

This Opinion is Not a
Precedent of the TTAB

Mailed: January 30, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re PT. Modiva International

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Serial No. 79357814

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Christina Bailey of Mohr Intellectual Property Law Solutions, PC for PT. Modiva International.

Anne Farrell, Trademark Examining Attorney, Law Office 118,
Michael Baird, Managing Attorney.

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Before Cataldo, Larkin, and Allard,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

PT. Modiva International (“Applicant”) seeks registration on the Principal Register of the mark shown below



for goods ultimately identified as “Preparations for dyeing and tinting of hair, namely, hair dye, hair coloring and dyes; Hair shampoo; Personal deodorants; Make-up kits comprised of cosmetics, lipsticks, beauty masks; Cosmetics; Skincare

cosmetics; Cosmetic creams; Lipsticks; Beauty masks; Perfumes; Perfume, eau de Cologne and aftershaves; Antiperspirant soap” in International Class 3.¹

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark DEODOREX, registered on the Principal Register for “dietary and nutritional supplements” in International Class 5,² as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed when the Examining Attorney made the refusal final. The appeal is fully briefed.³ We affirm the refusal to register.⁴

¹ Application Serial No. 79357814 was filed on June 17, 2022 under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f, to extend the protection of International Registration No. 1702030 to the United States. Applicant describes its mark as “the stylized wording ‘deorex’ in blue with a white background.” The colors blue and white are claimed as features of the mark.

² The cited Registration No. 3628684 issued on May 26, 2009 and has been renewed.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. See *New Era Cap Co. v. Pro Era, LLC*, Opp. No. 91216455, 2020 WL 2853282, at *1 n.1 (TTAB 2020). 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. Applicant’s appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney’s brief appears at 6 TTABVUE.

⁴ The citation form in this opinion is in a form provided in Section 101.03(a) of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (“TBMP”) (2024). This opinion cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites the Westlaw legal database (“WL”) and, in the initial full citation of a case, also identifies the number of the Board proceeding where it is available. The Board’s decisions that have issued since 2008 are available in TTABVUE and many precedential Board decisions that issued from 1996 to 2008 are available online from the TTAB Reading Room by entering the same information. Practitioners should also adhere to the practice set forth in TBMP § 101.03(a).

I. Prosecution History and Record on Appeal⁵

We briefly summarize below the prosecution history of the application because it provides useful background regarding our disposition of the appeal.

The Examining Attorney issued an initial Office Action refusing registration of Applicant's mark based on the cited registration, and raising certain informalities.⁶ The Examining Attorney made of record USPTO electronic records regarding the cited registration,⁷ and USPTO electronic records regarding third-party use-based registrations covering goods identified in the application and in the cited registration.⁸

Applicant responded to the Office Action by addressing the informalities and arguing against the Section 2(d) refusal.⁹ Applicant made of record pages from the website at zionmarketresearch.com regarding the professional hair care products market;¹⁰ pages from the website at globalnewswire.com regarding the deodorant market;¹¹ pages from the website of THE WALL STREET JOURNAL regarding deodorants;¹² and pages from the website at thebrainyinsights.com regarding the

⁵ Citations in this opinion to the file history of the application are to the downloadable .pdf versions of the documents in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). See *In re Seminole Tribe of Fla.*, Ser. No. 87890892, 2023 WL 3751113, at *1 n.1 (TTAB 2023).

⁶ April 11, 2023 Office Action at TSDR 1-8.

⁷ *Id.* at TSDR 9-10.

⁸ *Id.* at TSDR 11-44.

⁹ November 6, 2023 Response to Office Action at TSDR 1-20.

¹⁰ *Id.* at TSDR 21-24.

¹¹ *Id.* at TSDR 25-34.

¹² *Id.* at TSDR 35-44.

nutritional supplements market.¹³ Applicant also listed third-party registrations of “DEO-” formative marks that it claimed had been issued by the USPTO over the cited registration.¹⁴

The Examining Attorney then issued an Office Action making final the Section 2(d) refusal to register. The Examining Attorney advised Applicant that the list of third-party registrations contained in Applicant’s response to the initial Office Action was insufficient to make the registrations of record, and that Applicant was required to submit copies or electronic records of the registrations to make them of record.¹⁵ The Examining Attorney made of record third-party webpages that she claimed showed that the goods identified in the application and in the cited registration were commonly sold by the same entity under the same mark.¹⁶

II. Evidentiary Matter

Before we discuss the merits of the appeal, we must address an evidentiary matter. The Examining Attorney argues that “[a]ttached to its appeal brief, applicant has submitted copies of eight third-party registrations not previously entered into the evidentiary record,” 6 TTABVUE 2 (citing 4 TTABVUE 20-48),¹⁷ and objects to those

¹³ *Id.* at TSDR 45-50.

¹⁴ *Id.* at TSDR 16.

¹⁵ December 7, 2023 Final Office Action at TSDR 4.

¹⁶ *Id.* at TSDR 7-62.

¹⁷ Applicant also attached to both its appeal brief and its reply brief copies of third-party webpages that it had made of record during prosecution. 4 TTABVUE 49-78; 7 TTABVUE 13-42. The Board strongly discourages the practice of resubmitting materials that are already in the record as attachments to briefs. *In re Michalko*, Ser. No. 85584271, 2014 WL 2531202, at *1 (TTAB 2014).

registrations as being untimely submitted. *Id.* The Examining Attorney requests that the Board disregard them. *Id.* at 3.

In its reply brief, Applicant acknowledges that “[t]he eight third-party registrations submitted by Applicant were previously referenced in Applicant’s [response] of November 6, 2023,” 7 TTABVUE 8, but argues that it “mistakenly omitted the accompanying copies of the registrations when filing the [response].” *Id.* at 8. Applicant “attests that this omission was not the result of willful conduct or gross neglect on the part of Applicant,” claims that it “corrected this mistaken omission with filing the copies with its Appeal Brief,” and “respectfully requests the Board to view the third-party registrations as part of the record.” *Id.*

As discussed above, in the final Office Action, the Examining Attorney noted that Applicant had “submitted a list of third party registrations to argue that applicant’s mark should also be registered,”¹⁸ and advised Applicant that “the mere submission of a list of registrations or a copy of a private company search report does not make such registrations of record” and that “[t]o make third party registrations part of the record, an applicant must submit copies of the registrations, or the complete electronic equivalent from the USPTO’s automated systems, **prior to appeal.**” (emphasis added).¹⁹

The record in an appeal “should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal.” *In*

¹⁸ December 7, 2023 Final Office Action at TSDR 4.

¹⁹ *Id.* (citations omitted).

re Zerosix, LLC, Ser. No. 88981832, 2023 WL 4044952, at *1 (TTAB 2023) (quoting Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)) (sustaining the examining attorney’s objection to a list of third-party registrations that the applicant included in its appeal brief). Applicant could have made the referenced third-party registrations of record prior to appeal by including them in a request for reconsideration filed prior to, or simultaneously with, the filing of a notice of appeal, but Applicant did not request reconsideration. Instead, Applicant submitted the third-party registrations after the appeal had been filed.

“The proper procedure for an applicant or examining attorney to introduce evidence after an appeal has been filed is to submit a written request with the Board to suspend the appeal and remand the application for further examination.” *In re Weiss*, Ser. No. 88621608, 2024 WL 3617597, at *1 (TTAB 2024) (citing Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d)). Applicant did not request suspension of the appeal to allow the Examining Attorney to consider the third-party registrations on remand.

Because Applicant did not properly make the third-party registrations of record, we sustain the Examining Attorney’s objection and will give the third-party registrations and any arguments based on them no consideration in our decision.

III. Analysis of Likelihood of Confusion Refusal

“The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive.” *In re Charger*

Ventures LLC, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination of the likelihood of confusion under Section 2(d) of the Trademark Act is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”). *Charger Ventures*, 64 F.4th at 1379. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019).

Applicant states that the “two key considerations in the DuPont likelihood of confusion analysis are the similarity of the marks and the similarity of the goods associated with the marks.” 4 TTABVUE 10 (citing *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098 (CCPA 1976)). *See Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 WL 417620, at *6 (TTAB 2023), *civ. action filed*, No. 5:23-cv-00549-GW-PVC (C.D. Cal. Mar. 28, 2023) (“[i]n any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the [goods or] services.”). Applicant focuses on these two key factors in its briefs. 4 TTABVUE 10-18; 7 TTABVUE 8-12. In its appeal brief, Applicant also alludes to the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing,” *DuPont*, 476 F.2d at 1361, without specifically mentioning that factor. 4 TTABVUE 16-18.

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial

impression.” *Iron Balls Int’l Ltd. v. Bull Creek Brewing, LLC*, Canc. No. 92079099, 2024 WL 2844425, at *11 (TTAB 2024) (quoting *DuPont*, 476 F.2d at 1361). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Sage Therapeutics, Inc. v. Sageforth Psych. Servs., LLC*, Opp. No. 91270181, 2024 WL 1638376, at *5 (TTAB 2024) (quotation and quotation marks omitted).

“The proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning, LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012)). “The focus is on the recollection of the average purchaser, who normally ‘retains a general rather than a specific impression of marks.’” *Id.* (quoting *In re i.am.symbolic, llc*, Ser. No. 85916778, 2018 WL 3993582, at *4 (TTAB 2018)). The average purchaser here is a consumer of cosmetics and the other goods identified in the application.

The cited mark is DEODOREX in standard characters. Applicant’s mark is shown again below:

The image shows the word "deorex" in a blue, lowercase, sans-serif font. The letters are closely spaced and have a consistent weight throughout.

Applicant argues that “[w]ith respect to Registrant’s standard character mark, Applicant’s mark has a substantial and visually distinct design,” 4 TTABVUE 10, and that the “addition of the design and color combine, in this case, to make the shared portions a minority of the mark; the resulting Applicant’s mark, as a whole, is visually

completely different from Registrant's mark." *Id.* at 10-11. According to Applicant, it "must use the colored, stylized word version of the mark with [its] goods, and cannot use plain, standard characters and remain within the scope of a granted registration," *id.* at 11, and "if Registrant wants to use a stylized, color design mark of their standard character mark, they are required to file a separate application." *Id.* at 11-12.

Applicant also argues that the marks have different pronunciations, *id.* at 12, with the registrant's mark DEODOREX "follow[ing] the pronunciation and 4 syllable count of 'deodorant': /dee OW dr uhnt/ as they both contain the word 'ODOR,'" and Applicant's mark "compris[ing] only two syllables" without the word "ODOR." *Id.* According to Applicant,

[w]hen encountering a two- or three-syllable word beginning with "deo", the "deo" is pronounced as /DI a/, such as "deoxy" or /DEE uh/, such as "deodar". Thus, the sound value of "deo" causes the Applicant's mark "deorex" to either be pronounced as /DI a reks/ or /DEE uh reks/, where the dominant element of Applicant's mark for the purpose of sound comparison is the sound value of "de" in the "deo" portion of the mark.

Id.

With respect to meaning, Applicant argues that "Registrant's mark DEODOREX connotes deodorant or odor, while Applicant's mark connotes an arbitrary term 'deorex.'" *Id.* at 12-13.

Applicant concludes that

Applicant's "deorex" and Registrant's "DEODOREX" have different pronunciations, connotations, and overall commercial impressions such that a consumer would be able to distinguish between the blue, stylized "deorex" and

the standard text “DEODOREX” Similarly, “deorex” and “DEODOREX” would not create the same commercial impression in the minds of consumers.

Id. at 13-14.

The Examining Attorney responds that “applicant’s mark, DEOREX is similar in appearance, sound, connotation and commercial impression to registrant’s mark, DEODOREX” because “registrant’s and applicant’s marks both begin with ‘DEO’ and end with ‘REX,’” 6 TTABVUE 4, and consumers are inclined to focus on the first part of the marks, which both begin with “DEO.” *Id.* at 5.

The Examining Attorney rejects Applicant’s arguments regarding visual dissimilarity of the marks because the standard-character DEODOREX mark shown in the cited registration could be used in the same font and color as Applicant’s DEOREX mark. *Id.* (citations omitted). The Examining Attorney rejects Applicant’s arguments regarding aural dissimilarity of the marks because “there is no correct pronunciation of a mark; thus, consumers may pronounce a mark differently than intended by the mark owner,” *id.* (citations omitted), and “the beginning and ending of the compared marks could clearly be pronounced the same.” *Id.* at 6. With respect to meaning, the Examining Attorney argues that “the ‘DEO’ portion of [Applicant’s] mark also connotes deodorants as both applicant’s mark and deodorants in its identification of goods begin with ‘DEO’” such that “Applicant’s mark is suggestive of such goods.” *Id.* The Examining Attorney concludes that “the marks look and sound similar and create a similar overall commercial impression; therefore, the marks are confusingly similar for likelihood of confusion purposes.” *Id.*

In its reply brief, Applicant argues that the “existence of two additional letters (the one vowel and one consonant combination ‘DO’) in Registrant’s mark has a substantial impact on both the appearance of the mark and its pronunciation,” 7 TTABVUE 8, and that “the appropriate inquiry is not what the correct pronunciation is, but what the usual pronunciation by the ordinary consumer is.” *Id.* at 9. Applicant claims that “it is apparent that the ordinary consumer would plainly see and pronounce Applicant’s mark as a three-syllable word (DE-o-rex) and Registrant’s mark as a four-syllable word (de-O-dor-ex)” and that the “Examining Attorney has not provided a single example of two marks or words which share the same beginning and ending being pronounced the same when one of the marks or words has an additional vowel and an additional consonant.” *Id.*

With respect to the similarity of the marks in appearance, Applicant does not appear to dispute that the cited standard-character mark DEODOREX could be used in the same font and colors as Applicant’s mark, *id.* at 10-11, but argues that this possibility is insufficient to establish that the marks are confusingly similar and that confusion is “likely.” *Id.* at 11. Applicant concludes that “[i]f the marks are truly considered in their entirety with the additional letters and syllable in Registrant’s mark and the color and stylized design of Applicant’s mark, it is obvious that Applicant’s Mark and Registrant’s mark are sufficiently different in at least appearance and sound to avoid confusion.” *Id.*

In considering the visual similarity of the marks, “[s]ince Registrant’s mark is a standard character mark, we must consider that the . . . mark may be presented in

any font style, size or color, including the same font, size and color as the literal portions of Applicant’s mark” because “the rights associated with a standard character mark reside in the wording per se and not in any particular font style, size, or color.” *In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 WL 1620989, at *5 (TTAB 2018) (citing *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 1353 (Fed. Cir. 2013)). *See also In re Viterra Inc.*, 671 F.3d 1358, 1363 (Fed. Cir. 2012). Accordingly, we must assume that the word DEODOREX in the cited registration could be depicted in exactly the same stylized lowercase blue lettering in which Applicant’s mark DEOREX appears, as shown again below:



The “marks are visually similar, as both begin with” “DEO-” and end with “-REX,” *Sage Therapeutics*, 2024 WL 1638376, at *6, particularly if they are rendered in the same font style, size, and colors. “The second elements of the marks are different,” as DEO is followed by DO in the cited mark and by REX in Applicant’s mark, and “some consumers may notice and recall the difference.” *Id.* “But the marks share the same structure” by beginning with DEO and ending with REX, and this “structure results in marks that look like a variation on” the same theme. *Id.* “This is important because consumers familiar with the [DEODOREX] mark and the [supplements] provided under that mark may view the [stylized DEOREX] mark as an extension of the [DEODOREX] mark or as an affiliated branch of the business that provides

[supplements] under the [DEODOREX] mark.” *Id.*²⁰ “The common [DEO and REX] element[s] of the marks anchor[] them in a way to the same theme and create[] a risk that consumers will mistakenly assume connections between the [goods] provided under the marks. This type of similarity increases the likelihood of confusion.” *Id.*

With respect to similarity in sound, Applicant appears to concede in its reply brief, 7 TTABVUE 9, that “there is no correct pronunciation of a trademark, and consumers may pronounce a mark differently than intended by the brand owner.” *Viterra*, 671 F.3d at 1367. Applicant argues that “the appropriate inquiry is not what the correct pronunciation is, but what the usual pronunciation by the ordinary consumer is.” 7 TTABVUE 9. In support of that argument, Applicant cites two federal district court cases from the 1980s and the 1984 edition of Professor McCarthy’s treatise, *id.*, but “determining the usual pronunciation by the ordinary consumer” is not the “appropriate inquiry” under Federal Circuit and Board law. “[T]here is not necessarily one correct pronunciation of a trademark that is not a recognized word,” and it “is impossible to predict how the public will pronounce a particular mark.” *Look Cycle Int’l v. Kunshan Qiyue Outdoor Sports Goods Co.*, Canc. No. 92079409, 2024 WL 3739358, at *10 (TTAB 2024) (quoting *Edwards Lifesciences Corp. v. VigiLanz Corp.*, Opp. No. 91154210, 2010 WL 1514315, at *11 (TTAB 2010)). “Absent evidence to the contrary, we must consider all reasonable possibilities” for a mark’s

²⁰ As discussed below in connection with the second *DuPont* factor, the record shows that multiple entities sell both cosmetics and supplements under the same marks.

pronunciation. *Id.* (citing *StonCor Grp., Inc. v. Specialty Coatings, Inc.*, 759 F.2d 1327, 1332 (Fed. Cir. 2014)). The pronunciation of DEODOREX as DE-O-DOR-EX (similar to “deodorant,” a recognized word) advanced by Applicant may be a reasonable possibility, but so is the pronunciation of the mark as “DAYOH-DOREX,” with the first element DEO pronounced in the same manner as DEO could be pronounced in Applicant’s mark “DEO-REX.”

In any event, no matter exactly how the marks may be pronounced, they “are also similar in sound, as the first and dominant [“DEO”] element of each mark” and the last “REX” element of each mark “will sound identical.” *Sage Therapeutics*, 2024 WL 1638376, at *6. “The marks as a whole sound partially different” because of the presence of DO in the cited mark, but the “shared [DEO and REX] element[s] will have the same impact when spoken or heard as [they do] when seen.” *Id.*²¹ Just as marks are not viewed side-by-side for purposes of determining visual similarity, *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014), they are not pronounced sequentially for purposes of determining aural similarity. A consumer with a general rather than specific recollection of the sound of the cited “DEODOREX” mark who separately hears the “DEOREX” mark verbalized is unlikely to distinguish the marks in sound.

²¹ Applicant argues that the marks are dissimilar in sound because they differ in the number of syllables that must be verbalized, but the Board has long noted that consumers do not focus on such minutia in forming general impressions of marks. *In re John Scarne Games, Inc.*, 1959 WL 5901, at *1 (TTAB 1959) (“Purchasers . . . do not engage in trademark syllable counting—they are governed by general impressions made by appearance or sound, or both”).

Finally, with respect to connotation and commercial impression, neither mark appears to have an “established meaning.” *Sage Therapeutics*, 2024 WL 1638376, at *7. As discussed above, Applicant argues that the cited DEODOREX mark “connotes deodorant or odor,” 4 TTABVue 12-13, but there is no record evidence suggesting that the mark would have that meaning in the context of “dietary and nutritional supplements,” goods which are ingested, not applied topically, and which are not typically used to suppress body odor or improve one’s scent. But if DEODOREX does connote “deodorant” or “odor,” it is similar in meaning to Applicant’s mark DEOREX, which also connotes the suppression of body odor or the improvement of one’s scent in the context of the goods identified in the application as “personal deodorants,” “perfumes,” “eau de Cologne,” “aftershave,” and “antiperspirant soap.” Whatever the connotations of the marks are, it is more likely that they are similar rather than materially different.

The similarity of marks “is not a binary factor but is a matter of degree,” *St. Helena Hosp.*, 774 F.3d at 752 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003)). The marks DEODOREX and deorex (stylized) have some differences, but they are outweighed by similarities in appearance, sound, and connotation and commercial impression. The marks are more similar than dissimilar and the first *DuPont* factor supports a conclusion that confusion is likely.

B. Similarity or Dissimilarity of the Goods

“The second *DuPont* factor considers the similarity or dissimilarity and nature of the goods as described in the involved application and cited registration,” *In re*

Samsung Display Co., Ser. No. 90502617, 2024 WL 3451873, at *3 (TTAB 2024) (citing *DuPont*, 476 F.2d at 1361), and “contemplates whether the consuming public may perceive the respective goods as related enough to cause confusion about their source or origin.” *Id.* (citing *Naterra Int’l Inc. v. Bensalem*, 92 F.4th 1113, 1117 (Fed. Cir. 2024) (quoting *St. Helena Hosp.*, 774 F.3d at 752 (cleaned up) (internal citation omitted))).

“The goods need not be identical or even competitive to find a likelihood of confusion.” *Id.* (citing *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (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 [the goods] emanate from the same source.’” *Id.* (quoting *Coach Servs.*, 668 F.3d at 1369 (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 WL 1431084, at *10 (TTAB 2007))).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods are used together or used by the same purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; or copies of prior use-based registrations of the same mark for both applicant’s goods . . . and the goods . . . listed in the cited registration.

In re Embiid, Ser. No. 88202890, 2021 WL 2285576, at *10 (TTAB 2021) (quoting *In re Ox Paperboard, LLC*, Ser. No. 87847482, 2020 WL 4530517, at *6 (TTAB 2020)).

The goods identified in the cited registration are “dietary and nutritional supplements.” “[W]e must construe the [goods] identified in the cited registration as broadly as reasonably possible ‘to include all [goods] of the nature and type described

therein,” *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 WL 6140427, at *5 (TTAB 2023) (quoting *In re Solid State Design Inc.*, Ser. No. 87269041, 2018 WL 287909, at *6 (TTAB 2018) (internal quotation omitted)), and “we must resolve any ambiguities regarding their coverage in favor of the cited registration ‘given the presumptions afforded the registration under Section 7(b)’ of the Trademark Act.” *Id.* (quoting *In re C.H. Hanson Co.*, Ser. No. 77983232, 2015 WL 6121759, at *5 (TTAB 2015)).

The goods identified in the application are “Preparations for dyeing and tinting of hair, namely, hair dye, hair coloring and dyes; Hair shampoo; Personal deodorants; Make-up kits comprised of cosmetics, lipsticks, beauty masks; Cosmetics; Skincare cosmetics; Cosmetic creams; Lipsticks; Beauty masks; Perfumes; Perfume, eau de Cologne and aftershaves; Antiperspirant soap.”²² “[W]e must also give the [goods] identified in the application their full scope in our analysis of the second *DuPont* factor.” *Id.* at *5 (citation omitted).

The “Examining Attorney need not prove, and we need not find, similarity as to each [good] listed in the description of [goods]” in the application. *Id.* (quoting *In re St. Julian Wine Co.*, Ser. No. 87834973, 2020 WL 2788005, at *5 (TTAB 2020)). “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within [Class 3] in the application.”

²² We will focus on the goods identified broadly as “cosmetics.” “The Board may take judicial notice of dictionary definitions, including online dictionaries which exist in printed format or have fixed regular editions.” *Weiss*, 2024 WL 3617597, at *6 n.30 (quotation omitted). We take judicial notice that “cosmetics” are “substances that you put on your face or body that are intended to improve your appearance.” CAMBRIDGE DICTIONARY (dictionary.cambridge.org/us/dictionary/english/cosmetic, last accessed on January 29, 2025).

St. Julian Wine Co., 2020 WL 2788005, at *5 (quoting *In re Aquamar, Inc.*, Ser. No. 85861533, 2015 WL 4269983, at *4 n.5 (TTAB 2015)); *see also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981).

Applicant’s argument in its appeal brief under the heading “Differences Amongst Goods” has two components: (1) the cited mark already co-exists on the Principal Register with marks shown in third-party registrations, 4 TTABVUE 14-16, and (2) “[p]urchasers of personal care products are sophisticated, careful purchasers,” *id.* at 17, and “the dietary and nutritional supplement industry is a multibillion-dollar industry with sophisticated consumers.” *Id.* at 18.²³ Neither argument addresses the Examining Attorney’s evidence of relatedness discussed below, and Applicant does not address the second *DuPont* factor at all in its reply brief, so it appears that Applicant has all but “conced[ed] the issue” of relatedness. *In re Morinaga Nyugyo K.K.*, Ser. No. 86338392, 2016 WL 5219811, at *2 (TTAB 2016).

The Examining Attorney argues that the “evidence of record establishes that the goods are of a kind that may emanate from a single source.” 6 TTABVUE 7. The Examining Attorney cites third-party registrations and third-party websites showing that the “goods are closely related.” *Id.* at 8.

“As a general proposition, third-party registrations that cover goods . . . from both the cited registration and an Applicant’s application are relevant to show that the goods . . . are of a type that may emanate from a single source under one mark.” *In re*

²³ As discussed above, we have given no consideration to Applicant’s argument based on third-party registrations that are not properly in the record. We discuss Applicant’s argument under the fourth *DuPont* factor below.

Country Oven, Inc., Ser. No. 87354443, 2019 WL 6170483, at *5 (TTAB 2019) (citations omitted). The third-party use-based registrations made of record by the Examining Attorney include:

- Registration No. 6891770 covering “Cosmetics,” and “Dietary supplements” and various forms of “Nutritional supplements;”²⁴
- Registration No. 6602326 covering “Cosmetics,” and “Dietary supplements;”²⁵
- Registration No. 6997516 covering “Cosmetics,” and “Nutritional supplements;”²⁶
- Registration No. 7001528 covering “Cosmetics,” and “Dietary supplements” and “Nutritional supplements;”²⁷
- Registration No. 6982006 covering “Cosmetics,” and “Nutritional supplements;”²⁸
- Registration No. 6905410 covering “Body and beauty care cosmetics,” and “Nutritional supplements;”²⁹
- Registration No. 6893401 covering “Cosmetics,” and “Dietary food supplements;”³⁰
- Registration No. 6917561 covering “Cosmetics,” and “Dietary supplements;”³¹
- Registration No. 6940659 covering “Cosmetics,” and “Dietary and nutritional supplements;”³²

²⁴ April 11, 2023 Office Action at TSDR 13-14.

²⁵ *Id.* at TSDR 15-16.

²⁶ *Id.* at TSDR 17-18.

²⁷ *Id.* at TSDR 19-20.

²⁸ *Id.* at TSDR 21-22.

²⁹ *Id.* at TSDR 25-26.

³⁰ *Id.* at TSDR 27-28.

³¹ *Id.* at TSDR 29-30.

³² *Id.* at TSDR 31-32.

- Registration No. 6960876 covering “Cosmetics,” and “Dietary and nutritional supplements;”³³
- Registration No. 6947596 covering “Cosmetics,” and “Nutritional supplements;”³⁴
- Registration No. 7000037 covering “Cosmetics,” and “Nutritional supplements” and “Protein dietary supplements;”³⁵
- Registration No. 7014008 covering “Cosmetics,” and “Nutritional supplements;”³⁶
- Registration No. 6991810 covering “Cosmetics,” and “Dietary supplements;”³⁷ and
- Registration No. 7010657 covering “Cosmetics,” and “Dietary supplements” and “Nutritional supplements.”³⁸

These 15 third-party use-based registrations, owned by separate entities, are “sufficient in both quality and quantity to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *Country Oven*, 2019 WL 6170483, at *4-5 (finding that 10 third-party registrations were prima facie evidence of the relatedness of the involved goods and services) (citing *In re Pacer Tech.*, 338 F.3d 1348, 1351 (Fed. Cir. 2003)).³⁹ As noted above, Applicant makes no attempt to

³³ *Id.* at TSDR 33-34.

³⁴ *Id.* at TSDR 35-36.

³⁵ *Id.* at TSDR 37-38.

³⁶ *Id.* at TSDR 39-40.

³⁷ *Id.* at TSDR 41-42.

³⁸ *Id.* at TSDR 43-44.

³⁹ As in *Country Oven*, 2019 WL 6170483, at *6, our finding that the goods are related based on the Examining Attorney’s third-party registration evidence is bolstered by the Examining Attorney’s third-party use evidence showing that various types of cosmetics and supplements are sold together under the same mark. December 7, 2023 Final Office Action at TSDR 7-62

show that the involved goods are not related based on contrary evidence, and we find that the second *DuPont* factor supports a conclusion that confusion is likely.

C. Purchase Conditions and Degree of Consumer Care

As noted above, the fourth *DuPont* factor concerns the “conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 476 F.2d at 1361.

Applicant argues that “[p]urchasers of personal care products are sophisticated, careful purchasers,” 4 TTABVUE 17, based on a report on the website at zionmarketresearch.com captioned “Professional Hair Care Products Market Size, Share, Growth Report 2020,”⁴⁰ a Fortune Business Insights report on the website at globalnewswire.com captioned “Deodorant Market to Reach USD 30.76 Billion by 2026,”⁴¹ and an article on the website of THE WALL STREET JOURNAL captioned “Americans Can’t Get Enough Deodorant These Days. I’m Obsessed With It.”⁴² Applicant also argues that “the dietary and nutritional supplement industry is a multibillion-dollar industry with sophisticated consumers,” based on a report on the website at thebrainyinsights.com.⁴³

The Examining Attorney responds that Applicant has not presented any evidence in support of its arguments regarding the sophistication of purchasers of the goods;

(showing websites offering various supplements and cosmetics under the Perricone MD, Pacifica, and Honest marks).

⁴⁰ November 6, 2023 Response to Office Action at TSDR 21-24.

⁴¹ *Id.* at TSDR 25-34.

⁴² *Id.* at TSDR 35-44.

⁴³ *Id.* at TSDR 45-50.

that sophistication in a particular field does not immunize a consumer against confusion; that the standard of care for purchasing goods is that of the least sophisticated potential purchaser; and that the goods identified in the cited registration and in the application are relatively low-priced and subject to impulse buying. 6 TTABVUE 9 (citations omitted).

We find that the reports and articles regarding the size and growth of the markets for cosmetics and supplements are not probative of the degree of purchaser care likely to be exercised by consumers in those markets. The facts that more consumers may be entering a particular market, or that new consumers are enthusiastic about purchasing goods, does not show ipso facto that the consumers will exercise particular care in purchasing the goods.

As the Examining Attorney points out, “[w]e must make our determination based on the least sophisticated consumer.” *Look Cycle*, 2024 WL 3739358, at *6 (citing *Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1325 (Fed. Cir 2014)). The record shows that consumers may purchase both cosmetics and supplements online, where there is no opportunity to examine or sample the goods prior to purchase, and where some of the goods identified in the application are quite inexpensive.⁴⁴ “When products are relatively low-priced and subject to impulse purchase, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchaser care.” *In re FabFitFun, Inc.*, Ser.

⁴⁴ December 7, 2023 Final Office Action at TSDR 7-62. Some of the goods sell for as little as about \$10.00 per unit.

No. 86847381, 2018 WL 4043156, at *3 (TTAB 2018) (quoting *Recot*, 214 F.3d at 1329) (finding that lower-priced cosmetics may be purchased without a high degree of care). While there are likely some purchasers who will exercise considerable care in purchasing cosmetics out of vanity, or concern about applying the goods to the body, there is no evidence that the least sophisticated potential consumers of the goods will exercise anything more than ordinary care in their purchases, and some evidence that impulse purchases may occur. The fourth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

D. Summary

The key first and second *DuPont* factors both support a conclusion that confusion is likely, while the fourth *DuPont* factor is neutral. The marks are more similar than dissimilar when compared in their entirety, and cosmetics, and dietary and nutritional supplements, are commonly sold under the same mark. We conclude, based on the record as a whole, that consumers familiar with the cited mark DEODOREX for dietary and nutritional supplements who separately encounter Applicant's stylized deorex mark for cosmetics are likely to believe mistakenly that the goods have a common source.

Decision: The refusal to register is affirmed.