

This Opinion is not a  
Precedent of the TTAB

Mailed: August 17, 2016

**UNITED STATES PATENT AND TRADEMARK OFFICE**

**Trademark Trial and Appeal Board**

In re Mannatech, Inc.

Serial No. 86447383

Sanford E. Warren of Warren Rhoades LLP for Mannatech, Inc.

Tamara Frazier, Trademark Examining Attorney, Law Office 116 (Christine Cooper, Managing Attorney).

Before Quinn, Kuhlke and Cataldo,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Mannatech, Inc., filed an application to register on the Principal Register the mark shown below for goods identified as “dietary and nutritional supplements sold through a multi-level marketing program,” in International Class 5.<sup>1</sup>

The logo for NutriVerus features the word "NutriVerus" in a serif font. The letter "V" is stylized with a large, sweeping, curved line that arches over the top of the "V" and extends to the right, resembling a leaf or a swoosh.

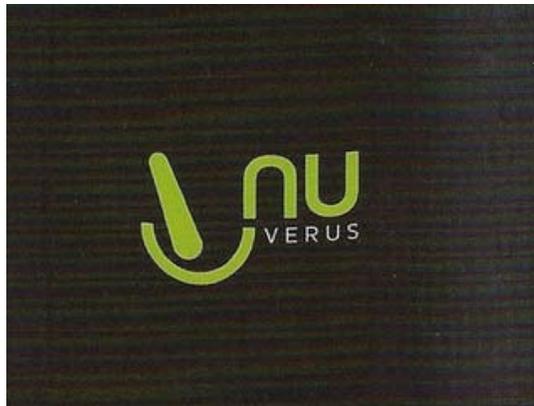
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<sup>1</sup> Application Serial No. 86447383 was filed on November 6, 2014, based on Applicant’s assertion of April 12, 2012 as a date of first use of the mark anywhere and in commerce.

**Serial No. 86447383**

The application includes the following description of the mark and color claim: “The mark consists of stylized NUTRI with a plant in the shape of a V followed by stylized ERUS.” “Color is not claimed as a feature of the mark.”

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, 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.<sup>2</sup>

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<sup>2</sup> Registration No. 3774292 issued on April 13, 2010. The registration also includes goods identified as “energy drinks; fruit juice” in International Class 32. Section 8 affidavit accepted; Section 15 affidavit acknowledged.

When the refusal was made final, Applicant appealed, and Applicant and the Examining Attorney filed briefs. 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); *Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

In this case, 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." In addition, the Examining Attorney introduced Internet evidence

that “there are close to 100 or more [multi-level marketing] companies with vitamins and/or health and wellness products”<sup>3</sup> including vitamins and dietary and nutritional supplements. Thus, Applicant’s goods are identical in part to those identified in the cited registration and otherwise related.

Considering the channels of trade and classes of purchasers, we observe that Applicant’s goods are available “through a multi-level marketing program.” However, because the goods are identical in part and there are no limitations as to channels of trade or classes of consumers in the cited registration, we must presume that Registrant’s identical goods will be offered in the same channels of trade, namely, through multi-level marketing programs, 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.

In addition, Applicant acknowledges that “Registrant’s website also suggests that Nu Verus is a multi-level marketing program”<sup>4</sup> and both Applicant and the Examining Attorney have submitted screenshots from Registrant’s Internet website in support of that contention.<sup>5</sup> Thus, Applicant’s arguments regarding any asserted 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 identification of goods in the registration is not limited by channels of trade or marketing. *See In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

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<sup>3</sup> December 12, 2015 denial of Applicant’s request for reconsideration at 6.

<sup>4</sup> November 13, 2015 request for reconsideration at 7.

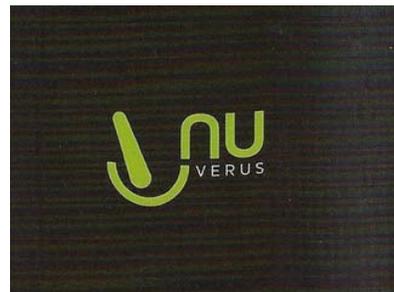
<sup>5</sup> *Id.* at 20-21; December 12, 2015 denial of Applicant’s request for reconsideration at 14-23.

Simply put, Applicant’s limitation of its trade channels to “a multi-level marketing program” does not overcome the presumed overlap of those trade channels with Registrant’s unrestricted, in-part identical, goods. Applicant’s argument that “the goods would never appear side by side on a store shelf nor would either company’s goods appear for sale with the multitude of samples from other retailers”<sup>6</sup> is inapposite. It is not necessary for the Examining Attorney to demonstrate that Applicant’s goods will appear in close proximity to those in the cited registration in order to support a finding that the trade channels for such goods are related. As discussed above, we must presume that Registrant’s unlimited trade channels include the restricted trade channels in which Applicant’s in-part identical goods are encountered. *Id.* The presumed overlap in trade channels is sufficient for purposes of our likelihood of confusion analysis.

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.

*Similarity of the Marks*

We next consider the marks NutriVerus and



and compare them in their entirety as to appearance, sound, connotation and commercial impression. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110

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<sup>6</sup> 8 TTABVue 19.

USPQ2d at 1160 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F. 3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). 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). Consumers may not necessarily encounter the marks at issue in close proximity and must rely upon their general recollections thereof. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467 (TTAB 1988).

In this case, the marks are similar to the extent that both contain the identical term VERUS as a prominent feature thereof. VERUS is set out by itself in the registered mark from the wording NU and the design of a mortar and pestle, and the stylized design of a plant in the shape of a large letter “V” in Applicant’s mark similarly sets VERUS apart from the preceding NUTRI therein. The marks further are similar to the extent that the wording NU VERUS in the registered mark is, overall, similar to the wording NUTRIVERUS in the applied-for mark in appearance and sound. The addition of the letters TRI in Applicant’s mark is not sufficient to distinguish the wording in 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).

NUTRI appears as a prefix and somewhat distinct from VERUS in Applicant's mark. Moreover, Applicant has introduced evidence that NUTRI is the root of the word "nourishment" which, in the context of Applicant's goods indicates that its nutritional supplements provide nourishment and, as such, at a minimum is suggestive of the goods.<sup>7</sup> By comparison, VERUS appears to be 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. NU appears as a prefix, and the second portion is identical to Applicant's second portion, VERUS. The connotation and commercial impression of the arbitrary term VERUS is the same for both marks used on identical goods.<sup>8</sup> 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.<sup>9</sup> The marks thus are similar in connotation or commercial impression, i.e., new or nourishing nutritional supplements and related goods emanating from the same source.

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<sup>7</sup> "Nutri" is defined as "prefix meaning 'nourishment.'" Applicant's April 14, 2015 response to the Examining Attorney's first Office action at 11.

<sup>8</sup> Applicant has introduce evidence from the open source Internet encyclopedia Wikipedia that Verus was a gladiator in the Roman Empire during the first century. *Id.* at 13-15. We note, however, that there is no evidence of the extent to which contemporary consumers are aware of this meaning of Verus, nor is there evidence of any significance of the ancient gladiator Verus in connection with Applicant's goods.

<sup>9</sup> We are not persuaded by Applicant's argument that the term NU in Registrant's mark will be perceived by consumers as the 13th letter in the Greek alphabet (*Id.* at 4; 13 TTABVUE 7, 20), inasmuch as there is no evidence that consumers of Registrant's goods would make such an association.

The mortar and pestle design element and colors in Registrant's mark are not sufficiently prominent or distinctive to overcome the dominance of the wording NUTRIVERUS. *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). This is because the verbal portion is most likely to indicate the origin of the goods, *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this presumption) and also to be used by purchasers to request the goods, *Skincode AG v. Skin Concept AG*, 109 USPQ2d 1325, 1329 (TTAB 2013); *M.C.I. Foods Inc. v. Bunte*, 96 USPQ2d 1544, 1551 (TTAB 2010). Similarly, the presentation in Applicant's mark of the large-sized letter "V" in the shape of a plant strongly reinforces the impression that Applicant's mark is "NutriVerus" rather than creating any additional association.

In support of its position that the marks at issue may co-exist, Applicant introduced copies of third party registrations consisting in part of the terms NUTRI and NU as well as a second term unrelated to those in either of the involved marks, identifying dietary or nutritional supplements and/or vitamins.<sup>10</sup> These include the marks:

NUTRI-MEGA and NU-MEGA and design,  
NUBEARS and NUTRI BEAR,

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<sup>10</sup> *Id.* at 17-49. All marks are in standard characters unless otherwise noted.

NU-ZYMES and NUTRI-ZYME,  
NUTRIGREEN and NU-GREENS,  
NUTRIBEAUTY and NUBEAUTY,  
NU-HEALTH and NUTRI HEALTH,  
NUTRISOURCE and NU-SOURCE,  
NUTRITEK and NU-TEK, and  
NUTRIPET and NU-PET.<sup>11</sup>

However, the probative value of these third-party registrations is greatly diminished by the absence in any of them of the arbitrary term VERUS that, as discussed above, is a dominant feature of both Applicant's mark and the mark in the cited registration. Simply put, while this evidence may show that the terms NUTRI and NU may be somewhat weaker in terms of source identifying capability, the term VERUS common to both marks at issue appears arbitrary and strong.

We find that, viewed as a whole, the similarities between the marks in appearance, sound, connotation 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.

*Conditions of Sale/Sophistication of Purchasers*

With regard to the conditions of sale, Applicant argues that

Each party sells their respective goods through distributors/sponsors via a multi-level marketing program, consumers are well educated in the source of the goods as well as the product lines prior to making a

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<sup>11</sup> Applicant further made of record copies of third-party registrations for NU and NUTRI formative marks for goods unrelated to those at issue herein.

purchase. The decision to purchase these goods is not made in haste, thus greatly reducing the likelihood of confusion. The procurement of these goods requires considerable thought, research, and deliberation as the consumer is making a conscious effort to improve their health.<sup>12</sup>

However, Applicant has submitted no evidence in support of these contentions. The Examining Attorney, on the other hand, has submitted evidence that goods similar to those offered by Applicant and Registrant are available for between \$12 and \$40, with a few outliers priced between \$60 and \$85.<sup>13</sup> These goods are neither prohibitively expensive nor intrinsically complex or technical in nature, and there is nothing in the record to support a finding that they will only be purchased by careful consumers possessing specialized knowledge or exercising a heightened degree of care. 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). Even if we accept, arguendo, that 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.

*Summary*

We have considered the *du Pont* factors for which Applicant and the Examining Attorney have provided arguments or evidence. The rest we treat as neutral. Based upon the evidence in this case, including any evidence not specifically discussed herein, we find that the goods are identical in part, that the restricted trade channels and classes of consumers of Applicant's goods are encompassed by the

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<sup>12</sup> *Id.* at 20.

<sup>13</sup> December 12, 2015 denial of Applicant's request for reconsideration at 14-23.

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unrestricted trade channels and classes of consumers of Registrant's identical goods, and that the marks, considered as a whole, are more similar than dissimilar. Any sophistication of consumers in their purchasing decisions are outweighed by the in part identical goods, trade channels and consumers, and similar marks.

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