

**This Opinion is Not a
Precedent of the TTAB**

Mailed: May 8, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Gulf Coast Pharmacy, Inc.
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Serial No. 86246922
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Gene Bolmarcich of Law Offices of Gene Bolmarcich,
for Gulf Coast Pharmacy, Inc.

Roger T. McDorman, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

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Before Quinn, Taylor, and Hightower,
Administrative Trademark Judges.

Opinion by Hightower, Administrative Trademark Judge:

Gulf Coast Pharmacy, Inc. (“Applicant”) seeks registration on the Principal Register of the mark shown at right:


PharmiCare

for “Retail pharmacy services; retail store services featuring home medical equipment, vitamins, medications, and home health products for general consumer health needs” (as amended) in International Class 35.¹

¹ Application Serial No. 86246922 was filed on April 9, 2014, based on Applicant’s claim of first use anywhere and use in commerce since at least as early as October 1, 2013. The application includes the following description: “The mark consists of the word ‘PharmiCare’ with a stylized i that looks like a person, with a line to the right of the stylized letter ‘T’ underscoring the word ‘CARE’.” Color is not claimed as a feature of the mark.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of a likelihood of confusion with the following two marks registered on the Principal Register to different owners:



1.  for “dietary supplement, namely vitamins” in International Class 5 (the “070 Mark” or “070 Registration”),² and
2. PHARMCARE, in standard characters, for “Long term care pharmaceutical services, in the nature of institutional retail pharmacy services primarily marketed to nursing facilities, assisted living centers, and other institutional and residential healthcare facilities” in International Class 35 (the “859 Mark” or “859 Registration”).³

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register as to both cited marks.

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence relevant to the factors bearing on the issue of likelihood of confusion. *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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key

² Registration No. 2025070, issued December 24, 1996; renewed March 7, 2007. The registration includes the following description: “The mark consists in part of the silhouettes of two beakers, a mortar and a pestle.” The mark is lined for the color gold; the design of the mortar and pestle is disclaimed.

³ Registration No. 4591859, issued August 26, 2014, from an application filed November 8, 2013; first use anywhere and use in commerce since at least as early as December 1, 1999 alleged.


considerations are the similarities between the marks and the similarities between the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“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.”).

A. Similarity of the Marks

We begin our analysis with the first *du Pont* factor, “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The proper test is “whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (quotation omitted). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1430 (TTAB 2013).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ

749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Nat’l Data*, 224 USPQ at 751.

Applicant’s mark is **PharmiCare**. The cited marks are  and PHARMCARE. The wording in composite word and design marks normally is accorded greater weight in the likelihood of confusion analysis because consumers use the words to call for the services. *See Productos Lacteos Tocumbo S.A. de C.V. v. Paeteria La Michoacana Inc.*, 98 USPQ2d 1921, 1934 (TTAB 2011); *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987). Given the relatively small size of the design elements in each of the two composite marks, we likewise find it appropriate to accord greater weight to the wording here. While the design element in Applicant’s mark distinguishes its appearance somewhat from both of the cited marks, the designs in both Applicant’s mark and the ’070 Mark are small compared to the wording and relatively less significant to the overall commercial impression of both marks. Moreover, while the ’070 Mark is lined for the color gold, Applicant’s mark could be presented in any color, including gold.

The literal portions of both cited marks are highly similar to the literal portion of Applicant’s mark, that is, “PharmiCare” vs. “PharmaCare” and PHARMCARE. We

recognize that there is no correct pronunciation of a mark that, like each of the three marks before us, is not a recognized word. *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.3d 1327, 111 USPQ2d 1649, 1651 (Fed. Cir. 2014); *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1912 (Fed. Cir. 2012). Nonetheless, the facts that Applicant's mark and the cited marks share the same structure – the root “pharm” followed by “care” – and differ by only one letter apiece create aural similarity. See *Interlego AG v. Abrams/Gentile Entm't Inc.*, 63 USPQ2d 1862, 1863 (TTAB 2002) (finding similarity between LEGO and MEGO). Slight differences in the sound of similar marks do not avoid the likelihood of confusion. *In re Energy Telecomms. & Elec. Ass'n*, 222 USPQ 350, 351 (TTAB 1983).

We find that consumers are likely to verbalize Applicant's mark very similarly to the '070 Mark because it is identical except for the “a” in place of the stylized “i” between “pharm” and “care.” Although the '859 Mark lacks a middle syllable, consisting entirely of “pharm” followed by “care,” we find that the pronunciation of **PharmiCare** also is likely to be similar to that of PHARMCARE. Both cited marks therefore are similar in sound to Applicant's mark.

In terms of meaning and connotation, all three marks are highly similar, deriving their significance largely – or, in the case of the '859 Mark, wholly – from the combination of the recognizable terms “pharm” and “care.” Each unites those terms in a single two- or three-syllable word, with no separate literal element.

Given the strong similarities in meaning and the relatively greater significance of the wording compared with the design components in the two composite marks,

we find that Applicant's mark makes an overall commercial impression similar to both of the cited registrations. The first *du Pont* factor thus weighs in favor of a likelihood of confusion between Applicant's mark and both cited registrations.

B. Similarity of the Goods and Services

We turn next to the similarity of the goods and services, the second *du Pont* factor. We must look to the goods and services as identified in the involved application and cited registrations, not to extrinsic evidence of actual use. *See, e.g., Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014).

The goods and services identified in the application and cited registrations are:

- Application: "Retail pharmacy services; retail store services featuring home medical equipment, vitamins, medications, and home health products for general consumer health needs"
- '070 Registration: "dietary supplement, namely vitamins"
- '859 Registration: "Long term care pharmaceutical services, in the nature of institutional retail pharmacy services primarily marketed to nursing facilities, assisted living centers, and other institutional and residential healthcare facilities"

The "vitamins" identified in the '070 Registration are related to Applicant's identified "retail store services featuring . . . vitamins," as Applicant concedes.⁴ Because the goods and services are related, and because Applicant's identified services are a channel of trade for the registered goods, the second *du Pont* factor weighs heavily in favor of a likelihood of confusion with the '070 Mark.

⁴ *See* Appeal Brief at unnumbered page 10, 4 TTABVUE at 11.

In contrast, Applicant contends that its services are not related to those identified in the '859 Registration, arguing that the limitations in the services recited in the registration render consumer confusion unlikely.⁵ Indeed, applicant argues that: “The phrase ‘institutional retail pharmacy’ is incongruous given that ‘institutional’ and ‘retail’ pharmacies are distinct types of pharmacies . . .,” and advocates construing the description in the cited registration by removing this “incongruous phrase.”⁶

The phrase “institutional retail pharmacy services,” however, is included in the USPTO Acceptable Identification of Goods & Services Manual (ID Manual).⁷ This suggests that the Office considers the wording “institutional retail pharmacy services” to be unambiguous.⁸ Rather than excluding this phrase from interpretation of the registrant’s ID, we find that “institutional retail pharmacy services” forms the heart of that recitation. The preceding phrase “in the nature of” indicates that the registrant uses the phrase to more specifically identify its “long term care pharmaceutical services,”⁹ while the following list (“nursing facilities, assisted living centers, and other institutional and residential healthcare facilities”)

⁵ See, e.g., Reply Brief at pages 6-7, 7 TTABVUE at 7-8.

⁶ Appeal Brief at unnumbered page 5, 4 TTABVUE at 6.

⁷ The Board may take judicial notice of entries from the ID Manual.

⁸ Applicant argues that reliance on extrinsic evidence of the actual nature of the services offered by the cited registration’s owner is appropriate because the description is ambiguous, and discusses a printout from the registrant’s website attached as an exhibit to Applicant’s brief. See Appeal Brief at unnumbered pages 5-7, 4 TTABVUE at 6-8. We note that this evidence was not attached to the brief and also would have been untimely. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d).

⁹ See Trademark Manual of Examining Procedure (TMEP) § 1402.11 (January 2015).

designates to whom the “institutional retail pharmacy services” are “primarily” marketed.

Even if we could conclude that “institutional retail pharmacy services” are dissimilar from “retail pharmacy services,” the Examining Attorney made of record ten use-based registrations identifying both “retail pharmacy services” and “institutional retail pharmacy services.”¹⁰ These registrations suggest that the services are of a kind which may emanate from a single source under a single mark. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). We must keep in mind that the test is not whether consumers would be likely to confuse the services, but rather whether they would be likely to be confused as to their source. *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012). Therefore, it is not necessary that the services be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the services are related in some manner, or that the circumstances surrounding their marketing are such that they would be encountered by the same persons in situations that would give rise, because of the marks, to a mistaken belief that they originate from the same source or that there is an association or connection between the sources of the services. *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009).

We find that Applicant’s “retail pharmacy services” are sufficiently similar to the type of retail pharmacy services identified in the ’859 Registration – “long term care

¹⁰ October 15, 2014 Final Office Action at 17, 22, 25, 28, 31, 34, 36, 39, 42, and 45.

pharmaceutical services, in the nature of institutional retail pharmacy services primarily marketed to nursing facilities, assisted living centers, and other institutional and residential healthcare facilities” – that the second *du Pont* factor weighs in favor of a likelihood of confusion as to source.

C. The Number and Nature of Similar Marks in Use for Similar Goods

Finally, Applicant argues, with respect to the '070 Mark only, that cited mark



“is a weak mark both inherently and commercially and therefore entitled to only a narrow scope of protection.”¹¹ To support its argument, Applicant submitted copies of ten registrations for dietary and/or nutritional supplements incorporating either PHARMA or CARE.¹² Since none of the registrations

incorporates both terms, each is less similar to the '070 Mark  than

is Applicant’s mark **Pharm*i*Care**. In addition, such registrations are not evidence that the marks therein have been used at all, let alone used so extensively

¹¹ Appeal Brief at unnumbered page 9, 4 TTABVUE at 10.

¹² August 16, 2014 Response to Office Action at 31-50 (Exhibit C). Applicant also submitted a list of applications and registrations incorporating either PHARM or CARE (but not both) from the Trademark Electronic Search System (TESS). *Id.* at 17-30 (Exhibit B). The mere submission of TESS search results listing third-party registrations, without copies of the registrations, is insufficient to make the registrations of record. Because the Examining Attorney did not advise Applicant of this, the Examining Attorney is deemed to have waived any objection to consideration of the list itself, for whatever limited probative value it may have. *See In re City of Houston*, 101 USPQ2d 1534, 1536 (TTAB 2012), *aff’d*, 731 F.3d 1326, 108 USPQ2d 1226 (Fed. Cir. 2013), *cert. denied*, 134 S. Ct. 1325 (2014). However, the mere listing of the registrations in the TESS search report, showing only the registration number, registered mark and whether the registration is live or dead, is entitled to very little probative weight. *See In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 n.6 (TTAB 2011).

that consumers have become sufficiently conditioned by their usage that they can distinguish between such marks on the basis of minor differences. The probative value of third-party trademarks depends entirely on their usage. *Palm Bay Imports*, 73 USPQ2d at 1693. Where, as here, the record includes no evidence about the extent of third-party uses, the probative value of this evidence is minimal. *Han Beauty Inc. v. Alberto-Culver Co.*, 236 F.3d 1333, 57 USPQ2d 1557, 1561 (Fed. Cir. 2001). “The existence of [third-party] registrations is not evidence of what happens in the market place or that consumers are familiar with them nor should the existence on the register of confusingly similar marks aid an applicant to register another likely to cause confusion, mistake or to deceive.” *AMF Inc. v. American Leisure Prods., Inc.*, 474 F.2d 1403, 177 USPQ 268, 269 (CCPA 1973).

Applicant also submitted a one-page printout from each of six websites indicating the use of “PharmaCare” in association with pharmaceutical services; two of the six also reference the offer of vitamins. The third-party sites are:

- DeKalb Health PharmaCare, “a full-service retail pharmacy, featuring over-the-counter items, vitamins and natural supplements”;
- Pharmacare Health Specialists of Wichita, KS, specializing in “home infusion and home care pharmacy”;
- PharmaCare Rx of Juliet, TN, offering pharmacy services, compounding, and medical supplies;
- PharmaCare compounding pharmacy of Tallmadge, OH, which appears to offer vitamins and supplements;
- PharmaCare Hawaii community pharmacies; and
- The PharmaCare Network, which appears to offer pharmacy services.¹³

¹³ August 16, 2014 Response to Office Action at 9-16 (Exhibit A). We note that the printouts contain no dates or URLs. Applicant also submitted a printout for Pharma-Care, Inc. health care consultation specialists, which does not appear directly relevant.

While the evidence indicates some third-party use of the name “PharmaCare” in association with pharmacy services, the examples and information provided about these uses are limited. The probative value of this evidence also is limited because the website printouts do not establish how many relevant customers may have encountered the third-party uses. In particular, the printouts alone do not establish that potential consumers have been so exposed to the name “PharmaCare” that they have become accustomed to it and look to other elements for source identification in association with vitamins or retail store services featuring vitamins. *See In re Thomas*, 79 USPQ2d at 1026 (stating that, “without evidence as to the extent of third-party use, such as how long the websites have been operational or the extent of public exposure to the sites, the probative value of this evidence is minimal”). Moreover, even if the cited ’070 Mark is weak, it is entitled to protection against the registration of a highly similar mark for related goods or services.

After considering all of the evidence properly of record and arguments pertaining to the *du Pont* likelihood of confusion factors, we find that there is a likelihood of confusion between Applicant’s applied-for mark and both cited marks.

Decision: The refusal to register Applicant’s mark is affirmed as to both cited registrations.