

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed:
December 11, 2015

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Americas Health and Wellness Fund LLC

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Serial No. 86265852

Bruce Goldner of Skadden, Arps, Slate, Meagher & Flom LLP for Americas Health and Wellness Fund LLC.

Darryl M. Spruill, Trademark Examining Attorney, Law Office 112 (Angela Bishop Wilson, Managing Attorney).

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Before Kuhlke, Ritchie, and Masiello, Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

Americas Health and Wellness Fund LLC (“Applicant”) has filed an application to register the mark LUBDUB in standard characters for the goods and services set forth below:

Powdered nutritional supplement protein drink mixes; Dietary supplement drink mixes; Nutritionally fortified beverages; Meal replacement shakes for weight loss purposes; Meal replacement bars for weight loss purposes; Nutritional supplement shakes; Meal replacement bars for use as a nutritional supplement; Nutritional supplement in the nature of protein enriched powdered water mix; Nutraceuticals for use as a dietary supplement, in International Class 5;

Nut and dried fruit-based snack and food bars; Trail mix consisting primarily of processed nuts, seeds, dried fruit and also including chocolate; Fruit-based food beverage; Fruit chips; Fruit salads; Vegetable salads; Fruit spreads; Shakes; Soups, in International Class 29;

Prepared entrees consisting of fruit drinks and fruit juices, fruit-based beverages, non-alcoholic beverages containing fruit juices, non-alcoholic fruit extracts used in the preparation of beverages, non-alcoholic fruit juice beverages, vegetable juices, vegetable-fruit juices and smoothies, fruit beverages; Smoothies, in International Class 32;

Retail store services featuring dietary supplements, vitamins and weight loss foods and products; On-line retail store services featuring dietary supplements, vitamins and weight loss foods and products; Vending in the field of heart healthy and weight loss foods, in International Class 35;

Cafe, juice bar services, restaurant and snack bar services, in International Class 43;

Providing a website featuring information and advice in the fields of diet, weight loss, diet planning and lifestyle wellness; Providing weight loss program services; Providing wellness services, namely, weight loss programs offered at a wellness center, in International Class 44.¹

The Trademark Examining Attorney refused registration under § 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the registered mark DUB as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is registered in standard character form for "non-alcoholic energy drinks," in

¹ Application Serial No. 86265852, filed April 29, 2014 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), on the basis of Applicant's asserted *bona fide* intention to use the mark in commerce.

International Class 32.² When the refusal was made final, Applicant filed a notice of appeal. Applicant and the Examining Attorney have filed briefs.

1. Evidentiary matters.

Applicant has made reference in its brief to various materials located on the Internet, setting forth the URLs or web addresses of the cited materials.³ Applicant did not make the cited materials of record during the prosecution of the application. They are not types of materials that would be suitable for judicial notice, and the Board will not use a URL to access websites to consider whatever content may appear therein. *In re Future Ads LLC*, 103 USPQ2d 1571, 1572 (TTAB 2012); *In re HSB Solomon Associates, LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012). Accordingly, we have not considered the cited materials.

We also note that during prosecution Applicant submitted a list of third-party registrations.⁴ The Examining Attorney, in his next Office Action, advised Applicant that the submission of such a list was not sufficient to make the listed registrations of record;⁵ and Applicant did not thereafter supplement the record. The Board does not take judicial notice of third-party registrations. Mere listings of registrations are not sufficient to make the registrations of record. TBMP § 1208.02 (2015); *In re Hoefflin*, 97 USPQ2d 1174, 1177 (TTAB 2010). Accordingly, we have not considered the listed registrations. “The record in the application should be complete prior to

² Reg. No. 3791620, issued May 18, 2010.

³ Applicant’s brief at 4, 6-7, and iii (table of “Other Authorities”), 4 TTABVUE 9, 11-12, 5.

⁴ Applicant’s response of November 11, 2014 at 6-8.

⁵ Office Action of January 23, 2015 at 3.

the filing of an appeal.” 37 C.F.R. § 2.142(d). *See also* TBMP § 1207.01. An applicant has the responsibility to make sure that the record is complete prior to filing a notice of appeal. *In re Van Valkenburgh*, 97 USPQ2d 1757, 1768 n. 32, 1769 (TTAB 2011).

2. Refusal under Section 2(d).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion as set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). 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, 192 USPQ 24, 29 (CCPA 1976).

(a) The marks.

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “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.” *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012) (citation omitted). Applicant correctly urges that we must avoid “dissection” of the marks

and must consider the marks at issue in their entireties in reaching our ultimate conclusion. However, there is nothing improper in giving more or less weight to a particular feature of a mark, for rational reasons. *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). “Indeed, this type of analysis appears to be unavoidable.” *Id.*

In appearance and sound, the two marks are similar in that each includes the syllable DUB. However, Applicant’s mark differs from the registered mark in appearance and sound by virtue of its initial syllable LUB. Applicant emphasizes that the position of LUB as the initial portion of the mark gives it additional weight. *See Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (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”); *see also Palm Bay Imports v. Veuve Clicquot Ponsardin*, 73 USPQ2d at 1692 (“Veuve” is the most prominent part of the mark VEUVE CLICQUOT because “veuve” is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In the present case, we agree.

With respect to the meanings of the marks, there is no evidence of record as to the meaning of DUB. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (1993) indicates that the word has many meanings, including the following:⁶

⁶ The Board may take judicial notice of dictionary definitions. *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983).

¹ ... **1 a** : to confer knighthood ... **b** : to dignify or give new character to by a name, title, or description ...

⁵ ... **1** : to provide (a motion picture film) with a new soundtrack ...

Id. at 698. There is no evidence of record to support Applicant's contention that DUB refers to a type of car wheel rim.⁷

The record contains one dictionary definition to indicate the meaning of LUBDUB, as follows:

lubb-dupp *noun*

Definition of LUBB-DUPP

: the characteristic sounds of a normal heartbeat as heard in auscultation

Variants of LUBB-DUPP

Lubb-dupp *also* lub-dup *or* lub-dub⁸

The Examining Attorney argues that the above definition is not persuasive evidence of the meaning of Applicant's mark because the definition refers not to LUBDUB but to the word "lubb-dupp." Regarding the reference to the variant "lub-dub," the Examining Attorney argues that the definition "is less persuasive because it does not show applicant's mark as having a definite meaning ..."⁹ We disagree. The appearance of the term "lub-dub" in a dictionary, even as a "variant" of another word, indicates that this term is a recognized word that is understood to have the indicated definition. Thus, the evidence indicates that the two marks have

⁷ Applicant's brief at 4, 4 TTABVUE 9.

⁸ Definition from <merriam-webster.com>, Office Action of January 23, 2015 at 8.

⁹ Examining Attorney's brief, 6 TTABVUE 10.

substantially different connotations and commercial impression. Although the word DUB is present within the mark LUBDUB, we find that the addition of the prefix LUB- alters the meaning of the syllable DUB; it is unlikely that customers would perceive -DUB, as it appears in Applicant's mark, as having the same meaning as DUB standing alone.

In view of the differences between the marks in appearance, sound, and meaning, we find that the marks create, overall, different commercial impressions. Accordingly the *du Pont* factor of the similarity or dissimilarity of the marks weighs against a finding of likelihood of confusion.

(b) The goods; trade channels.

We consider next the similarity or dissimilarity of the goods as identified in the application and the cited registration. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-1162 (Fed. Cir. 2014); *Octocom Syst. Inc. v. Houston Computers Svcs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). We will focus on Applicant's goods identified as "fruit-based beverages, non-alcoholic beverages containing fruit juices, [and] non-alcoholic fruit juice beverages," as these are the goods that are most similar in nature to Registrant's "non-alcoholic energy drinks." Applicant argues that "[a]lthough the goods provided under the respective marks may very broadly be characterized as beverages, they are not interchangeable or even closely related."¹⁰ The evidence to which Applicant refers in support of this argument is not of record.

¹⁰ Applicant's brief at 7, 4 TTABVUE 12.

The Examining Attorney, in order to demonstrate that Applicant's beverages are related to energy drinks, has submitted a number of third-party registrations.¹¹ Third-party registrations that are based on use in commerce and which individually cover a number of different goods and services may have some probative value to the extent that they serve to suggest that the listed goods and services are of types which may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). The Examining Attorney's evidence includes 7 use-based registrations that cover both energy drinks and fruit beverages. Accordingly, at best the evidence would support an affirmance of the Examining Attorney's refusal as to the goods in Class 32.

The Examining Attorney has submitted evidence to show that energy drinks and fruit beverages can both be found on the websites of GNC and The Vitamin Shoppe; and at the juice bar of a gym called Fitness For You.¹² This evidence illustrates the types of trade channels through which such goods travel and suggests that at least sometimes they are found in the same trade channels.

We consider the beverages of Applicant and Registrant to be sufficiently related that, if both were offered under a single mark, customers would likely perceive a connection between them.

¹¹ Office Action of August 19, 2014 at 50-100.

¹² *Id.* at 12-49.

(c) Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. In view of the substantially different commercial impressions created by the marks at issue, we find that Applicant's mark, even as applied to Applicant's goods in Class 32, is not likely to cause confusion, mistake or deception as to the source of Applicant's goods or services. *Kellogg Co. v. Pack'em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142, 1145 (Fed. Cir. 1991) ("We know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive").

Decision: The refusal to register is reversed.