

This Opinion is not a  
Precedent of the TTAB

Mailed: March 17, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*TdeltaS Limited*

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Serial No. 79282075

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Rebecca L. Wilson of The Dobrusin Law Firm PC  
for TdeltaS Limited

Kristen Z. Wu, Trademark Examining Attorney, Law Office 114,  
Nicole Nguyen, Managing Attorney.

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Before Zervas, Shaw and Goodman,  
Administrative Trademark Judges.

Opinion by Shaw, Administrative Trademark Judge:

TdeltaS Limited (“Applicant”) appeals the final refusal to register the mark



on the Principal Register for goods identified as:

Non-alcoholic drinks in the nature of energy drinks, fruit drinks and soda drinks containing caloric substitutes for carbohydrates and used to maintain, promote and enhance health, wellness and fitness and to treat medical conditions; non-medicated non-alcoholic-based substances in the nature of energy drinks, fruit drinks and soda drinks for the treatment of muscle fatigue, muscle conditions, epilepsy, anxiety, dementia, cancer, cachexia and cell damage and substances for improving cognitive function,

raising ketone blood levels in humans or animals, all the aforementioned containing ketone esters or hydroxybutyrates; non-alcoholic beverages fruit-based beverages and energy drinks, namely, isotonic beverages, nutritionally fortified beverages, sports drinks, vitamin fortified non-alcoholic beverages, all the aforesaid containing ketone esters or hydroxybutyrates; non-alcoholic syrups and other non-alcoholic preparations for making fruit beverages and energy drinks containing ketone esters or hydroxybutyrates, in International Class 32.<sup>1</sup>

The description of the mark in the application states: “The mark consists of the design of the Greek character delta in blue with [the] word ‘delta’ appearing on the bottom of the character in white, all to the left of the word ‘Gold’ in the stylized font in blue.” The colors blue and white are claimed as a feature of the mark. The application states that the transliteration of the non-Latin character in the mark is “delta.”

The Trademark Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

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<sup>1</sup> Application Serial No. 79282075 based on International Reg. No. 1522657, which issued January 23, 2020. The USPTO was notified of the request for extension of protection on March 26, 2020.

The application as filed included goods in International Class 5, however, applicant did not include the International Class 5 goods in its appeal. *See In re MGA Entm’t Inc.*, 84 USPQ2d 1743, 1745 n.1 (TTAB 2007) (applicant did not appeal requirement to delete Class 28 goods, and Board treated Class 28 goods as deleted from application). In effect, it has abandoned the International Class 5 goods.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. References to the briefs and other materials in the appeal record refer to the Board’s TTABVue online docketing system.

likelihood of confusion with the mark DELTAGOLD, in typed form, for “nutritional supplements,” in International Class 5.<sup>2</sup>

When the refusal was made final, Applicant requested reconsideration, and appealed only the refusal of registration as to the goods in class 32. The Examining Attorney denied the request for reconsideration, and the appeal resumed. The case is fully briefed.<sup>3</sup> We affirm the refusal to register.

### I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973) (“*DuPont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the goods and the similarities between the marks. *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

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<sup>2</sup> Registration No. 2818341, issued February 24, 2004, renewed. A mark in typed form is the legal equivalent of a standard character mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012) (explaining that in 2003 there was a non-substantive change in nomenclature from a “typed mark” to a “standard character mark”).

<sup>3</sup> Applicant attached exhibits to its appeal brief. The exhibits were previously submitted with Applicant’s responses and should not have been submitted with Applicant’s brief. *ITC Entm’t Grp. Ltd. v. Nintendo of Am. Inc.*, 45 USPQ2d 2021, 2022-23 (TTAB 1998) (filing duplicative submissions is a waste of time and resources, and is a burden on the Board).

differences in the essential characteristics of the goods and differences in the marks.”).

A. Strength of the cited mark

Before we discuss the similarity of the marks, we address Applicant’s evidence and argument under the sixth *DuPont* factor, “[t]he number and nature of similar marks in use on similar goods,” *DuPont*, 177 USPQ at 567, as this may impact the scope of protection accorded the cited registration. The Federal Circuit has held that evidence of the extensive registration and use of similar marks by others in the field can be powerful evidence of a mark’s weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015).

Of course, because Registrant’s mark is registered, it is presumptively valid and distinctive for the identified goods. Trademark Act Sections 7(b) and 33(a), 15 U.S.C. §§ 1057(b) and 1115(a); *In re Fiesta Palms LLC*, 85 USPQ2d 1360, 1363 (TTAB 2007). Nonetheless, we may acknowledge the weakness of a registered mark in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).




Applicant argues that extensive third-party “use” of the DELTA portion of the cited mark makes it weak, which “lessens any likelihood of confusion between Applicant’s mark and the Cited Mark.”<sup>4</sup> According to Applicant:

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<sup>4</sup> Applicant’s Br., p. 14, 8 TTABVUE 15.

These third party uses of DELTA demonstrate that at least the word DELTA (which is the dominant portion of the cited MARK) is commonly used in the supplement industry. In other words, the Cited Mark is diluted through use by many supplement manufacturers and are [sic] not entitled to a wide scope of protection.<sup>5</sup>

In support, Applicant submitted copies of the following eight registrations, including two owned by Applicant, for DELTA-formative marks registered for dietary and nutritional supplements:<sup>6</sup>

Mark	Reg. No.	Relevant Goods
DELTA STATE	2161295	Dietary food supplements
DELTA DOCTORS GROUP	2841272	Nutritional supplements
DELTA GENESIS	5181464	Dietary supplements
DELTA-5	5801292	Dietary and nutritional supplements containing fatty acids
	5846501	Antioxidant pills; enzyme dietary supplements; enzyme preparations for medical purposes; enzymes for medical purposes; nutritional supplements; vitamin preparations
	6104511	A variety of dietary supplements and preparations
	6150306	A variety of nutritional supplements
DELTA RECOVERY	5537077	Dietary supplements

Third-party registrations are not evidence that the registered marks are in use or that the public is familiar with them, *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). Because Applicant did not provide evidence of third-party use of marks consisting of or comprised of the terms DELTA or GOLD, we have no evidence of commercial weakness. *Tao Licensing, LLC v. Bender Consulting Ltd.*,

<sup>5</sup> *Id.*

<sup>6</sup> Applicant’s August 9, 2021 response to Office Action, TSDR pp. 36-53.

125 USPQ2d 1043, 1057 (TTAB 2017) (“Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.”) (citing *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976)).

Third-party registrations alone may be relevant, in the manner of dictionary definitions, “to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” *Juice Generation*, 115 USPQ2d at 1675 (internal quotation marks omitted); *Jack Wolfskin*, 116 USPQ2d at 1136. In other words, consumers will look to other elements of the marks to distinguish the source of the goods. See *Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030 (TTAB 2016), (PRIMROSE and ROSE SENIOR LIVING were not confusingly similar in the context of many third-party uses of ROSE and ROSE-formative marks, demonstrating that consumers had become alert to minute distinctions among the various marks).

The term “delta” is defined, inter alia, as “the 4th letter of the Greek alphabet”, in mathematics, as “an increment of a variable—symbol  $\Delta$ ,” and, in chemistry, as “fourth in position in the structure of an organic molecule.”<sup>7</sup> Applicant argues that the term

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<sup>7</sup> <https://www.merriam-webster.com/dictionary/delta>, accessed March 15, 2022. We take judicial notice of this definition. The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imps. Co.*, 213 USPQ 594 (TTAB 1982), *aff'd*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or regular fixed editions. *In re Red Bull GmbH*, 78 USPQ2d 1375, 1377 (TTAB 2006).

“delta” in Registrant’s mark refers to ingredients, i.e., “delta- and gamma tocotrienols,”<sup>8</sup> whereas in its mark, “[t]he Greek Delta symbol is meant to represent ‘change’ or ‘difference[.]’”<sup>9</sup> Regardless of the intended meaning of DELTA when used in connection with nutritional supplements, the fact that a number of DELTA-formative marks have been registered for use on these goods suggests that DELTA in this context is somewhat weak.

None of the cited third-party registrations, however, consist of the terms DELTA and GOLD together. Rather, these marks include only a portion of the marks at issue. In addition, all of the marks listed by Applicant have other matter besides DELTA to distinguish them from each other and from the involved marks. Only Applicant’s and Registrant’s marks include both DELTA and GOLD. We agree with the Examining Attorney that “[e]ven assuming ‘DELTA’ is a diluted term, the dilution of a single term does not show that the combined terms DELTAGOLD or DELTA GOLD are dilute as a whole.”<sup>10</sup>

We find that these third-party registrations do not establish that Registrant’s mark DELTAGOLD as a whole is entitled to a limited scope of protection. *See In re Merck & Co., Inc.* 189 USPQ 355, 356 (TTAB 1975) (third-party registrations showing frequent adoption of the letter “M” as a portion of composite mark do not establish that registrant’s mark M-VAC as a whole is weak and entitled to limited protection).

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<sup>8</sup> Applicant’s Br., pp. 19-20, 8 TTABVUE 20-21.

<sup>9</sup> *Id.* at 15, 8 TTABVUE 16.

<sup>10</sup> Examining Attorney’s Br., 10 TTABVUE 8.

We find that the cited mark is entitled to an ordinary scope of protection, that which is afforded an inherently distinctive mark. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109-10 (CCPA 1974); *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (a mark on the Principal Register without a claim of acquired distinctiveness and not shown to be weak or strong receives “the normal scope of protection to which inherently distinctive marks are entitled.”).

Applicant's third-party evidence thus fails to limit the strength of Registrant's mark, either commercially or conceptually, and the sixth *DuPont* factor is neutral.

B. The similarity or dissimilarity of the marks in their entirety in terms of appearance, sound, connotation and commercial impression.

We next consider the first *DuPont* factor relating to the similarity of the marks. In comparing the marks, we must consider them in their entirety as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”); *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (“Similarity in any one of these elements may be sufficient to find the marks confusingly similar.”) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). The emphasis of our analysis must be on the recollection of the average purchaser, who normally retains a general, rather



than specific, impression of trademarks. We remain mindful that “marks must be considered in light of the fallibility of memory and not on the basis of side-by-side comparison.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

As shown above, Applicant’s proposed mark comprises the wording “delta Gold” with the Greek letter Delta in blue and containing the word “delta” in white:



The cited mark is DELTAGOLD in typed form.<sup>11</sup> In Applicant’s mark, the Greek letter Delta, including the wording “delta,” appears first. DELTA also is the first word in the cited mark. In both marks, the Greek letter and/or word DELTA is followed by the word GOLD.

We find that Applicant’s mark encompasses the entirety of Registrant’s DELTAGOLD mark. Marks have frequently been found to be similar where one mark incorporates the entirety of another mark, as is the case here. *Coca-Cola Bottling Co. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL is similar to BENGAL LANCER); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (finding applicant’s mark VANTAGE TITAN confusingly similar to registered mark TITAN); *In re U.S. Shoe Corp.*, 229 USPQ 707, 709 (TTAB 1985) (finding applicant’s CAREER IMAGE marks similar to registered mark CREST CAREER IMAGES).

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<sup>11</sup> Applicant states that the cited mark is “stylized” (Applicant’s Br., 10, 8 TTABVUE 11), however, as the Examining Attorney correctly notes in her brief (Examining Attorney’s Br., 10 TTABVUE 2), the mark is in typed form. *See* Office Action of April 17, 2020, TSDR p. 2.

Applicant admits that the marks “could be pronounced the same way,”<sup>12</sup> but nevertheless argues that the marks have different connotations:

Applicant uses a Greek symbol in their mark, which obviously changes the connotation of the mark. The Greek Delta symbol is meant to represent “change” or “difference” which is easily confirmed by any search of the same, this is representative of the Applicant’s products as well and further distinguishes the Applicant’s mark from that of the cited mark which is the plain words DeltaGold.<sup>13</sup>

This argument is unpersuasive. As the Examining Attorney argues, “the delta symbol in Applicant’s mark does not distinguish the marks or alter the impression created by Applicant’s mark. Rather, considering Applicant’s mark in its entirety, the delta symbol is simply a visual representation of the word DELTA and reinforces the meaning of DELTA in the mark.”<sup>14</sup> We agree that the Greek letter DELTA in Applicant’s mark, reinforces, rather than attenuates, the similarity to Registrant’s DELTAGOLD mark. *See In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1185 (TTAB 2018) (chateau design reinforces the word CHATEAU).

Because the Greek letter Delta in Applicant’s mark is a visual representation of the word DELTA, it is subordinate to the wording DELTA GOLD as well. It is an often-recited principle that when a mark consists of a literal portion and a design portion, the literal portion is usually more likely to be impressed upon a purchaser’s memory and to be used in calling for the goods or services; therefore, the literal portion is normally accorded greater weight in determining whether marks are

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<sup>12</sup> Applicant’s Br., p. 10, 8 TTABVUE 11.

<sup>13</sup> *Id.* at 15, 8 TTABVUE 16.

<sup>14</sup> Examining Attorney’s Br., 10 TTABVUE 7.

confusingly similar. *See Viterra*, 101 USPQ2d at 1911 (determining that “the verbal portion of a word and design mark likely will be the dominant portion”); *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir. 1983) (“[I]n a composite mark comprising a design and words, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed.”).

Moreover, because the Greek letter Delta is pronounced the same as the word DELTA, to the extent consumers focus on the Greek letter Delta, they still are likely to pronounce Applicant’s mark the same as Registrant mark. With regard to commercial impression, as noted above, Applicant argues that its “Greek Delta symbol is meant to represent ‘change’ or ‘difference[.]’”<sup>15</sup> While we agree with Applicant that it is possible consumers may perceive its mark in this manner, we must also bear in mind that Registrant’s mark could engender the same connotation, particularly when the marks are being spoken.

In terms of appearance, DELTAGOLD is registered in typed form and may be used in any typeface or color including the same typeface and shade of blue used in Applicant’s mark, or in a manner to accent the prominence of the DELTA and GOLD components of these marks. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011) (registrant is “entitled to depictions of the standard character mark regardless of font style, size, or color[.]”).

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<sup>15</sup> *Id.* at 15, 8 TTABVUE 16.

In sum, we find Applicant's mark to be very similar overall compared to the cited mark in appearance, sound, connotation and commercial impression. This *DuPont* factor weighs heavily in favor of likely confusion.

C. The nature and similarity or dissimilarity of the goods, the established, likely-to-continue trade channels, and the classes of consumers.

We next consider the second *DuPont* factor, which "considers '[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration." *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir, 2018) (quoting *DuPont*, 177 USPQ at 567). The issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*5 (TTAB 2020); *L'Oreal v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012). The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be "related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

We need not find similarity as to each and every good listed in an applicant's identification. It is sufficient for a refusal based on likelihood of confusion that relatedness is established for any item encompassed by the identification of goods in

a particular class in the application. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods in the application).

Applicant's goods identify a variety of non-alcoholic, non-medicated beverages used to maintain, promote and enhance health, wellness and fitness and to treat medical conditions. Registrant's goods are "nutritional supplements."

The Examining Attorney argues that "Applicant's non-alcoholic beverages are highly similar and closely related to Registrant's nutritional supplements because the goods commonly emanate from the same source."<sup>16</sup> In support, the Examining Attorney introduced nine internet webpage excerpts showing that companies which offer nutritional supplements also offer beverage preparations under the same mark:

1. **Perfect Keto**, showing that supplements containing hydroxybutrates, such as Applicant's, as well as a wide variety of health-promoting nutritional supplements and beverage preparations, are provided under the same mark and in the same channels of trade;<sup>17</sup>
2. **HVMN**, showing that ketone ester drinks, such as Applicant's, as well as a wide variety of health-promoting nutritional supplements and beverage

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<sup>16</sup> Examining Attorney's Br., 10 TTABVUE 10.

<sup>17</sup> April 17, 2020 Office Action, TSDR pp. 4-8.

preparations, are provided under the same mark and in the same channels of trade;<sup>18</sup>

3. **Beverage Daily**, showing that it is increasingly common for energy drinks to contain vitamins and other ingredients intended to supplement the diet;<sup>19</sup>
4. **Pure Boost**, showing that nutritional and dietary supplements also take the form of drinks intended to be consumed for their energy-enhancing purposes;<sup>20</sup>
5. **GNC**, showing that energy drinks and nutritional supplements move in the same channels of trade and target the same types of consumers;<sup>21</sup>
6. **Ketond**, showing that beverage preparations containing hydroxybutrates, such as Applicant's, are sold in connection with other nutritional supplement products under the same mark;<sup>22</sup>
7. **Life Extension**, showing that Applicant's other ketone ester drinks of the type identified in the instant application are sold in the same channels of trade as the type of nutritional supplements provided by Registrant;<sup>23</sup>

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<sup>18</sup> *Id.* at TSDR pp. 9-13.

<sup>19</sup> February 9, 2021 Office Action, TSDR p. 2-5.

<sup>20</sup> *Id.* at TSDR pp. 6-13.

<sup>21</sup> *Id.* at TSDR pp. 14-18.

<sup>22</sup> *Id.* at TSDR pp. 19-35.

<sup>23</sup> *Id.* at TSDR pp. 36-39.

8. **The Feed**, showing that Applicant's other ketone ester drinks of the type identified in the instant application are sold in the same channels of trade as the type of nutritional supplements provided by the Registrant;<sup>24</sup> and
9. **KetoneAid**, showing that ketone ester supplements also come in the form of non-alcoholic fruit-flavored beverages of the type provided by Applicant.<sup>25</sup>

Excerpts from third-party websites showing the same entity sells products comprising both Applicant's and Registrant's description of goods may be probative to finding that the goods are related. *See Detroit Athletic*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under the same mark, showing that "consumers are accustomed to seeing a single mark associated with a source that sells both"); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009) (third-party internet evidence may be probative to prove goods are related); *In re Paper Doll Promotions, Inc.*, 84 USPQ2d 1660, 1668 (TTAB 2007) (evidence obtained from the Internet may be used to support a determination under Section 2(d) that the goods or services are related).

The Examining Attorney also introduced eighteen third-party registrations encompassing both nutritional supplements in class 5 and enhanced beverages in class 32, showing that the goods may emanate from a single source under the same mark.<sup>26</sup> The following seven examples, based on use in commerce, are relevant:

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<sup>24</sup> August 11, 2021 Denial of Request for Reconsideration, TSDR pp. 86-89.

<sup>25</sup> *Id.* at TSDR pp. 101-03.

<sup>26</sup> *Id.* at TSDR pp. 2-74. We have not considered registrations that do not evince use of the

Mark	Reg. No.	Relevant Goods
BUILDING ATHLETES FROM THE INSIDE OUT	4199218	Dietary and nutritional supplements; and Sports drinks; powder sports drink mixes
LUCKYFIT	5266424	Nutritional and dietary supplements and dietary supplement drinks for fitness; dietary and nutritional supplements for endurance sports; and  Beauty beverages, namely, energy drinks containing nutritional supplements for fitness; sports drinks, namely, performance drinks
 CARB CHECK	5127220	Dietary and nutritional supplements; dietary supplement drinks in the nature of mineral beverages; and  Sports drinks, namely, energy drinks, performance drinks and recovery drinks; sports drinks enhanced with minerals and nutrients; energy drinks enhanced with minerals
<i>love your body</i> 	6164773	Nutritional supplements in all forms; and  Nutritionally fortified beverages not for medical purposes; non-alcoholic beverages containing fruit juices
LIMU	5917036	Dietary and nutritional supplements; and  Beauty beverages, namely, fruit juices and energy drinks containing nutritional supplements
A CIRCADIAN BEVERAGE	6330873	Dietary and nutritional supplements; Dietary supplemental drinks; Dietary supplement drink mixes; and  Non-alcoholic water-based beverages; Non-alcoholic water-based sparkling beverages; Non-alcoholic water-based beverages containing herbal extracts and botanical



registered mark in the United States. *Calypso Tech. Inc. v. Calypso Capital Mgmt. LP*, 100 USPQ2d 1213, 1221 (TTAB 2011) (third party registrations based on international registrations are not evidence that the marks have been used in the United States).



Mark	Reg. No.	Relevant Goods
		ingredients; Non-alcoholic water-based beverages containing vitamins and minerals; Sparkling water; Herbal drinks; Drinking water with vitamins; Sports drinks enhanced with vitamins

Third-party registrations that cover goods from both Applicant’s application and the cited registration are relevant to show that the goods are of a type that may emanate from a single source under one mark. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1051; *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002).


In addition, the following four registrations, owned by Applicant, encompass both nutritional supplements in class 5 and energy drinks in class 32:

Mark	Reg. No.	Relevant Goods
DELTAG	5614209 <sup>27</sup>	Nutritional additives or supplements for medical purposes, nutraceutical use or as a food in the nature of a dietary supplement or additive for use in pharmaceutical or veterinary preparations; and  Non-alcoholic drinks and energy drinks.
	5854098 <sup>28</sup>	Nutritional food and beverage additives for medical purposes in the nature of food and dietary beverage supplements, nutritional supplements for medical purposes; and  Non-alcoholic drinks and energy drinks.
	6104511 <sup>29</sup>	Nutritional additives in the nature of dietary supplements for use in pharmaceutical or veterinary preparations; and

<sup>27</sup> Applicant’s August 9, 2021 response to Office Action, TSDR pp. 28-30.

<sup>28</sup> *Id.* at TSDR pp. 23-25.

<sup>29</sup> *Id.* at TSDR pp. 45-47.

Mark	Reg. No.	Relevant Goods
		Non-alcoholic beverages; fruit drinks and fruit juices; and energy drinks.
	6150306 <sup>30</sup>	Nutritional Supplements; and  Non-alcoholic drinks; fruit drinks and fruit juices; and energy drinks, fruit drinks and soda drinks.

The foregoing evidence of use and registration shows that both Applicant’s beverages used to maintain, promote and enhance health, wellness and fitness, and to treat medical conditions and Registrant’s nutritional supplements, are often sold under the same mark. This establishes that Applicant’s goods and Registrant’s goods are related for likelihood of confusion purposes. *Detroit Athletic*, 128 USPQ2d at 1051 (“[C]onsumers are accustomed to seeing a single mark associated with a source that sells both.”).

Citing *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003), Applicant argues that the evidence of record is insufficient under the substantial evidence standard to support a finding that the goods are related: “The sparse evidence showing that some companies could possibly offer overlapping goods is not significant to show relatedness.”<sup>31</sup> We disagree that the evidence of record is sparse.

Evidence is substantial if a “reasonable person might find that the evidentiary record supports the agency’s conclusion.” *On-Line Careline*, 56 USPQ2d at 1475. Here, ample evidence, including Applicant’s own registrations, establish that there is but a fine line between Registrant’s nutritional supplements and Applicant’s

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<sup>30</sup> *Id.* at TSDR pp. 31-34.

<sup>31</sup> Applicant’s Br., p. 18, 8 TTABVUE 19.

beverages used to maintain, promote and enhance health, wellness and fitness, and to treat medical conditions. For example, the online medical dictionary definition of “nutritional supplements” submitted by the Examining Attorney shows the overlapping purpose of the goods:

Nutritional supplements are used for many purposes. They can be added to the diet to boost overall health and energy; to provide immune system support and reduce the risks of illness and age-related conditions; to improve performance in athletic and mental activities; and to support the healing process during illness and disease. However, most of these products are treated as food and not regulated as drugs are.<sup>32</sup>

We find that substantial evidence supports the conclusion that the respective goods are related for the purposes of determining a likelihood of confusion.

Applicant also argues that its mark and the cited mark “attach to entirely distinct goods used by two entirely different consuming groups.”<sup>33</sup> This argument is unpersuasive. As noted above, the issue is not whether purchasers would confuse the goods, but whether there is a likelihood of confusion as to the source of the goods. *Ox Paperboard*, 2020 USPQ2d 10878, at \*5. Here, the evidence supports the conclusion that confusion as to source is likely.

Considering the channels of trade, because the goods are related and the identifications of goods in the application and registration contain no limitations, it is presumed that the goods identified therein move in all channels of trade normal

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<sup>32</sup> See <https://medical-dictionary.thefreedictionary.com/Nutritional+Supplements>, August 11, 2021 Denial of Request for Reconsideration, TSDR p. 7.

<sup>33</sup> Applicant’s Br., p. 19, 8 TTABVUE 20.

for those goods, and that they are available to all classes of purchasers. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014). *See also Coach Services*, 101 USPQ2d at 1723 (absent limitation “goods are presumed to travel in all normal channels . . . for the relevant goods.”). Given the foregoing evidence from third-party commercial websites and the third-party registrations for companies offering the types of goods identified in the application and cited registration, we find the channels of trade and classes of purchasers for Registrant’s nutritional supplements to be the same as or similar to those for Applicant’s beverages used to maintain, promote and enhance health, wellness and fitness and to treat medical conditions. *Id.*

In view of the evidence demonstrating that the goods frequently emanate from a single source, and are sold in some of the same channels of trade to the same classes of consumers, the second and third *DuPont* factors weigh in favor of finding that confusion is likely.

D. Consumer sophistication and purchaser care

Under the fourth *DuPont* factor, we consider “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. Applicant argues, with little support, that “the buyers of the goods exemplified by Applicant’s mark and the Registrant Mark are sophisticated consumers capable of differentiating different types of supplements and the need for specialized supplements, additives or foods depending on their need.”<sup>34</sup> Applicant

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<sup>34</sup> *Id.* at 14, 8 TTABVUE 22-23.

points to an online article from “Healthline Media” entitled “How to Choose High Quality Vitamins and Supplements.”<sup>35</sup> This article, however, does not support the conclusion that buyers of the respective goods are “sophisticated consumers.” Instead, the article simply discusses ways to ensure that the purchased vitamins and supplements are of high quality.

On the other hand, some of the third-party website evidence for competitive products submitted by the Examining Attorney and Applicant shows that the respective goods are sometimes inexpensive. For example, a sixty-pill bottle of PERFECT KETO brand “Exogenous Ketone Capsules” sells for as little as \$16.99.<sup>36</sup> A thirty-serving box of PUREBOOST brand “antioxidant energy” drink mixes sells for as little as \$20.00.<sup>37</sup> A pack of NURISH brand personalized multivitamins sells for \$6.67.<sup>38</sup> And a box of Carnation Breakfast Nutritional Drink Mix sells for \$5.60.<sup>39</sup>

“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot Inc. v. M.C. Becton*, 54 USPQ2d at 1899; *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). *See also L’Oreal*, 102 USPQ2d at 1439 (“Products such as opposer’s cosmetics and personal care products . . . tend to be relatively

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<sup>35</sup> *Id.* at 8 TTABVUE 23, Ex. D to Applicant’s August 9, 2021 response to Office Action, TSDR pp. 112-28.

<sup>36</sup> Office Action of April 17, 2020, TSDR p. 7.

<sup>37</sup> Office Action of February 9, 2021, TSDR p. 6.

<sup>38</sup> August 9, 2021 response to Office Action, TSDR p. 85.

<sup>39</sup> *Id.* at TSDR p. 88.

inexpensive and may be the subjects of impulse purchases). Moreover, even if we assume that the goods may not be an impulse purchase, there is insufficient evidence in the record to support a finding that potential purchasers exercise a higher degree of care such that the conditions of sale would weigh against a likelihood of confusion, given the absence of any restrictions in the identifications.

Further, because there is no evidence to suggest that customers of Applicant's beverages and Registrant's nutritional supplements are any more sophisticated than customers of any other goods, we consider ordinary members of the public as potential purchasers of the respective goods. "Board precedent requires the decision to be based 'on the least sophisticated potential purchasers.'" *See Stone Lion Capital*, 110 USPQ2d at 1163. Such ordinary and average consumers are likely to be confused by similar marks used in connection with goods that are similar, as discussed above.

This fourth *DuPont* factor regarding the conditions of sale also weighs in favor of a finding of likelihood of confusion.

#### E. Applicant's prior registrations

To support its argument that there is no likelihood of confusion, Applicant points out that it owns the four above-mentioned registrations for DELTA-formative marks for goods in both classes 5 and 32.<sup>40</sup> Applicant also points out that it owns

Registration No. 5577900 for the mark  for non-alcoholic drinks and gels, namely, energy shots; beers; fruit drinks and fruit juices; syrups for making non-

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<sup>40</sup> A

pplicant's Br., p. 14, 8 TTABVUE 15.

alcoholic drinks, namely, essences for use in making soft drinks; energy drinks; non-alcoholic drinks, gels or beverages containing ketone body esters, in class 32.

Under the thirteenth *DuPont* factor, we consider “[a]ny other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Cases involving prior registrations under this *DuPont* factor customarily consider whether substantially similar marks should be allowed to coexist on the Register because of an applicant’s prior registration of a similar mark for the involved goods or services. *See, e.g., In re USA Warriors Ice Hockey Program, Inc.*, 122 USPQ2d 1790 (TTAB 2017) (finding composite mark including the words USA WARRIORS ICE HOCKEY and NONE TOUGHER separated by a logo likely to cause confusion with composite mark including the words USA HOCKEY despite applicant’s prior registration of composite mark including the words USA WARRIORS ICE HOCKEY and NONE TOUGHER separated by a logo); *In re Strategic Partners Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012) (finding that applicant’s ownership of a prior registration for a substantially similar mark for the same goods which had coexisted with the cited registration for over five years was sufficient to “tip the scale in favor of applicant and a finding of no likelihood of confusion.”).

When determining whether the coexistence of an applicant’s prior registration with another party’s registration weighs against citing the latter registration in a Section 2(d) refusal of the applicant’s mark, the examining attorney should consider: (1) whether the applicant’s prior registered mark is the same as applicant’s mark or is otherwise not meaningfully different; (2) whether the identifications of goods or

services in the application and the applicant's prior registration are identical or identical in relevant part; and (3) the length of time the applicant's prior registration has coexisted with the registration being considered as the basis for the Section 2(d) refusal. *Strategic Partners*, 102 USPQ2d at 1400.

Unlike *Strategic Partners*, Applicants' prior registrations are not for substantially similar marks. That is, none of Applicant's prior registrations include both the words DELTA and GOLD. Accordingly, we do not consider the issuance of Applicant's prior registrations to be a dispositive factor against a finding of likelihood of confusion because Applicant's previously registered marks are not the same as its currently proposed mark. *See, e.g., In re Nuclear Research Corp.*, 16 USPQ2d 1316 (TTAB 1990) (finding that a prior mark is substantially similar to an applicant's current mark if the prior mark has presented the same, continuing commercial impression as applicant's currently proposed mark).

Nor have Applicant's prior registrations co-existed with the cited registration for a significant period of time, and none of the prior registrations have achieved incontestable status. Thus, they are still subject to a cancellation action by Registrant, based on likelihood of confusion. *USA Warriors*, 122 USPQ2d at 1793 (the co-existence of a registration less than five years old "represents a key factual distinction from *Strategic Partners*").

We find that Applicant's prior registrations for other DELTA-formative marks do not weigh in favor of a finding that confusion is unlikely. This *DuPont* factor is neutral.



F. Conclusion

We find Applicant's mark is similar to the cited mark. Applicant's and Registrant's goods are related, and the channels of trade and classes of consumers are the same. The *DuPont* factor involving consumer sophistication and purchaser care is favors a finding that confusion is likely. The remaining *DuPont* factors are neutral.

We conclude that there is a likelihood of confusion between Applicant's mark,



, and the cited mark, DELTAGOLD, for the respective goods.

**Decision:** The refusal to register Applicant's mark is affirmed.