

This Opinion is not a
Precedent of the TTAB

Mailed: June 23, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Femelabs LLC
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Serial No. 86523344
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Matthew H. Swyers of The Trademark Company PLLC,
for Femelabs LLC.

Dominick John Salemi, Trademark Examining Attorney, Law Office 106,
Mary I. Sparrow, Managing Attorney.

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Before Kuczma, Masiello and Goodman,
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

Femmelabs LLC (“Applicant”) seeks registration on the Principal Register of the
mark **VF10** (in standard characters) for:

Dietary supplements; dietary supplements for female
urogenital health in International Class 5.¹

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), based on a likelihood

¹ Application Serial No. 86523344 was filed on February 3, 2015, based upon Applicant’s
claim of first use anywhere since at least as early as March 5, 2014, and first use in commerce
since at least as early as April 1, 2014.

of confusion with the mark VF-360 (in standard characters) set forth in Registration No. 4629583 owned by Vivia Formula, for vitamins; nutritional supplements in International Class 5.²

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination of likelihood of confusion under § 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also, In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). Applicant addresses the following factors in this case: the similarity or dissimilarity of the marks, the similarity or dissimilarity of the goods, the sophistication of the customers and the absence of actual confusion between the marks. We have considered all of the evidence as it pertains to the relevant *du Pont* factors, as well as Applicant's arguments (including any evidence and arguments not specifically discussed in this opinion). To the extent any other *du Pont* factors for which no evidence or argument were presented may nonetheless be applicable, we treat them as neutral.

² Registration No. 4629583, issued October 28, 2014.

A. The similarity of the goods

The identification of goods in the subject application includes dietary supplements while the Cited Registration includes nutritional supplements. “Dietary supplements” and “nutritional supplements” are terms used to identify substances intended for ingestion by individuals in order to supply a need or deficiency of their bodies. “A **dietary supplement**” is defined as “a product intended for ingestion that contains a ‘dietary ingredient’ intended to add further **nutritional value to (supplement)** the diet.”³ (emphasis added). Thus, by definition dietary and nutritional supplements are highly similar in nature. Indeed, Applicant has conceded the similarity of dietary supplements and nutritional supplements.⁴

In view of the foregoing, we find that the goods are, in part, highly similar, supporting a likelihood of confusion under the second *du Pont* factor.

B. The similarity of the marks

Applicant points out that the only common element between its mark VF10 and Registrant’s mark VF-360 are the letters VF which lead-off each mark. Upon closer inspection, Applicant asserts that the distinctions between the numbers in conjunction with the hyphen found in Registrant’s mark distinguish the marks.

Despite some “superficial similarities between the letters VF,” Applicant argues that its mark either creates a commercial impression of perfection or strength by

³ We take judicial notice of the definition of “dietary supplement” as that term is defined by the U.S. Food and Drug Association, <http://www.fda.gov/AboutFDA/Transparency/Basics/ucm195635.htm> (6/21/2016).

⁴ Brief of the Applicant p. 10 (4 TTABVUE 11).

using the number 10, a number with strong associative ties to those concepts. On the other hand, Registrant's mark, according to Applicant, creates an impression of completeness as a reference to the degrees that it takes to complete a full circle or turn. Additionally, Applicant notes that it displays the number "10" as a superscript, *i.e.*, VF¹⁰, while Registrant's mark uses a hyphen in connection with the numerals which defeats the ability to use the number as a superscript. Thus, "in no way could [Registrant's mark] create an impression of perfection or strength given the separate and distinct uses of the number '10' versus the number '360' in our society."⁵

Whether Applicant's mark displays the number "10" as a superscript is not a distinction between its mark and Registrant's mark. As presented for registration, Applicant's mark is in standard characters and does not limit the number "10" to use as a superscript. The addition of a hyphen in Registrant's mark VF-360 does not distinguish the marks either. *See e.g., Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010). Thus, we must consider the similarity of the marks with both marks being in the same format, *i.e.*, VF10 and VF-360.

There is no evidence supporting the meaning of either mark or of any of the parts of the marks. In distinguishing the marks, Applicant overlooks that both marks begin with the same distinctive letters and end with the numeral "0." Yet, the first half of each mark is identical. Both marks begin with the identical letters "VF" which is what is first perceived about each mark whether by sight or by sound. Lettered marks having only two letters in common, used on identical or closely related goods, have

⁵ Brief of the Applicant p. 10 (4 TTABVUE 11).

been held likely to cause confusion. *See, e.g., Feed Serv. Corp. v. FS Servs., Inc.*, 432 F.2d 478, 167 USPQ 407 (CCPA 1970) (finding confusion between FSC and FS); *In re Instruteck Corp.*, 184 USPQ 618, 620 (TTAB 1974) (finding confusion between IC stylized and IC SILENCER and Design); *Edison Bros. Stores, Inc. v. Brutting E.B. Sport-Int'l GmbH*, 230 USPQ 530 (TTAB 1986) (finding confusion between EB and EBS).

In the absence of evidence showing different commercial impressions resulting from the significance of the numerals “10” and “360” in Applicant’s and Registrant’s marks, Applicant’s mark VF10 is similar to Registrant’s mark VF-360. Moreover, where the goods and/or services of an applicant and registrant are similar in kind and/or closely related, as they are here, the degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as in the case of diverse goods and/or services. *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350, 1354 (Fed. Cir. 2004); *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987).

C. Sophistication of purchasers

Applicant argues, without support, that consumers of Applicant’s and Registrant’s goods are sophisticated insofar as purchasers of supplements and vitamins are generally aware of the materials being ingested into their bodies and exercise great care in determining those which they will use as supplements.⁶

⁶ Brief of the Applicant p. 11 (4TTABVUE 12).

Even assuming purchasers of Applicant's goods are sophisticated, this does not necessarily mean that they are immune to source confusion. It is well-settled that even careful or sophisticated purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar marks on or in connection with goods and services. *See In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009); *In re Cynosure Inc.*, 90 USPQ2d 1644, 1647 (TTAB 2009), *citing Wm. K. Stamets Co. v. The Metal Prods. Co.*, 176 USPQ 92, 93 (TTAB 1972) (even technically trained purchasers who are extremely familiar with expensive machinery may be confused when similar marks are used with respect to the same goods). Here, the respective goods are highly similar, and sold under such similar marks that even sophisticated purchasers could be led to the mistaken belief that they originated from the same source. Therefore, the *du Pont* factor relating to the purchasers to whom sales are made, *i.e.*, "impulse" versus careful, sophisticated purchasing, is neutral.

D. Absence of Actual Confusion

Applicant notes there is no evidence of record indicating actual confusion in the marketplace between Applicant's goods and Registrant's goods despite co-existence in the marketplace for nearly a year and a half. Applicant contends it is contradictory to discount the absence of actual confusion as a meaningful factor in the case.⁷

⁷ Brief of the Applicant p. 12 (4 TTABVUE 13).

Applicant's uncorroborated statements of no known instances of actual confusion are of little evidentiary value. *See In re Bissett-Berman Corp.*, 476 F.2d 640, 642, 177 USPQ 528, 529 (CCPA 1973) (stating that self-serving testimony of appellant's corporate president's unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The fact that an applicant in an *ex parte* case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred. *See, e.g., In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001); *In re Jeep Corp.*, 222 USPQ 333, 337 (TTAB 1984); *In re Barbizon Int'l, Inc.*, 217 USPQ 735, 737 (TTAB 1983). Moreover, Applicant admits that its goods and Registrant's goods have only co-existed in the marketplace for under a year and a half.

E. Conclusion

In view of the foregoing, because the marks and goods are similar, we find that there is a likelihood of confusion between Applicant's mark VF10 and the VF-360 mark in the cited registration.

Decision: The refusal to register Applicant's mark VF10 is affirmed.