § 1213.08(c) with regard to the disclaimer of the "misspelled" word PAK in its proper spelling of "PACK."

reinforced by its location as the first word in the marks. *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it is often the first part of a mark which is most likely to be impressed in the mind of a purchaser and remembered"). See also *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word).

While "SERIES" and "PAK," differ in appearance and sound, both suggest the manner in which the goods are offered, *i.e.*, in a series or pack of doses. As a result, when the marks PLATINUM SERIES and PLATINUM PAK are viewed in their entirety, they are more similar than dissimilar in appearance and convey a similar connotation, namely, that of a series or pack of high quality dietary or nutritional supplements. Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of confusion. See *Krim-Ko Corp. v. The Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) ("It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion"); and *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988) ("In appropriate

cases, a finding of similarity as to any one factor (sight, sound or meaning) alone 'may be sufficient to support a holding that the marks are confusingly similar'") (citations omitted)).

In view of the foregoing, we find that the similarities in the marks outweigh the differences, and that this *du Pont* factor also weighs in favor of a finding of likelihood of confusion.

Conditions of Sale

The next *du Pont* factor discussed by applicant is that of the conditions of sale. Applicant asserts (brief, p.

10) that its goods, as well as those of registrant,

are orally ingested and taken by health conscious individual[s], likely after doing a fair amount of due diligence because of the potential impact, positive or negative, that ingesting such a product might have on one's appearance, performance and/or health.

However, given that applicant's goods and those of registrant are dietary or nutritional supplements that may be purchased and ingested together, even sophisticated consumers may not realize that applicant's recited goods do not emanate from the same source as those of registrant. Furthermore, even if some degree of care were exhibited in making the purchasing decision, because of the similarities between the marks, even careful purchasers are not likely

to distinguish between them. As a result, we also find this *du Pont* factor to weigh against applicant.

Summary

Neither applicant nor the examining attorney has discussed any of the remaining *du Pont* factors. We note, nonetheless, that none seems to be applicable, inasmuch as we have no evidence with respect to them.

In light of the foregoing, we conclude that consumers familiar with registrant's goods sold under its above-referenced PLATINUM PAK mark would be likely to believe, upon encountering applicant's goods rendered under its mark that the goods originated with or are associated with or sponsored by the same entity.

Lastly, to the extent that any of the points raised by applicant raise a doubt about likelihood of confusion, that doubt is required to be resolved in favor of the prior registrant. See *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); and *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 165, 223 USPQ 1289 (Fed. Cir. 1984).

**Decision:** The refusal to register is affirmed as to Registration No. 3309212.<sup>12</sup>

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<sup>12</sup> In view thereof, we need not consider the examining attorney's refusal to register as to the remaining ten cited registrations.