

**This Opinion is Not a
Precedent of the TTAB**

Mailed: March 5, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Rainbow Light Nutritional Systems, Inc.

Serial No. 85871276

Anthony Robinson for Rainbow Light Nutritional Systems, Inc.

James Rauen, Trademark Examining Attorney, Law Office 109,
Dan Vavonese, Managing Attorney.

Before Seeherman, Bergsman and Lykos,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Rainbow Light Nutritional Systems, Inc. (“Applicant”) seeks registration on the Principal Register of the mark EMBRACE PRENATAL 35+ (in standard characters) for

Vitamins and dietary supplements, namely supplements designed for women to support conception, pregnancy and nursing, in Class 5.¹

Applicant disclaimed the exclusive right to use the term “Prenatal 35+.”

¹ Application Serial No. 85871276 was filed on March 8, 2013, based upon Applicant’s allegation of a *bona fide* intention to use the mark in commerce under Section 1(b) of the Trademark Act.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark EMBRACE (in standard characters) for "dietary supplements, namely, weight loss supplements in capsule form," in Class 5, as to be likely to cause confusion.²

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Issue

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached evidence to its main brief. Trademark Rule 2.142(d), 37 CFR § 2.142(d) reads as follows:

The record in the application should be complete prior to the filing of an appeal. The Trademark Trial and Appeal Board will ordinarily not consider additional evidence filed with the Board by the appellant or by the examiner after the appeal is filed. After an appeal is filed, if the appellant or the examiner desires to introduce additional evidence, the appellant or the examiner may request the Board to suspend the appeal and to remand the application for further examination.

In his brief, the Trademark Examining Attorney objected to Applicant's attempt to introduce evidence with its brief. Despite the objection by the Trademark Examining Attorney, who cited authority supporting the objection, Applicant also submitted evidence with its reply brief.

² Registration No. 4123827, issued April 10, 2012.

The objection is sustained and the evidence submitted with Applicant's brief and reply brief will be given no consideration.

II. Applicable Law

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *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 confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) ("The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks."). These factors, and any other relevant *du Pont* factors in the proceeding now before us, will be considered in this decision.

A. The similarity or dissimilarity and nature of the goods.

As noted above, Applicant is seeking to register its mark for "vitamins and dietary supplements, namely supplements designed for women to support conception, pregnancy and nursing" and the description of goods in the cited registration is "dietary supplements, namely, weight loss supplements in capsule form."

In its reply brief, Applicant quoted the Dietary Supplement Health and Education Act of 1994 for the definition of “dietary supplement.”³

A dietary supplement is a product taken by mouth that contains a "dietary ingredient" intended to supplement the diet. The "dietary ingredients" in these products may include: vitamins, minerals, herbs or other botanicals, amino acids, and substances such as enzymes, organ tissues, glandulars, and metabolites. Dietary supplements can also be extracts or concentrates, and may be found in many forms such as tablets, capsules, softgels, gelcaps, liquids, or powders. They can also be in other forms, such as a bar, but if they are, information on their label must not represent the product as a conventional food or a sole item of a meal or diet. Whatever their form may be, DSHEA places dietary supplements in a special category under the general umbrella of "foods," not drugs, and requires that every supplement be labeled a dietary supplement.

The issue with respect to the relatedness of the goods is whether dietary supplements designed for pregnant women are related to dietary supplements designed as a weight loss supplement.

To prove that dietary supplements designed for pregnant women and dietary supplements designed as a weight loss supplement are related, the Trademark Examining Attorney submitted excerpts from websites showing third parties using the same trademark to identify a myriad of dietary supplements, including prenatal supplements and weight loss supplements:⁴

³ Applicant's Reply Brief, p. 7.

⁴ January 7, 2014 Office Action.

1. Nature's Way Store (natureswaystore.com) uses the **NATURE'S WAY•STORE** trademark and logo to identify diet and weight loss supplements and prenatal supplements.

2. The **VitaFusion** trademark is used to identify weight management fiber supplements and prenatal vitamins.

3. The **Super Nutrition** trademark is used to identify prenatal vitamins, as well as vitamins and supplements designed for, *inter alia*, "prostate function," "digestive aids," and "all-day energy."

4. The **One-A-Day** trademark is used to identify prenatal supplements, as well as vitamins and supplements designed for, *inter alia*, "physical energy & mental alertness," "heart health," and "bone and breast health."

5. The **New Chapter** trademark is used to identify prenatal vitamins, as well as vitamins and supplements designed for, *inter alia*, "prostate function," "the wisdom of whole food," and "anti-inflammatory relief."

6. The **Doctor's Choice** trademark is used to identify prenatal vitamins, as well as vitamins and supplements designed for, *inter alia*, "healthy aging, digestion, blood sugar, bones and the immune system," "daily energy, enhanced immunity and balanced nutrition," and "diabetes."

7. The **Nordic Naturals** trademark is used to identify prenatal vitamins, as well as vitamins and supplements designed for, *inter alia*, "memory and mood," "healthy brain and visual development," and diet supplement for children.

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.