

This Opinion is Not a
Precedent of the TTAB

Mailed: January 8, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

In re Wet Holdings (Global) Limited

Serial No. 79290215

Edwin D. Schindler for Wet Holdings (Global) Limited.

Karl Wert, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

Before Kuhlke, Adlin and Thurmon, Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Wet Holdings (Global) Limited seeks registration of WEECAN, in standard characters, for “waters, namely, still water, carbonated mineral water and flavored mineral water; carbonated mineral water, and flavored mineral water; flavored waters; functional water-based beverages, namely, energy drinks, fruit juice beverages and beauty beverages, namely, fruit juices and energy drinks containing nutritional supplements; mineral waters,” in International Class 32.¹ The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles the registered mark

¹ Application Serial No. 79290215, filed June 7, 2020 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a), requesting an extension of protection of International Registration No. 1542390.

WECANVEGAN, in standard characters, for “retail store services featuring vegan and nutritional fortified foods and beverages; online retail store services featuring vegan and nutritional fortified foods and beverages” in International Class 35,² that it is likely to cause confusion. After the refusal became final, Applicant appealed and filed a request for reconsideration that was denied.³ The appeal is fully briefed.

I. Examining Attorney’s Objection Sustained

The Examining Attorney’s objection, 9 TTABVUE 3-4,⁴ to Applicant’s reliance on a mere list of third-party registrations, 6 TTABVUE 7-9, is sustained. As the Examining Attorney made clear to Applicant during prosecution, May 30, 2023 Office Action TSDR 7,⁵ mere lists of third-party registrations are essentially irrelevant. *See In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 WL 3570240 at *6 n.17 (TTAB 2018)⁶ (“[T]he list does not include enough information to be probative. The list includes only the serial number, registration number, mark, and status (live or

² Registration No. 6140141, issued September 1, 2020 (the “Registration”). The Registration also identifies goods in Classes 29 and 30 which are not a basis for the refusal.

³ Applicant’s November 29, 2023 Request for Reconsideration was denied in the May 29, 2024 Subsequent Final Office Action.

⁴ Citations to the appeal record are to TTABVUE, the Board’s online docketing system. The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear.

⁵ Citations to the application file are to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) online database, by page number, in the downloadable .pdf format.

⁶ As part of an internal Board pilot program to broaden acceptable forms of legal citation in Board cases, citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) § 101.03 (2024). This opinion cites U.S. Court of Appeals decisions by the page numbers on which they appear in the Federal Reporter (e.g. F.2d, F.3d, or F.4th). For Board opinions, this decision cites to the Westlaw legal database.

dead) of the ... registrations. Because the goods are not listed, we do not know whether the listed registrations are relevant.”); *see also Edom Labs. Inc. v. Licher*, Opp. No. 91193427, 2012 WL 1267961, at *4 (TTAB 2012).

Nonetheless, Applicant properly made of record a number of third-party registrations, November 29, 2023 Request for Reconsideration TSDR 14-120, and we have considered those.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record bearing on the likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1381 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”).

A. The Goods and Services, and Their Channels of Trade and Classes of Consumers

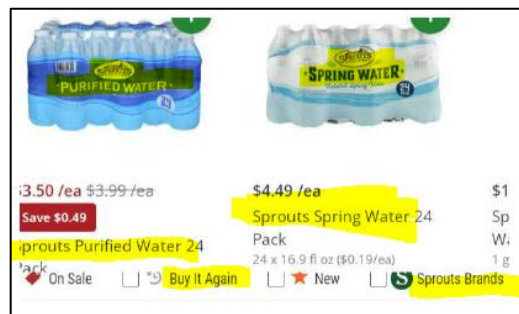
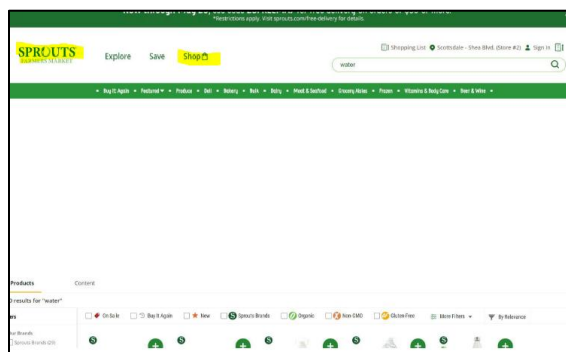
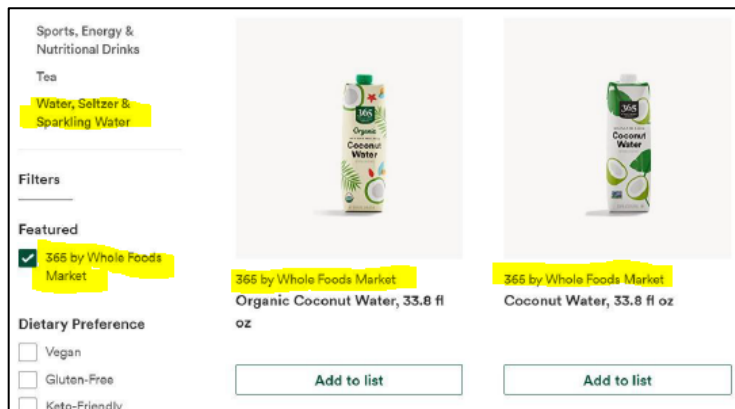
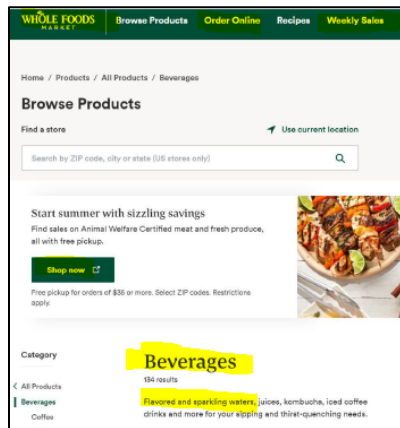
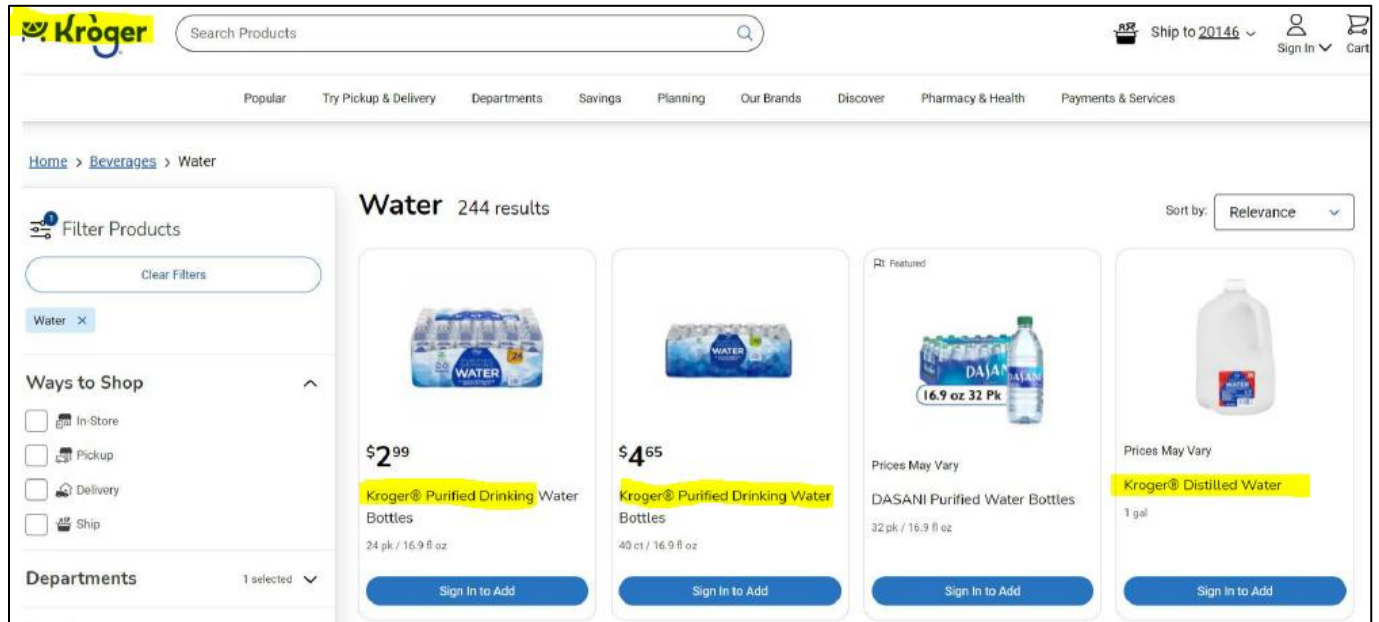
We find the goods and services related on the face of the identifications of goods in the involved application, and services in the cited Registration. Specifically, Registrant’s retail stores “featuring vegan and nutritional fortified ... beverages” are

identified broadly enough to encompass “nutritional fortified” water or other beverages, which are encompassed by Applicant’s identification of goods. As a practical matter, consumers would expect to find beverages in retail beverage stores. *See e.g. In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018) (“[W]e have held that confusion is likely where one party engages in retail services that sell goods of the type produced by the other party”); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65 (Fed. Cir. 1988) (BIGGS for retail grocery and general merchandise store services likely to be confused with BIGGS for furniture); *In re Accelerate s.a.l.*, Ser. No. 77522433, 2012 WL 684459, at *4 (TTAB 2012) (affirming refusal to register COLOMBIANO COFFEE HOUSE for “providing food and drink” based on registered certification mark COLOMBIAN for “coffee”); *In re Peebles Inc.*, Ser. No. 74073163, 1992 WL 215315, at *2 (TTAB 1992) (finding “that store services and the goods which may be sold in that store are related goods and services”). For example, we have previously found jewelry to be related to retail jewelry stores. *In re Thomas*, Ser. No. 78334625, 2006 WL 1258862, at *3 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks.”).

Furthermore, the Examining Attorney has introduced evidence that several third party marks, including KROGER, WHOLE FOODS and SPROUTS, are used for beverages falling within Applicant’s identification of goods on the one hand, and retail

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store services falling within Registrant's identification of services on the other, as shown below:



May 30, 2023 Office Action TSDR 10, 41, 42, 59, 60 (highlighting added); *see also id.* at 12-40, 43-58 and 61-132.

In its Appeal Brief, Applicant does not dispute that the goods and services are related. This factor weighs in favor of finding a likelihood of confusion.

The Examining Attorney's evidence, including the KROGER, WHOLE FOODS and SPROUTS evidence depicted above, shows that the channels of trade and classes of consumers for Applicant's goods and Registrant's services overlap. *Id.* at 11-132. Indeed, consumers purchase water and other beverages at grocery or other retail stores that offer water or other beverages. This too is undisputed. These factors thus also weigh in favor of finding a likelihood of confusion.

B. Strength of Registrant's Mark

Before addressing the marks themselves, we consider the strength of the cited mark, to ascertain the scope of protection to which it is entitled. There are two types of strength: conceptual and commercial. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength ...").

Here, Applicant argues, based solely on a number of third-party registrations, that "[d]ue to the widespread usage of the phrase 'we can' for both similar and distinct goods, the phrase 'we can' should be accorded only a very narrow 'scope of protection.'" 6 TTABVue 7-8. We disagree that Applicant has shown "widespread usage" of "WE CAN" or variations thereof, or that the cited mark is commercially weak.

In fact, the third-party registrations upon which Applicant relies, accompanied by "no evidence of the extent of the use of the marks in commerce, do not diminish the

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commercial strength of’ the cited mark. *In re Embiid*, Ser. No. 88202890, 2021 WL 2285576, at *16 (TTAB 2021) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, Canc. No. 92057132, 2017 WL 6336243, at *14 (TTAB 2017)). *See also Mighty Leaf Tea*, 601 F.3d 1342, 1347 (Fed Cir. 2010). This is because “third-party registrations are not evidence of third-party use of the registered marks in the marketplace, for purposes of the sixth *du Pont* factor.” *In re Davey Products Pty Ltd.*, Ser. No. 77029776, 2009 WL 2420527, at *7 (TTAB 2009) (citing *Olde Tyme Foods Inc. v. Roundy’s Inc.*, 961 F.2d 200, 204 (Fed. Cir. 1992)). Applicant has not introduced evidence that any of the marks in the third-party registrations it relies upon are in use.

While the third-party registrations Applicant introduced “may bear on conceptual weakness if a term is commonly registered for similar goods or services,” *In re Embiid*, 2021 WL 2285576, at *17, here, with one arguable exception, the registrations upon which Applicant relies do not identify “similar goods or services.” In fact, the only third-party registration Applicant introduced that identifies retail food or beverage store services, or beverages, is Registration No. 5325822 for the mark YES WE CAN for “wines”. November 29, 2023 Request for Reconsideration TSDR 27, 43. Even if we found that “wine” is related to Registrant’s retail store services, which on this record we cannot, a single probative third-party registration would be quantitatively insufficient to establish that the cited mark is conceptually weak. *See In re Inn at St.*

John's, LLC, Ser. No. 87075988, 2018 WL 2734893, at *4 (TTAB 2018), *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019).⁷

In any event, we acknowledge, as Applicant argues, that the phrase “WE CAN” is “suggestive of a positive, accomplished we-can-get-it-done attitude of a ‘task’ to be accomplished.” 6 TTABVUE 7. At the same time, however, there is no evidence or argument, or basis to find, that this “suggestive” meaning has anything specific to do with retail food and beverage stores. Indeed, there is no evidence of any retail food or beverage store other than Registrant using or registering marks containing “WE CAN” or variations thereof. In the context of the cited WECANVEGAN mark, the suggestive phrase “WE CAN” highlights Registrant’s offering of vegan food and beverages, and perhaps encourages a vegan lifestyle. For this reason, we find that Registrant’s WECANVEGAN mark is conceptually slightly weak in its entirety, and entitled to a somewhat reduced scope of protection.

However, because the cited mark is registered on the Principal Register without a claim of acquired distinctiveness, we must presume that WECANVEGAN is inherently distinctive, i.e., that it is at worst suggestive of Registrant’s services. 15 U.S.C. § 1057(b) (registration is “prima facie evidence of the validity of the registered mark”); *In re Fiesta Palms, LLC*, Ser. No. 76595049, 2007 WL 950952, at *3 (TTAB 2007) (when mark is registered on the Principal Register, “we must assume that it is at least suggestive”). *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 1408 (Fed. Cir.

⁷ As the Examining Attorney points out, Registration No. 5281217, upon which Applicant relies, has been cancelled. May 29, 2024 Subsequent Final Office Action TSDR 1.

1997)). As an inherently distinctive, registered mark, WECANVEGAN is entitled to protection against confusingly similar marks. The question we answer below is whether the parties' marks are close enough for confusion to occur despite Registrant's mark being conceptually somewhat weak to the extent it suggests that Registrant's stores offer vegan food and beverages.

C. The Marks

We consider the marks "in their entirety as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). Here, the marks are similar because they both include "WECAN"/"WEECAN," and different because Registrant's mark includes the trailing term "VEGAN," while Applicant's mark consists solely of "WEECAN." We find that the marks' similarities outweigh their differences.

In fact, the marks look and sound quite similar, because "WECAN" and "WEECAN" would likely sound identical and look highly similar. To be sure, the trailing term "VEGAN" in Registrant's mark results in a somewhat different appearance and sound overall, but that term is entitled to less weight in our analysis, for three reasons. First, it is merely descriptive of the "vegan" goods sold in and through Registrant's stores and identified in the cited Registration. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000) ("Regarding descriptive terms, this court has noted that the 'descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.'") (quoting *In re Nat'l Data Corp.*, 753 F.2d 1056, 1060 (Fed. Cir. 1985)); see also *In re Dixie Rests., Inc.*, 105

F.3d 1405 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ). Second, the phrase “WECAN,” rather than “VEGAN,” is the dominant part of the cited mark because it comes first, making “VEGAN” less significant. *In re Detroit Athletic Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (“The identity of the marks’ initial two words is particularly significant because consumers typically notice those words first.”); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, Opp. No. 74797, 1988 WL 252340, at *3 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”). Third, the term “VEGAN” could be descriptive of some of Applicant’s goods too, such as “fruit juices and energy drinks containing nutritional supplements,” and therefore consumers could perceive Registrant’s mark as a variation of Applicant’s, or Applicant’s mark as a shortened version of Registrant’s. *See In re Bay State Brewing Co., Inc.*, Ser. No. 85826258, 2016 WL 1045677, at *3 (TTAB 2016) (“we also keep in mind the penchant of consumers to shorten marks”); *United Rum Merchs. Ltd. v. Fregal, Inc.*, 1982 WL 52025, at *3 (TTAB 1982); *Big M, Inc. v. U.S. Shoe Corp.*, 1985 WL 71976, at *3 (TTAB 1985) (“we cannot ignore the propensity of consumers to often shorten trademarks”).

We do not find the extra “e” in Applicant’s mark WEECAN to be particularly significant here. Applicant’s mark WEECAN would most likely sound exactly the same as “WECAN” in Registrant’s mark, and these variations of “we can” look almost the same. Moreover, there is no argument, much less evidence, that “WEECAN” conveys a different meaning or creates a different commercial impression than

“WECAN.” To the contrary, Applicant argues that “‘We Can’ or ‘Wee Can’ implies the ability to accomplish or achieve a ‘task’ or ‘something’ of consequence,” 6 TTABVue 9, effectively conceding that “WEE CAN” is a variation of “WE CAN,” rather than an unrelated term with a different meaning.

In short, the marks are similar. This factor also weighs in favor of finding a likelihood of confusion.

III. Conclusion

The goods and services are related, and the trade channels and classes of consumers for those goods and services overlap, as shown by both the identifications of goods and services in the involved application and cited Registration, and the Examining Attorney’s evidence. This weighs heavily in favor of finding confusion likely. The marks are similar, and this also weighs in favor of finding a likelihood of confusion. There is no evidence that Registrant’s mark is commercially weak. While it is a bit weak conceptually, it is inherently distinctive and entitled to protection against Applicant’s similar mark. In fact, Applicant’s mark is more similar to Registrant’s mark than any of the third-party marks upon which Applicant relies. We find that Registrant’s mark is inherently distinctive and entitled to protection against Applicant’s similar mark for related goods. *See Specialty Brands, Inc, v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 675 (Fed. Cir. 1984); *Sabhnani v. Mirage Brands, LLC*, Canc. No. 92068086, 2021 WL 6072822, at *13 (TTAB 2021) (“while the registered marks all contain the word ‘MIRAGE,’ they contain additional elements that cause many of them to be less similar to Petitioner’s mark than Respondent’s marks are”); *In re I-Coat Co., LLC*, Ser. No. 86802467, 2018 WL 2753196, at *6 (TTAB 2018) (“none

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of the marks [in third-party registrations] are as similar to the mark in the cited registration as is Applicant's mark"); *Nike, Inc. v. WNBA Enters., LLC*, Opp. No. 91160755, 2007 WL 763166, at * (TTAB 2007) ("Simply put, none of the marks in these registrations and applications is as similar to opposer's mark as applicant's mark."). No likelihood of confusion factor supports registration of Applicant's mark. Confusion is likely.

Decision: The refusal to register Applicant's mark under Section 2(d) of the Trademark Act is affirmed.