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## [Toothpaste Trademark Tussle](#)

Posted on November 5, 2010 by [Dan Kelly](#)

News outlets reported this past summer on [GlaxoSmithKline's](#) trademark infringement lawsuit against [Colgate-Palmolive Company](#) about the use of what GSK alleges are its trademarks for TRIPLE PROTECTION and a nurdle.

I'm sorry . . . what's that? You've never heard of a nurdle? You have probably seen one. A nurdle looks like this:



(You obviously have never been to [Nurdle World](#).)

Like the HULK suit [on which I reported a couple of weeks ago](#), the hundred or so pages of pleadings to date can best be summed up by looking at a couple of pictures, which show what the kerfuffle is all about. Here:



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This is probably a good time to review the trademark principle that, in a trademark infringement analysis (or a likelihood of confusion analysis, not to be confused with *the* LIKELIHOOD OF CONFUSION® analysis, which you would find [here](#)), a side-by-side comparison of the trademarks or products is generally discouraged, as the typical consumer frequently does not encounter accused products side-by-side in the marketplace.

In this case, I am most sympathetic to Gawker's [analysis](#) of this suit. Sarcasm aside, Colgate actually fired the first shot in this suit, at least from the standpoint of filing suit, filing a declaratory judgment action against GSK hours before GSK filed a conventional trademark suit against Colgate, both in the [United States District Court for the District of Southern New York](#). The cases have been consolidated with GSK as the natural plaintiff (the one alleging harm), and Colgate has filed counterclaims attacking the validity of GSK's TRIPLE PROTECTION and nurdle trademarks. All of the initial pleadings (complaint, answer and counterclaim, and answer to counterclaims) are now on file as of the end of last month.

Unlike the HULK case, this one is a closer call. Each party has some good arguments. GSK has trademark registrations on TRIPLE PROTECTION and a red, white, and blue nurdle. Colgate argues that TRIPLE PROTECTION is weak and that a nurdle is descriptive because it shows the product. The critical question: on seeing the nurdle and TRIPLE ACTION description on packages of Colgate product, would consumers be confused into thinking that the toothpaste in the Colgate package was sourced, sponsored, or endorsed by the makers of Aquafresh? Certainly not after this suit.

