Mailed: September 21, 2007

UNITED STATES PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Nexense, Ltd.

_____

Serial No. 78465875

_____

Kenneth W. Farak of Renner, Otto, Boisselle & Sklar for Nexense, Ltd.

Daniel Capshaw, Trademark Examining Attorney, Law Office 110 (Chris A. F. Pedersen, Managing Attorney)

_____

Before Drost, Cataldo and Bergsman, Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

An application was filed by Nexense, Ltd. to register on the Principal Register the mark NEXAVER in standard character form for the following goods, as amended: "Medical devices, namely respiration sensors, pulse sensors, blood pressure sensors" in International Class 10.[1]

[1] Application Serial No. 78465875 was filed on August 11, 2004, based on applicant's assertion of its bona fide intent to use the mark in commerce in connection with the goods, and claiming priority under Section 44(d) of the Trademark Act. Applicant subsequently perfected a Section 44(e) basis for application by submitting a copy of its foreign registration.

The trademark examining attorney refused registration under Section 2(d) of the Trademark Act on the ground that applicant's mark, as used in connection with its goods, so resembles the mark NEXAVAR, previously registered on the Principal Register in typed or standard character form for "pharmaceutical preparations for the treatment of cardiovascular diseases, central nervous system diseases, cancer, respiratory and infectious diseases, diagnostic reagents adapted for medical use" in International Class 5,[2] as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the examining attorney filed briefs on the issue under appeal. In addition, applicant filed a reply brief.

Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth 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, 1203 (Fed. Cir. 2003). In any likelihood of

[2] Registration No. 2745627 issued on August 5, 2003.

confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods and/or services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 27 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).

The Marks

We first consider whether applicant's mark and registrant's mark are similar or dissimilar when viewed in their entireties in terms of appearance, sound, connotation and overall commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). In this case, applicant's mark, NEXAVER, is nearly identical in appearance and sound to the registered mark NEXAVAR. The marks differ by a single vowel that forms the penultimate letter of each mark. Such difference does little to diminish the otherwise identical appearance of the marks. As to sound, the substitution of the letter "e" in applicant's mark for the letter "a" in that of registrant does not necessarily mean that the marks will be pronounced differently. It is well settled that there is no correct pronunciation of a trademark. *See In re Belgrade Shoe*, 411 F.2d 1352, 162 USPQ 227 (CCPA 1969) and *Interlego AG v.*

Abrams/Gentile Entertainment Inc., 63 USPQ2d 1862 (TTAB 2002). *See also In re Microsoft Corp.*, 68 USPQ2d 1195 (TTAB 2003) (it is not possible to control how consumers will vocalize marks). Particularly in cases such as this in which neither mark is a recognized term having an accepted pronunciation, it is possible that consumers will pronounce applicant's mark in an identical manner to that of registrant's mark. In view of the nearly identical nature of NEXAVER and NEXAVAR in terms of appearance and sound, the marks convey highly similar commercial impressions.

We are not persuaded by applicant's argument that because its NEXAVER mark "is the combination of Applicant's name and the word 'saver' as in life saver" (brief, p. 7) the mark when viewed in relation to its goods "creates the connotation that Applicant's sensors save lives" (*Id*). Applicant simply provides no evidence that consumers encountering its mark on its identified goods would derive either that or any other connotation therefor. Neither does applicant provide any evidence to support its suggestion that "NEX" in registrant's NEXAVAR mark suggests the word "next" or that registrant's goods connote "a 'next

generation' drug for treating diseases" (brief, p. 8).[3] In short, applicant's assertions regarding the connotations of its mark and that of registrant are speculative and unsupported by the record in this case. Due to the nearly identical nature of the NEXAVER and NEXAVAR marks, we find that to the extent the marks convey a particular connotation, those connotations are likely to be highly similar.

Finally, there is no evidence of record that NEXAVAR is anything but a strong, distinctive mark that is entitled to a broad scope of protection.

Thus, despite the minor difference in spelling, the marks NEXAVER and NEXAVAR are nearly identical in appearance, sound, connotation and commercial impression. Accordingly, this d*u Pont* factor favors a finding of likelihood of confusion.

The Goods

Turning now to our consideration of the recited goods, we must determine whether consumers are likely to mistakenly believe that they emanate from a common source. It is not necessary that the goods at issue be similar or competitive, or even that they move in the same channels of

[3] We note, for instance, that neither mark appears to have an accepted definition or meaning.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.