UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
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General Contact Number: 571-272-8500

Baxley

Mailed: September 30, 2016

Cancellation No. 92061862 – 85.036 432

Cyanotech Corporation

v.

Nutrex Research, Inc.

Concurrent Use No. 94002616

Cyanotech Corp.

v.

Nutrex Research, Inc.

v.

Nutrex nv

v.

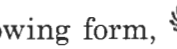
Monique Loppe (deleted as excepted user)

Andrew P. Baxley, Interlocutory Attorney:

In the above-captioned cancellation proceeding, Cyanotech Corporation ("Cyanotech") seeks to cancel Nutrex Research, Inc's ("NRI") registrations for the mark NUTREX RESEARCH in the following stylizied form, 

, for "Dietary supplements for enhancing energy, athletic performance, physical prowess and libido, developing muscle mass, and weight loss" in International Class 5 and

"Online retail store services featuring dietary supplements for enhancing energy, athletic performance, physical prowess and libido, developing muscle mass, and weight loss" in International Class 35.[1] As grounds for cancellation, Cyanotech alleges nonownership,[2] fraud,[3] and likelihood of confusion with its "previously used nationwide in the United States since 1991" marks NUTREX and NUTREX HAWAII for "nutritional supplements." NRI denied the salient allegations of the petition to cancel in its answer.

In the above-captioned concurrent use proceeding, Cyanotech seeks to register the marks NUTREX and design in the following form,  ,[4] and NUTREX

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[1] Registration Nos. 3870696 and 3870697, issued November 2, 2010 and alleging 2002 as the date of first use anywhere and date of first use in commerce. Each registration includes a disclaimer of RESEARCH and a statement that color is not claimed as a feature of the mark.

[2] The nonownership claim set forth in paragraph 8 of the petition to cancel (1 TTABVUE 8) is insufficient because Cyanotech has not pleaded any factual matter that provides fair notice of the basis therefor. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[3] The fraud claim set forth in paragraph 9 of the petition to cancel (1 TTABVUE 8) is insufficient. As an initial matter, the basis for the such claim is not pleaded in the petition to cancel, which merely refers to the declaration of Robert John Capelli (Exhibit C thereto). Other than status and title copies of pleaded registrations, the Board does not consider exhibits to pleadings. *See* Trademark Rule 2.122(c).

In any event, the statements in the Capelli declaration, taken together, merely indicate that NRI was aware of Cyanotech's pleaded marks prior to filing the underlying applications for NRI's registrations and do not allege any deceptive intent by NRI. Pleadings of fraud require allegation of sufficient underlying facts from which the Board may reasonably infer that a party acted with the requisite intent to deceive. *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479 (TTAB 2009).

[4] Application Serial No. 85423883, filed September 15, 2011, and alleging May 5, 2010 as the date of first use anywhere and date of first use in commerce.

HAWAII in standard characters[5] and for "Nutritional supplements for human consumption; nutraceuticals for the treatment of oxidative stress, decreased immunity, and inflammatory conditions; nutraceuticals for use as a dietary supplement; dietary supplements; nutritional supplements; nutritional additives for medical purposes for use in foods and dietary supplements for human consumption; nutritional additives for use in feed for animals for medical purposes; dietary supplements for animal consumption; food supplements; food supplements, namely, anti-oxidants; homeopathic supplements, namely, diluted doses from the plant, mineral and animal kingdoms for human consumption; drink mixes, namely, dietary drink mix for use as a meal replacement, powdered fruit-flavored dietary supplement drink mix, nutritional supplement in the nature of a nutrient-dense, protein-based drink mix" in International Class 5. Both applications include the following concurrent use statement:

> Subject to Concurrent Use Proceeding with 3204937,[6] 3798632, 3849395,[7] 3870696 and 3870697. [Cyanotech] claims the exclusive

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[5] Application Serial No. 85423915, filed September 15, 2011, and alleging December 6, 1990 as the date of first use anywhere and March 1, 1991 as the date of first use in commerce. The application includes a disclaimer of HAWAII.

[6] Registration No. 3204937 for the mark NUTRIX in standard characters for goods in International Classes 5 and 29 was issued to Monique Loppe on February 6, 2007. That registration was cancelled under Trademark Act Section 8, 15 U.S.C. § 1058, on September 13, 2013.

[7] Registration No. 3798632 for the mark NUTREX in standard characters for goods in International Classes 1 and 5 was issued on July 15, 2009 to Nutrex nv. Registration No. 3849395 for the mark NUTREX THE FINISHING TOUCH FOR NUTRITION and design in the following form, nutrex, for goods in International Classes 1 and 5 was issued on September 21, 2010 to Nutrex nv. These registrations was the subjects of Cancellation No. 92061883, styled *Cyanotech Corporation v. Nutrex nv* and were cancelled on November 13, 2015, after default judgment was entered in that proceeding.

> right to use the mark in the area comprising the states of Alaska, Colorado, Hawaii, Idaho, Maine, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Rhode Island, South Dakota, Utah, Vermont, West Virginia, Wyoming and all U.S. Territories, including without limitation, Guam, Puerto Rico and the U.S. Virgin Islands.

On December 16, 2014, December 18, 2014, and January 7, 2015, Cyanotech filed notices of ineffective service on excepted concurrent user Monique Loppe ("Loppe"). On December 29, 2014, named excepted registrant Nutrex nv filed a consented motion to extend time to answer. On April 27, 2015, Cyanotech then filed a motion to delete Nutrex nv as a party to the concurrent use proceeding. The motion to delete Nutrex nv does not include proof of service upon Nutrex nv filed an untimely response thereto.

In a January 29, 2016 order, the Board (1) consolidated the above-captioned proceedings; (2) stated that these proceedings cannot go forward until Cyanotech furnishes a correct address for Loppe (see TBMP § 1106.05); (3) deferred consideration of the motion to delete Nutrex nv, and (4) suspended proceedings for settlement negotiations and to allow time for Cyanotech to serve its involved applications on Loppe.

On March 18, 2016, Cyanotech and NRI filed a renewed joint motion to remove Nutrex nv and Loppe as parties. That motion indicates service upon Nutrex nv, but does not indicate any attempt at service upon Loppe, as required by Trademark Rule 2.119(a).

Before the Board could act on the March 18, 2016 motion, Cyanotech and NRI, on June 17, 2016, filed a second renewed motion to remove Nutrex nv and Loppe as

parties to this proceeding and to grant Cyanotech its concurrent use registrations. Such motion includes proof of service upon Loppe at three different addresses from her address of record to which there had previously been ineffective service.[8] In the June 17, 2016 motion, Cyanotech and NRI expressly withdrew the March 18, 2016 motion. On August 8, 2016, Cyanotech and NRI filed a notice of ineffective service of the June 17, 2016 motion upon Loppe at Villarica, 57 Rue Boileau, Paris 75016 France.

In view of Cyanotech's and NRI's filing of three separate motions to delete Loppe and Nutrex nv as parties to the concurrent use proceeding, the Board will consider only the most recently filed motion, i.e., the June 17, 2016 motion. Although Nutrex nv did not respond to the third such motion, it responded, albeit late, to the first motion to delete Loppe and Nutrex nv. Because the record indicates that, prior to the filing of the third motion to delete parties, Nutrex nv had already indicated its opposition to its deletion as a party to the concurrent use proceeding, the Board, in its discretion, will consider Nutrex nv's response in deciding whether to delete Nutrex nv as a party to the concurrent use proceeding. *See* Trademark Rule 2.127(a).

The Board turns first to the motion to delete as it relates to Loppe. In the January 29, 2016 order the Board stated that, because Loppe does not own an

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[8] Loppe's address of record is 33 Avenue de Saxe, Paris 75007 France. Delivery of the service copies of Cyanotech's involved concurrent use applications to Loppe at that address was unsuccessful. *See* 5, 7, and 9 TTABVUE.
After conducting further research on possible addresses for Loppe, Cyanotech and NRI served the June 17, 2016 motion upon Loppe at the following addresses: (1) 159 Rue de la Republique, 38590 Sillans, France; (2) 26 Rue Docteur Guyonnet, 38590 Sillans, France; and (3) Villarica, 57 Rue Boileau, 75016 Paris, France.

application or registration, the proceeding cannot go forward until Cyanotech furnishes the correct address for the user. However, because, upon further investigation, Cyanotech asserts that Loppe has abandoned use of her mark, it may file a motion to amend its application to delete reference to that user. The motion includes an explanation of the facts that provide the basis for the motion, as required by TBMP § 1106.05. Bearing in mind Loppe's failure to participate in the concurrent proceeding after having been served documents regarding such proceeding at four different addresses, the motion to delete Loppe as a party to this proceeding is hereby granted as conceded. *See* Trademark Rule 2.127(a). Loppe is hereby deleted as a named excepted user and party to the concurrent use proceeding.

With regard to the motion to delete Nutrex nv, a mark is deemed abandoned under Trademark Act Section 45, 15 U.S.C. 1127,

> [w]hen its use has been discontinued with intent not to resume such use. Intent not to resume may be inferred from circumstances. Nonuse for 3 consecutive years shall be prima facie abandonment. "Use" of a mark means the bona fide use of such mark made in the ordinary course of trade, and not made merely to reserve a right in the mark.

Nutrex nv's registrations that are cited in Cyanotech's concurrent use statement were cancelled as a result of the default judgment that was entered in Cancellation No. 92061883. However, such cancellation by itself does not extinguish Nutrex nv's common law rights in the mark. *See Lever Brothers Co. v. Shaklee Corp.*, 214 USPQ 654, 660 (TTAB 1982).

In support of the motion to delete Nutrex nv, Cyanotech and NRI submitted a series of declarations of David M. Wallace in support of their motion to delete Loppe and Nutrex nv. In February 15, 2016 and June 6, 2016 declarations, Wallace avers that his online research uncovered no use in the United States of Nutrex nv's marks. Opposition No. 92061862, 7 TTABVUE 34 and 37-38. In an undated declaration,[9] Dr. Wallace further avers that "[i]n a telephone interview with Nutrex NV in Belgium, [he] was informed that Nutrex nv 'currently had no distribution in the U.S.'" However, this statement is inadmissible hearsay. *See Dynamark Corp. v. Weed Eaters, Inc.*, 207 USPQ 1026, 1030 (TTAB 1980).

In addition, Cyanotech and NRI incorporated by reference a declaration of David A. Wright, an intellectual property investigator, that Cyanotech submitted the first motion to delete Loppe and Nutrex nv from the concurrent use proceeding. In that declaration, Wright avers that his online research uncovered no use of Nutrex nv's marks in the United States and that he spoke with Kurt Van de Mierop, Nutrex nv's sales and marketing manager, who stated that there is no use of Nutrex nv's involved marks in the United States at this time.

In opposition, Nutrex nv submitted evidence that it has been an exhibitor at the International Production and Processing Expo in Atlanta, Georgia annually since 2011.[10] However, the record is not clear regarding how Nutrex nv's marks are used

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[9] The declaration appears to be the same as Dr. Wallace's declaration that was filed in the USPTO files for Cyanotech's involved Application Serial Nos. 85423883 and 85423915 on January 15, 2013.

[10] In opposition to the motion to delete it as a party to the concurrent use proceeding, Nutrex nv relies upon the affidavit of Kurt Van de Mierop, who is identified as its director

at these events.[11] Use of a mark at a trade show booth where orders for goods are taken and goods were later shipped may conceivably constitute use in commerce sufficient to overcome an assertion of abandonment. *See Milliken & Co. v. Image Industries Inc.*, 39 USPQ2d 1192, 1194 (TTAB 1996). In addition, Mr. Van de Mierop denies having made the statement alleged by Mr. Wright.

In view of the uncertainty concerning the nature of Nutrex nv's use of its marks at such events in the United States, the Board is unwilling to delete Nutrex nv as a party of the concurrent use proceeding at this time. Accordingly, the motion to delete Nutrex nv as a party to the concurrent use proceeding is denied without prejudice.

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in the underlying application for its now-cancelled Registration No. 3798632. That affidavit relies in part upon hyperlinks to websites. Providing hyperlinks to Internet materials is insufficient to make such materials of record. *See In re HSB Solomon Assocs., LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012); *Safer Inc. v. OMS Investments Inc.*, 94 USPQ2d 1031, 1039 (TTAB 2010) (Internet postings are transitory in nature and may be modified or deleted).

[11] Trademark Act Section 45, 15 U.S.C. § 1127, states in relevant part as follows:

> The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—
>
> (1) on goods when—
>
> (A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and
>
> (B) the goods are sold or transported in commerce....

Because Nutrex nv remains a party to the concurrent use proceeding, the Board declines to consider Cyanotech's and NRI's consent agreement. Nonetheless, with regard to that agreement, the Board notes the following considerations.[12]

In the concurrent use proceeding, it is Cyanotech's burden as the concurrent use applicant and plaintiff to establish that there is no likelihood of confusion arising from concurrent use of the parties' marks. *See Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1484 (TTAB 2014). The fact that the parties' have filed a consent agreement does not preclude a determination that there is a likelihood of confusion between the marks. *See In re Bay State Brewing Co.*, 117 USPQ2d 1958 (TTAB 2016) (registration refused notwithstanding consent agreement). *But see Holmes Oil Co. v. Myers Cruizers of Mena Inc.*, 101 USPQ2d 1148 (TTAB 2011) (excepted user's motion to implement parties' consent agreement, which provides for applicant to obtain territorially restricted registration while excepted user's registration remains unrestricted, granted).

Two key factors in deciding likelihood of confusion issues are the degree of similarity of the parties' marks and the degree of similarity of their respective goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *Fram Trak Industries Inc. v. WireTracks LLC*, 77 USPQ2d 2000, 2005 (TTAB 2006). Regarding the marks at issue, likelihood of confusion issues are determined based on the marks as shown in the drawings of the applications and registrations at issue. *See In re Kysela Pere et Fils Ltd.*, 98

[12] The following is not a determination of the sufficiency of the Cyanotech's and NRI's consent agreement and is merely to assist the parties in moving forward herein.

USPQ2d 1261, 1268 (TTAB 2011). No consideration can be given to allegedly distinguishing features which are not part of the mark sought to be registered, such as the trade dress with which the parties' marks are used. *See In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981).

Although marks must be considered in their entireties, more or less weight may be given to a particular feature of a mark. *See In re National Data Corp.*, 753 F2d. 1056, 224 USPQ 749, 750 (Fed.Cir. 1985). Where a mark consists of a between a design and a word mark, the word portion is generally dominant in creating the commercial impression of the mark at issue. *Allstate Insurance Co. v. DeLibro*, 6 USPQ2d 1220, 1223 (TTAB 1988). In addition, disclaimed matter is less dominant. *See In re National Data Corp.*, 224 USPQ at 750. Accordingly, in view of the parties' common use of NUTREX, the addition of disclaimed wording, i.e., HAWAII by Cyanotech and RESEARCH by NRI, and Cyanotech's use of a design element may be insufficient to avoid a likelihood of confusion between the parties' marks.

Further, likelihood of confusion issues are decided on the basis of the identification of goods and/or services set forth in the applications and registrations at issue, regardless of what the record may reveal as to the particular nature of the parties' goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed. *See Octocom Systems Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Because there are no restrictions in the identifications of goods and/or services in Cyanotech's applications and NRI's registrations, the Board must presume that the parties'

goods and/or services includes all goods of the type, including those types that could travel in many of the same channels of trade. *In re Elbaum*, 211 USPQ at 640. The identifications of goods in Cyanotech's involved applications include "dietary supplements," which the Board must presume encompass the "Dietary supplements for enhancing energy, athletic performance, physical prowess and libido, developing muscle mass, and weight loss" set forth in the identification of goods in NRI's Registration No. 3870696. Because those goods are legally identical, the Board must presume that they travel in the same channels of trade to the same classes of purchasers. Moreover, when marks appear on legally identical goods, as they do in part here, the degree of similarity of marks necessary to support a conclusion of likely confusion declines. *See Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698 (Fed. Cir. 1992).

In addition, the parties allege nationwide co-existence since 2002 in their consent agreement, Cyanotech seeks geographically restricted registrations through its involved applications.[13] Where the trading territories of parties to a concurrent use proceeding overlap in actual use, that fact can preclude the granting of concurrent use registrations.[14] *See Gray v. Daffy Dan's Bargaintown*, 823 F.2d 522, 3 USPQ2d 1306, 1308-09 (Fed. Cir. 1987) ("The issue of likelihood of confusion in this concurrent use proceeding was properly resolved by looking at the concurrent

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[13] Cyanotech did not file an amendment to delete the concurrent use statement from its applications. *See* Trademark Rule 2.133(a); TBMP § 514.

[14] The parties should not infer that these are the only potential issues with the parties' consent agreement.

use applicant's area of actual use, not merely the area 'claimed' in his application."); *My Aching Back, Inc. v. Alfred Klugman*, 6 USPQ2d 1892 (TTAB 1988). *But see Holmes Oil Co., supra.*

The Board deems the filing of Cyanotech's first notice of ineffective service upon Loppe on December 16, 2014 to have tolled the running of dates in the concurrent use proceeding. Proceedings herein were otherwise suspended pursuant to the January 29, 2016 consolidation order and are hereby resumed. Dates herein are reset as follows. *See* TBMP Appendix of Forms, Appendix H.

Answers due in Concurrent Use Proceeding[15]	10/30/16
Deadline for Discovery Conference	11/29/16
Discovery Opens	11/29/16

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[15] Because NRI's registrations are cited in Cyanotech's concurrent use applications, NRI need not file an answer. See Trademark Rule 2.99(d)(2). However, because Nutrex nv's were cancelled, Nutrex nv must file an answer to avoid default. See Trademark Rule 2.99(d)(3).

Nutrex nv intends to represent itself herein. While Patent and Trademark Rule 11.14 permits any person to represent himself, it is generally advisable for a person who is not acquainted with the technicalities of the procedural and substantive law involved in a Board proceeding to secure the services of an attorney who is familiar with such matters. The Patent and Trademark Office cannot aid in the selection of an attorney.In this proceeding, the parties should review the Trademark Board Manual of Procedure (TBMP) and the Trademark Rules of Practice, online at http://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab. The Board expects all parties appearing before it, whether or not they are represented by counsel, to comply with the Trademark Rules of Practice and where applicable, the Federal Rules of Civil Procedure, online at http://www.law.cornell.edu/rules/frcp.

Trademark Rules 2.119(a) and (b) state that every submission filed in this proceeding must be served upon the attorney for the other party, or on the party if there is no attorney, and proof of such service must be made before the paper will be considered by the Board. Consequently, copies of all submission which the parties may subsequently file in this proceeding must be accompanied by a signed statement indicating the date and manner in which such service was made, e.g., by mail. The statement, whether attached to or appearing on the paper when filed, will be accepted as prima facie proof of service.

Nutrex nv is further advised that it may not use certificate of mailing procedure on submissions that it files with the Board by mail from outside of the United States. *See* Trademark Rule 2.197; TBMP § 110. Accordingly, Nutrex nv is urged to file submissions herein through the Board's Electronic System for Trademark Trials and Appeals (ESTTA) database, available online at http://estta.uspto.gov.

Initial Disclosures Due	12/29/16
Expert Disclosures Due	4/28/17
Discovery Closes	5/28/17
Cyanotech's Pretrial Disclosures Due	7/12/17
Cyanotech's 30-day Testimony Period Ends	8/26/17
NRI's Pretrial Disclosures Due	9/10/17
NRI's 30-day Testimony Period Ends	10/25/17
Nutrex nv's Pretrial Disclosures Due	11/9/17
Nutrex nv's 30-day Testimony Period Ends	12/24/17
Cyanotech's Rebuttal Disclosures Due	1/8/18
Cyanotech's 15-day Rebuttal Period Ends	2/7/18
Cyanotech's Trial Brief Due	4/8/18
NRI's Trial Brief Due	5/8/18
Nutrex nv's Trial Brief Due	6/7/18
Reply Brief for Cyanotech Due	6/22/18

In each instance, a copy of the transcript of testimony, together with copies of documentary exhibits, must be served on the adverse party within thirty days after completion of the taking of testimony. Trademark Rule 2.125. Briefs shall be filed in accordance with Trademark Rules 2.128(a) and (b). An oral hearing will be set only upon request filed as provided by Trademark Rule 2.129. If either of the parties or their attorneys should have a change of address, the Board should be so informed promptly.

A copy of this order is sent to the following addresses

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