

**THIS DECISION IS  
NOT A PRECEDENT  
OF THE TTAB**

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

gcp

Mailed: September 26, 2011

Opposition No. 91194995

Cytosport, Inc.

v.

Comercializadora de Lácteos y  
Derivados, S.A. de C.V.

**Before Bucher, Zervas, and Bergsman,  
Administrative Trademark Judges.**

**By the Board:**

Comercializadora de Lácteos y Derivados, S.A. de C.V.  
("applicant") seeks to register the mark NUTRI LECHE in  
standard character format for "milk-based beverages  
containing milk concentrates, vegetable oil and added  
nutrients" in International Class 29.<sup>1</sup> Applicant has  
provided the English translation of the Spanish term "LECHE"  
to mean "milk." Applicant has also disclaimed the term  
"LECHE."

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<sup>1</sup>Application Serial No. 77502817, filed on June 19, 2008 pursuant  
to Trademark Act Section 44(e).

Cytosport Inc. ("opposer") has filed a notice of opposition to registration of applicant's NUTRI LECHE mark. As grounds for opposition, opposer alleges priority of use and that applicant's mark, when used on the identified goods, so resembles opposer's previously used and registered family of "MILK" marks, as identified below, as to be likely to cause confusion, mistake or to deceive under Section 2(d) of the Trademark Act.

Opposer's pleaded marks are as follows:

MUSCLE MILK for "powdered nutritional supplement containing milk derived ingredients for adding to food or drink" in International Class 5;<sup>2</sup>

MUSCLE MILK for "nutritional supplements" in International Class 5;<sup>3</sup>

MUSLCE MILK for "meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages" in International Class 5 and "protein based, nutrient-dense snack bars" in International Class 29;<sup>4</sup>

MUSCLE MILK LIGHT for "dietary and nutritional supplements" in International Class 5;<sup>5</sup>

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<sup>2</sup> Registration No. 2714802, issued on May 13, 2003, claiming June 1, 1998 as both the date of first use anywhere and date of first use in commerce. Section 8 and 15 affidavits accepted and acknowledged on December 17, 2008.

<sup>3</sup> Registration No. 2809666, issued on February 4, 2003, claiming October 8, 1999 as both the date of first use anywhere and the date of first use in commerce. The term "MUSLCE" is disclaimed. Section 8 and 15 affidavits accepted and acknowledged on April 14, 2009.

<sup>4</sup> Registration No. 2973352, issued on July 19, 2007, claiming October 1, 2001, as both the date of first use anywhere and date of first use in commerce. Section 8 affidavit accepted on May 7, 2011.

<sup>5</sup> Registration No. 3333886, issued on November 13, 2007, claiming January 31, 2007 as both the date of first use anywhere and date of first use in commerce. The term "LIGHT" is disclaimed.

MUSCLE MILK N' OATS for "dietary and nutritional supplements" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30;<sup>6</sup>

MUSCLE MILK PUDDING for "dietary and nutritional supplements" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30;<sup>7</sup>

MIGHTY MILK for "dietary and nutritional supplements" in International Class 5;<sup>8</sup> and

MIGHTY MILK BAR for "dietary and nutritional supplement" in International Class 5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30.<sup>9</sup>

Opposer has also pleaded ownership of two applications; one for the mark MIGHTY MILK N' OATS<sup>10</sup> and the other for the mark MIGHTY MILK PUDDING.<sup>11</sup> Both applications recite "dietary and nutritional supplement" in International Class

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<sup>6</sup> Registration No. 3311489, issued on October 16, 2007, claiming January 31, 2006 as both date of first use anywhere and date of first use in commerce for both classes. The term "OATS" is disclaimed.

<sup>7</sup> Registration No. 3311490 issued on October 16, 2007, claiming January 31, 2007 as both date of first use anywhere and date of first use in commerce for both classes. The term "PUDDING" is disclaimed.

<sup>8</sup> Registration No. 3132139, issued on August 22, 2006, claiming December 31, 2004 as the date of first use anywhere and July 31, 2005 as the date of first use in commerce.

<sup>9</sup> Registration No. 3886569, issued on December 7, 2010, claiming October 14, 2010 as both the date of first use anywhere and date of first use in commerce for both classes. The term "BAR" is disclaimed.

<sup>10</sup> Application Serial No. 77103659, filed on February 9, 2007, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

<sup>11</sup> Application Serial No. 77103668, filed on February 9, 2007, based upon an allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act. The Board notes that this application has been abandoned for failure to file a timely Statement of Use.

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5 and "fortified food, namely, protein based, nutrient-dense oatmeal" in International Class 30.

Applicant, in its answer, has denied the salient allegations of the notice of opposition.

**Applicant's Motion for Summary Judgment**

This case now comes before the Board for consideration of applicant's motion for summary judgment on opposer's asserted claim of likelihood of confusion. The motion is fully briefed.

In support of its motion, applicant, while conceding for the purpose of its motion that opposer owns valid trademarks and has priority, essentially argues that the differences in appearance, pronunciation and commercial impression between applicant's NUTRI LECHE mark and opposer's pleaded MILK marks are so great that confusion as to source is not likely. Specifically, applicant contends that the dominant element of its mark is the wording NUTRI which has no meaning, although it may suggest a product that is "nutritious" or contains "nutrients." As such, applicant maintains that the term NUTRI is more likely to be noticed and recalled by potential consumers.

Moreover, applicant argues that while the terms "LECHE" and "MILK" mean the same thing in the abstract, they have different connotations when used in the parties' respective marks. In support of this point, applicant states that it

has agreed to disclaim the term LECHE because it is descriptive of its milk-based beverage products. In contrast, applicant maintains that opposer successfully disputed the Office's requirement to disclaim MILK in opposer's applications for the marks MIGHTY MILK and MUSCLE MILK by arguing that the term MILK, as used in opposer's marks, suggests that opposer's goods replicate mother's milk in that the goods are natural, healthy and nutritious. Further, applicant maintains that confusion is unlikely between marks that share a descriptive or suggestive term, i.e., the term "milk" and the Spanish equivalent thereof, when the dominant elements of the marks are completely different.

As evidence in support of its motion, applicant has submitted the declaration of John M. Murphy, counsel for applicant, which introduces the following exhibits: (i) a printout from the USPTO's TARR database displaying the status of application Serial No. 77103668 for the mark MIGHTY MILK PUDDING; (ii) an excerpt from the *Larousse Gran Diccionario Ingles-Español*, with an English translation of the Spanish word "leche"; (iii) copies of an office action dated October 1, 2008, and the response thereto dated March 23, 2009 regarding application Serial No. 77502817 to register the mark NUTRI LECHE; (iv) a response to an office action dated June 21, 2004 in application Serial No. 7854425

to register the mark MUSCLE MILK; and (v) a response to an office action dated March 20, 2006 in application Serial No. 78574711 to register the mark MIGHTY MILK.

In response, opposer maintains that there are sufficient similarities between the marks such that a reasonable fact finder could find that similarities between the marks, taken together with the relatedness of the respective goods and channels of trade, are sufficient such that a likelihood of confusion does exist between the marks. Specifically, opposer contends that because the term LECHE means "milk," applicant's mark should be interpreted as NUTRI MILK.<sup>12</sup> As such, opposer argues that a fact finder could conclude that consumers are likely to believe that the mark NUTRI LECHE is part of opposer's family of MILK marks, and that the product used in connection with the NUTRI LECHE mark originates from the same source as opposer's products.

Opposer further argues that it is unclear from the record whether the term "LECHE" in applicant's mark is in fact generic, descriptive or suggestive of applicant's identified goods and, therefore, additional discovery is required to make such determination. To the extent such discovery would reveal that the term "LECHE" is suggestive of applicant's identified goods, opposer maintains that

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<sup>12</sup>We note that this argument is not supported by any declaration or any other evidence of record.

there is even a greater probability that a likelihood of confusion exists between applicant's NUTRI LECHE mark and opposer's pleaded MIGHTY MILK and MUSCLE MILK marks.

Opposer also argues that even if the word "leche" aka "milk" is determined to be descriptive, it does not mean that the respective marks are not confusingly similar. The fact that a word, which is part of a trademark, is deemed descriptive does not remove the word from the mark and remains visible, audible and meaningful to consumers. In other words, opposer contends that consumers will not discount the word "leche" aka "milk" from NUTRI LECHE mark based on whether the product does or does not contain dairy milk; rather, upon hearing or seeing applicant's NUTRI LECHE mark on beverage products, consumers familiar with opposer's family of MILK marks would likely believe that the respective marks and products are affiliated.

Finally, opposer argues that summary dismissal is improper where dissimilarity of the marks alone is the basis for concluding that there is no issue of fact as to likelihood of confusion. Opposer contends that, even if the Board were to agree with applicant, and concludes that the respective marks are dissimilar, this factor alone does not obviate the need to consider other important factors, such as the relatedness of the parties' respective goods and the channels of trade through which they travel, in making a

final determination as to whether a likelihood of confusion exists.

As evidence in support of its motion, opposer has submitted the declaration of Roberta White, Vice President of Legal and Regulatory Affairs for opposer, who declares that (1) opposer first used its MUSCLE MILK mark in 1998; (2) opposer's products are sold and marketed at health and nutrition retail outlets, convenience stores, club stores and fitness gyms; (3) opposer markets its goods to both English and Spanish speaking consumers and that opposer has several marketing campaigns directed specifically to Spanish speaking consumers in the United States; and (4) opposer currently uses a family of MILK marks in connection with some of its dietary and nutritional supplements. The declaration also introduces copies of various federal registrations for MILK marks owned by opposer. Opposer also introduces, *inter alia*, without a supporting declaration, (1) a printout of the prosecution history of applicant's involved application;<sup>13</sup> (2) copies of its pleaded registrations; and (3) a printout of C.F.R. Title 21, Chapter 1, Part 131, Sec. 131.110 which provides a

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<sup>13</sup>The submission of the file history of applicant's involved application is unnecessary inasmuch as it is already of record. See Trademark Rule 2.122(b)(1).



description of milk and its properties as defined by the Food and Drug Administration.

Concurrently with its opposition to applicant's motion for summary judgment, opposer has also filed a motion for continued discovery under Fed. R. Civ. P. 56(d).

In reply, applicant disputes opposer's need for additional discovery inasmuch as opposer has been able to respond substantively to applicant's motion. Moreover, applicant argues that opposer has not demonstrated ownership of a family of "MILK" marks because opposer has failed to show that its pleaded marks have been used and advertised in such a manner as to create common exposure and recognition of common ownership. Applicant contends that opposer's only support for its contention that it owns a family of MILK marks is the declaration of opposer's in-house counsel which applicant argues is pure assertion, not evidence. Lastly, applicant argues that that dissimilarities of the marks alone is sufficient to find that a likelihood of confusion does not exist.

We first turn to opposer's motion for continued discovery under Fed. R. Civ. P. 56(d). In support of its motion, opposer contends that it needs discovery regarding the following subject matters in order to respond properly to applicant's motion for summary judgment:

1. Information regarding all possible English translations of applicant's NURTI LECHE mark;
2. Information regarding the products with which applicant has used or intends to use the NUTRI LECHE mark;
3. Information regarding applicant's date of first use of the NUTRI LECHE mark;
4. Information regarding the consumers to which applicant markets or intends to market its products;
5. Information regarding the channels of trade through which applicant distributes or intends to distribute its products;
6. Information regarding the circumstances under which applicant became aware of opposer's MILK marks;
7. Information regarding the primary ingredients and nutrients found in applicant's product;
8. Information regarding whether applicant's products are "nutritionally fortified;" and
9. Information regarding whether applicant's products identified for use in connection with the NUTRI LECHE mark are or contain "milk" as that term is defined by the U.S. Food and Drug Administration in 21 CFR § 131.110.

We note that applicant's motion for summary judgment only concerns whether the marks at issue are sufficiently

similar and/or dissimilar for likelihood of confusion purposes and that for purposes of the motion, applicant has effectively conceded that all of the other likelihood of confusion factors favor finding that there is a likelihood of confusion. We further note that opposer has been able to respond substantively to this limited issue without the need for the requested additional discovery. See *Ron Cauldwell Jewelry, Inc. v. Clothestime Clothes, Inc.*, 63 USPQ2d 2009, 2012 n. 8 (TTAB 2002) ("Inasmuch as opposer has submitted a substantive response to applicant's motion for summary judgment, opposer's request for discovery pursuant to Fed. R. Civ. P. 56(f) is denied"). Moreover, we find that the discovery requested by opposer goes beyond the scope of the issues presented in applicant's motion and therefore such discovery is unnecessary for purposes of responding to applicant's motion for summary judgment. With regard to opposer's alleged need to obtain discovery from applicant regarding all English translations of applicant's NUTRI LECHE mark, we note that applicant has already made of record a dictionary definition of the term "LECHE" and, to the extent there are other definitions of said term, opposer can obtain such definitions by conducting its own research. Accordingly, opposer's motion for continued discovery under Fed. R. Civ. P. 56(d) is denied.

We now turn to the merits of applicant's motion for summary judgment. In a motion for summary judgment, the moving party has the burden of establishing the absence of any genuine dispute of material fact and that it is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. A genuine dispute with respect to a material fact exists if sufficient evidence is presented that a reasonable fact finder could decide the question in favor of the non-moving party. See *Opryland USA Inc. v. Great American Music Show, Inc.*, 970 F.2d 847, 23 USPQ2d 1471 (Fed. Cir. 1992). Thus, all doubts as to whether any particular factual issues are genuinely in dispute must be resolved in the light most favorable to the non-moving party. See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ 1542 (Fed. Cir. 1992).

In the present case, we find that applicant has adequately met its burden of proof of showing that no genuine dispute of material fact exists, and that there is no likelihood of confusion as a matter of law with regard to all of opposer's pleaded marks. We believe that the circumstances here are similar to those in *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 USPQ2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991), in

that the single *DuPont*<sup>14</sup> factor of the dissimilarity of the marks in their entirety substantially outweighs any other relevant factors and is dispositive of the issue of likelihood of confusion.

As noted above, in bringing its motion for summary judgment based solely on the dissimilarities of the parties' respective marks, applicant has effectively conceded all other relevant *DuPont* factors in opposer's favor for the purposes of applicant's motion, and the Board has so considered those factors as favoring opposer. Thus, even viewing the other relevant *DuPont* factors in opposer's favor, the dissimilarities of the marks are so great as to avoid likelihood of confusion.

While we acknowledge that the term "LECHE" contained in applicant's involved mark means "milk" in English, we note that applicant seeks to register the mark NUTRI LECHE not NUTRI MILK. As such, we find that applicant's mark creates a markedly different visual appearance as compared to opposer's pleaded MILK marks. In addition to the visual differences, applicant's NUTRI LECHE mark and opposer's pleaded MILK marks, when considered as a whole, do not sound alike. Further, the marks do not share the same meaning; the first term in applicant's mark, i.e., NUTRI, is not a

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<sup>14</sup> See *In re DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 463 (CCPA 1973).

recognized word but may suggest that applicant's goods are nutritious or contain nutrients. In comparison, the first terms in opposer's pleaded marks are MUSCLE<sup>15</sup> and MIGHTY<sup>16</sup> which do not convey anything about nutrients or nutrition. In view thereof, we find that when wording with completely different connotations is added before LECHE and MILK, i.e., NUTRI on the one hand and MUSCLE and MIGHTY on the other,

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<sup>15</sup> **mus·cle** 'noun, verb, -cled, -cling, adjective

**noun**

1. a tissue composed of cells or fibers, the contraction of which produces movement in the body.
2. an organ, composed of muscle tissue, that contracts to produce a particular movement.
3. muscular strength; brawn: *It will take a great deal of muscle to move this box.*
4. power or force, especially of a coercive nature: *They put muscle into their policy and sent the marines.*
5. lean meat.

*The American Heritage® Dictionary of the English Language (4th Ed. 2006).*

<sup>16</sup> **might·y** adjective, might·i·er, might·i·est, adverb, noun

**adjective**

1. having, characterized by, or showing superior power or strength: *mighty rulers.*
2. of great size; huge: *a mighty oak.*
3. great in amount, extent, degree, or importance; exceptional: *a mighty accomplishment.*

*The American Heritage® Dictionary of the English Language (4th Ed. 2006).*

The Board may take judicial notice of dictionary definitions, including online reference works which exist in print format or have regular fixed editions. See *Boston Red Sox Baseball Club LP v. Sherman*, 88 USPQ2d 1581, 1590 (TTAB 2008) (judicial notice taken of definition from the Merriam-Webster Online Dictionary).

the ensuing combination of the terms create marks with completely different connotations. The commercial impressions of applicant's mark is different from opposer's marks too because of the differences in connotation, appearance and sound.

We would arrive at the same conclusion even if opposer established that it owns a family of "\_\_\_\_ MILK" marks and purchasers understand that the English translation of "leche" is "milk." The differences in sound, meaning and appearance noted above sufficiently distinguish opposer's pleaded MILK marks from applicant's mark which would not lead a prospective purchaser to conclude that NUTRI LECHE is part of opposer's alleged family of marks.

In view of the foregoing, we find that applicant's involved NUTRI LECHE mark and opposer's pleaded MILK marks, considered in their entirety, are dissimilar in appearance, sound, and connotation, and create utterly dissimilar commercial impressions. *See Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USPQ2d 1459 (Fed. Cir. 1998) (court affirms Board dismissal of opposition based on dissimilarity of the marks CRISTAL and CRYSTAL CREEK); *Kellogg Co. v. Pack'em Enterprises, Inc.*, 21 USPQ2d at 1145 (court affirms Board dismissal of opposition based on dissimilarity of the marks FROOTEE ICE and elephant design and FRUIT LOOPS); *Keebler Co. v. Murray Bakery*

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*Products*, 866 F.2d 1386, 9 USPQ2d 1736 (Fed. Cir. 1989) (court affirms Board dismissal of opposition based on dissimilarity of the marks PECAN SANDIES and PECAN SHORTEES). See also *Sears Mortgage Corp. v. Northeast Savings F.A.*, 24 USPQ2d 1227 (TTAB 1992) (dissimilarity between the marks APPROVAL PLUS and APPROVALFIRST dispositive).

Accordingly, applicant's motion for summary judgment is granted, and the opposition is dismissed with prejudice.