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UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board  
P.O. Box 1451  
Alexandria, VA 22313-1451

Brown/Lykos

Mailed: January 4, 2008

Opposition No. 91176206

Ultimate Nutrition, Inc.,

v.

Nxcare, Inc.

**Before Quinn, Drost and Mermelstein, Administrative  
Trademark Judges.**

**By the Board:**

This case now comes before the Board for consideration of applicant's motion for summary judgment (filed August 1, 2007). The motion is contested.

Applicant seeks registration of the mark CREATINE-D2T for "dietary supplements" in International Class 5, alleging a bona fide intent to use the mark in commerce.<sup>1</sup> On March 13, 2007, opposer filed a notice of opposition alleging that CREATINE is generic in relation to "dietary supplements" and without entry of a disclaimer of that term, the application is not entitled to registration under Section 6 of the Lanham Act.

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<sup>1</sup> Application No. 76657818, filed April 3, 2006.

In its notice of opposition, opposer pleaded ownership of its registration for CREATINE SUPREME for "nutritional products, namely dietary supplements" in International Class 5.<sup>2</sup> In its answer, applicant denied the salient allegations of the notice of opposition and asserted various affirmative defenses, including the following: "[w]hen a compound word is formed by hyphenating two words or terms, one of which would be unregistrable alone, no disclaimer is necessary" (paragraph 13) and "[a] disclaimer of the word CREATINE in Applicant's application for the mark CREATINE-D2T would be improper and is not required" (paragraph 15).

Applicant has moved for summary judgment on the grounds that a disclaimer of the term CREATINE is not required as a matter of law, as pled in the affirmative defenses noted above. We grant applicant's motion.

Summary judgment is an appropriate method of disposing of cases in which there are no genuine issues of material fact in dispute, thus leaving the case to be resolved as a matter of law. See Fed. R. Civ. P. 56(c). A party moving for summary judgment has the burden of demonstrating the absence of any genuine issue of material fact, and that it is entitled to summary judgment as a matter of law. See

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<sup>2</sup> Registration No. 2407205, issued November 12, 2000, Sections 8 and 15 affidavits acknowledged and accepted. Opposer's registration includes a disclaimer of the exclusive right to use the word CREATINE apart from the mark as shown.

*Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The nonmoving party must be given the benefit of all reasonable doubt as to whether genuine issues of material fact exist, and the evidentiary record on summary judgment, and all inferences to be drawn from the undisputed facts, must be viewed in the light most favorable to the nonmoving party. See *Opryland USA, Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992).

Based on the record and the arguments of the parties, we find that applicant has met its burden of demonstrating that there are no genuine issues of material fact with respect to entry of a disclaimer, and that applicant is entitled to judgment in its favor as a matter of law.

Neither party disputes any material issue of fact relevant to applicant's motion.

Trademark Act Section 6(a), 15 U.S.C. §1056(a), provides that "the Director may require the applicant to disclaim an unregistrable component of a mark otherwise registrable" in its entirety. Merely descriptive and generic matter in a mark are unregistrable and therefore subject to disclaimer unless the matter is merged together with distinctive elements of the mark in such a manner that the resulting composite is "unitary" and can not be divided into separable elements. See *In re Omaha National Corp.*, 819 F.2d 1117, 2 USPQ2d 1859, (Fed. Cir. 1987). Thus, a

defendant in such an opposition may prevail by establishing that the matter, even if descriptive, generic or otherwise unregistrable, is part of a unitary, composite mark or element that is registrable as a whole.

Factors in determining whether matter in a mark is considered part of a unitary mark or registrable element include 1) whether it is physically connected by lines or other design features; 2) the relative location of the respective elements; and 3) the meaning of the terminology as used on or in connection with the goods or services. *Dena Corp. v. Belvedere International Inc.*, 950 F.2d 1555, 1561, 21 USPQ2d 1047, 1052 (Fed. Cir. 1991). When a compound word mark is formed by hyphenating two words or terms, one of which would be unregistrable alone, the mark is deemed unitary and no disclaimer is necessary. See "*X Laboratories, Inc. v. Odorite Sanitation Service of Baltimore, Inc.*", 106 USPQ 327, 329 (Comm'r Pat. 1955) (requirement for a disclaimer of "TIRE" deemed unnecessary in application to register TIRE-X for a tire cleaner); TMEP §1213.05(a)(ii).

Here, opposer asserts that since CREATINE is generic,<sup>3</sup> a disclaimer of the term is required in the applied-for mark CREATINE-DT2. However, applicant's mark consists of a compound word mark comprised of the terms CREATINE and DT2 physically connected by a hyphen. Unlike opposer's mark, CREATINE SUPREME, none of the terms in applicant's mark stand alone. Based upon all relevant factors, the components in applicant's mark, including the hyphen, merge in such a way that CREATINE loses its separate, descriptive significance, forming a compound mark with a single, unitary significance. See *In Re Grass GMBH*, 79 USPQ2d 1600, 1604 (TTAB 2006). Finally, we note that registration of CREATINE-D2T is recognition of applicant's rights in the entire mark, and neither creates nor recognizes rights in any components of the mark apart from each other. Trademark Act Section 6(b), 15 U.S.C. §1056(b); see *"X" Laboratories, Inc.*, 106 USPQ at 329.

Viewing all doubt and inferences in a light most favorable to opposer, we conclude that there is no genuine issue of material fact, and that applicant is entitled to judgment as a matter of law. Therefore, applicant's motion

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<sup>3</sup> We need not determine whether CREATINE is descriptive or generic for "dietary supplements," but for the sake of this motion we presume it to be. "Even if the term CREATINE is considered descriptive or generic, the mark is ... formed by hyphenating two words, thereby creating a unitary mark." Applicant's Brief at 3.

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for summary judgment is granted and the opposition is dismissed with prejudice.