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Mailed: August 17, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Draion M. Burch DO Inc.

Serial No. 88603134

Andrea Evans of The Law Firm of Andrea Hence Evans LLC,
for Draion M. Burch DO Inc.

Corinne Kleinman, Trademark Examining Attorney, Law Office 122,
Kevin Mittler, Managing Attorney.

Before Wolfson, Adlin, and Coggins,
Administrative Trademark Judges.

By Wolfson, Administrative Trademark Judge:

Draion M. Burch DO Inc. ("Applicant") seeks registration on the Principal Register of the standard character mark MOMENTUM for "Vaginal moisturizers; Personal lubricants" in International Class 5.[1]

[1] Application Serial No. 88603134 was filed on September 3, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1052(b), based on Applicant's allegation of its bona fide intent to use the mark in commerce. The application as filed included goods in Class 10. However, the Examining Attorney's refusal was ultimately directed to the Class 5 goods only. Applicant requested division of the application, which was approved, and the Class 10 goods were

The Examining Attorney refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a prior registration for the standard character mark MOMENTUM NUTRITION ("NUTRITION" disclaimed) for

> Dietary and nutritional supplements; Dietary and nutritional supplements for endurance sports; Dietary and nutritional supplements used for weight loss; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary food supplements; Dietary supplement beverage for Bodybuilding; Dietary supplement drink mixes; Dietary supplemental drinks; Dietary supplements; Dietary supplements for human consumption; Nutritional supplements; Powdered fruit-flavored dietary supplement drink mix; Powdered nutritional supplement concentrate; Protein supplement shakes for weight gain purposes; Protein supplements; Vitamin and mineral supplements; Vitamin supplements; Weight management supplements; Whey protein supplements

in International Class 5.[2]

When the refusal was made final, Applicant filed this appeal and requested reconsideration. When Applicant's request for reconsideration was denied, the appeal resumed. For the reasons set forth below, we affirm the refusal to register.

I. Likelihood of Confusion

A. Legal Standard

Our determination of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du*

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moved to trademark application Serial No. 88980036 (the "child" application), for which a Notice of Allowance has issued.

[2] Reg. No. 4751199, issued June 9, 2015.

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 make that determination on a case-by-case basis, *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1474 (Fed. Cir. 2000), aided by the application of the factors set out in *DuPont.* We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.,* 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019); *In re Country Oven, Inc.,* 2019 USPQ2d 443903, at *2 (TTAB 2019). "In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services." *In re Chatam Int'l Inc.,* 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004), *cited in Ricardo Media Inc. v. Inventive Software, LLC,* 2019 USPQ2d 311355, at *5 (TTAB 2019). *See also In re i.am.symbolic, llc,* 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017).

B. Similarity of the Marks

We compare Applicant's mark to the cited registered mark "in their entireties as to appearance, sound, connotation and commercial impression." *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). (quoting *DuPont*, 177 USPQ at 567). "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *Inn at St. John's*, 126 USPQ2d at 1746 (TTAB 2018) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014); *see also TBC Corp. v. Holsa Inc.*, 126 F.3d 1470, 44 USPQ2d 1315, 1318 (Fed. Cir. 1997). We assess not whether the marks can be distinguished in a

side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs., Inc. v. Triumph Learning LLC,* 668 F.3d 1356, 101 USPQ2d 1713, 1713 (Fed. Cir. 2012)). The proper focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1675 (TTAB 2018); *see also In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016) (citing *Spoons Rests. Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd per curiam*, 972 F.2d 1353 (Fed. Cir. 1992)).

Applicant seeks to register the mark MOMENTUM. The registered mark is MOMENTUM NUTRITION. The marks are similar in appearance and pronunciation due to the shared term, MOMENTUM.

Although we must consider the marks in their entireties, in articulating reasons for reaching a conclusion on the issue of likelihood of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark. *In re Viterra, Inc.,* 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Nat'l Data*, 224 USPQ at 751 ("Indeed, this type of analysis appears to be unavoidable."). The term MOMENTUM is the dominant feature of Registrant's mark because, as the first term in the mark, it is most likely to be remembered by purchasers and used to call for the goods. *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) ("it 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,* 73 USPQ2d at 1692; *Century 21 Real Est. Corp. v. Century Life of Am.,* 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Moreover, the term "NUTRITION" is at best descriptive of Registrant's dietary and nutritional supplements and is thus less significant or less dominant when compared with the term MOMENTUM in the mark. "That a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark." *In re Nat'l Data Corp.,* 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). *See also In re Detroit Ath. Co.*, 903 F.3d 1297, 1305, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018); *In re Code Consultants, Inc.,* 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter often "less significant in creating the mark's commercial impression").

The marks also look and sound alike because the cited mark incorporates Applicant's mark completely. Likelihood of confusion has frequently been found where one mark incorporates the entirety of another mark. *TiVo Brands LLC v. Tivoli, LLC*, 129 USPQ2d 1097, 1115 (TTAB 2019) (TIVOTAPE and TIVOBAR confusingly similar to TIVO). *See also Coca-Cola Bottling Co. of Memphis, Tenn., Inc. v. Joseph E. Seagram and Sons, Inc.,* 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL for gin and BENGAL LANCER and design for nonalcoholic club soda, quinine water and ginger ale); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, * 6-7 (TTAB 2019) (ROAD WARRIOR and WARRIOR); *In re Integrated Embedded*, 120 USPQ2d 1504, 1513 (TTAB 2016) ("Applicant's mark BARR GROUP

wholly encompasses the registered mark BARR").

With regard to the connotation of the marks, Applicant argues that because "there is no nutritional value for Applicant's personal lubricants and vaginal moisturizers," 9 TTABVUE 8, "no consumer would believe that 'nutrition' is descriptive for the personal lubricants and vaginal moisturizers." *Id.* at 9. Applicant's argument is unpersuasive. The test is not whether consumers would perceive that the term "nutrition" applies to Applicant's goods, but whether consumers would mistakenly believe that Applicant's goods and Registrant's goods are produced by or originate from a single source. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Anderson*, 101 USPQ2d 1912, 1919 (TTAB 2012).

Applicant's mark may be seen as a shortened version of Registrant's mark, used by Registrant to extend its product lines from dietary, nutritional, vitamin, and mineral supplements into personal lubricants and vaginal moisturizers. As is shown by the Examining Attorney's evidence, discussed more fully below, consumers have been exposed to and familiarized with third-party brands identifying both types of goods.

We are also unpersuaded by Applicant's argument that the connotation of the term MOMENTUM differs in the two marks. As the dictionary definition confirms, the term essentially refers to the time required to bring a moving object to rest, or the force gained by an object as it moves: [3]

[3] From www.merriam-webster.com/dictionary/momentum, December 2, 2020 Request for Reconsideration, TSDR 28.

> 1 : a property (see property sense l a) of a moving body that the body has by virtue of its mass (see mass entry 2 sense l c) and motion and that is equal to the product of the body's mass and velocity broadly: a property of a moving body that determines the length of time required to bring it to rest when under the action of a constant force or moment
>
> 2 : strength or force gained by motion or by a series of events The wagon gained momentum as it rolled down the hill.

Applicant suggests that this "property of a moving body" carries sexual overtones when applied to its goods, and that this connotation "is unique to personal lubricants and vaginal moisturizers, not the supplements identified in [Registrant's] mark." 9 TTABVUE 10. Applicant points to its advertising tagline "keep your momentum going as long as you want it to last" as evidence of the differing connotations in the marks, but we are not persuaded that such meaning could not similarly apply to the energy and higher vitality that may come from taking dietary or nutritional supplements. Moreover, to the extent consumers would perceive any variation in the meaning of this term based on the nature of the goods, such variation would be slight and fail to overcome the otherwise strong similarities between the marks.

We also reject Applicant's argument that Registrant's mark is weak because the USPTO has registered four marks containing the term MOMENTUM owned by different entities.[4] Three of these marks are for unrelated goods (coffee and related accessories for brewing; juice and other beverages; and wine) and Applicant has not offered evidence or an explanation as to why they are relevant to the issues before us.

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[4] December 2, 2020 Response to Office Action, TSDR 56-63.

See i.am.symbolic, 123 USPQ2d at 1751 (disregarding third-party registrations for goods in other classes where the proffering party "has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of [such third-party] marks for goods in other classes ... support[s] a finding that registrants' marks are weak with respect to the goods identified in their registrations"); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (third-party registrations for goods that appear to be in fields which are far removed from the goods at issue are of limited probative value).

The fourth third-party registration submitted by Applicant is for the mark TRUNUTRIMENTUM CREATE HEALTH MOMENTUM, which has been registered for dietary, nutritional, vitamin and mineral supplements.[5] However, as the Board has stated, "one third-party registration has little probative value, especially in the absence of evidence that the mark is in use on a commercial scale or that the public has become familiar with it." *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016); *cf. Bond v. Taylor*, 119 USPQ2d 1049, 1055 (TTAB 2016), (finding that "evidence of one third-party user of a mark that is similar to [Registrant's] mark is not sufficient to establish that [Registrant's] mark is a weak mark entitled to only a narrow scope of protection"). The existence of this single third-party registration does not lessen the scope of protection accorded Registrant's mark.

Viewing Applicant's and Registrant's marks in their entireties, we find that the

[5] *Id.* at 58-59.

marks are similar in sight, sound, connotation and overall commercial impression. The first *DuPont* factor strongly favors a finding of likelihood of confusion.

C. Relatedness of the Goods; Channels of Trade; Classes of Consumers

The second and third *DuPont* factors consider the relatedness of the involved goods, their trade channels, and classes of consumers. *DuPont,* 177 USPQ at 567. We consider Applicant's and Registrant's goods as they are identified in Applicant's application and Registrant's cited registration. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP,* 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014). The goods need not be identical or even competitive to find a likelihood of confusion. *See On-line Careline*, 56 USPQ2d at 1475; *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329, 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 the goods emanate from the same source." *Coach Servs.,* 101 USPQ2d at 1722 (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

Applicant's goods are vaginal moisturizers and personal lubricants. Registrant's goods are various dietary and nutritional supplements in liquid, dry powdered and concentrate forms. The Examining Attorney argues that the goods are closely related, 11 TTABVUE 17, and supports her argument by making of record twelve third-party Principal register registrations, based on use, for goods contained in both Applicant's

application and Registrant's registration.[6] *See In re I-Coat Co.*, 126 USPQ2d at 1737 (use-based, third-party registrations have probative value "to the extent they may serve to suggest that the goods are of a kind that emanate from a single source") (citing *In re Infinity Broad. Corp.*, 60 USPQ2d 1214, 1217-18 (TTAB 2001)); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). These include:

- REPHRESH, Registration No. 3591790 for "dietary and nutritional supplements" and "vaginal moisturizers; vaginal washes; water-based personal lubricants." TSDR 51-53.

- JO, Registration No. 3752193 for "dietary supplements" and "gels for use as personal lubricant; silicone-based personal lubricants; water-based personal lubricants." TSDR 56-58.

- SEEDLOCKE, Registration No. 5192291 for "dietary and nutritional supplements" and "personal lubricants; personal sexual lubricants." TSDR 62-64.

- PEPPER & WITS, Registration No. 5921910 for "dietary supplements; vaginal moisturizers." TSDR 70-71.

- YOUNG, WILD & V, Registration No. 5875700 for "dietary and nutritional supplements" and "vaginal moisturizers." TSDR 72-73.

- AMITY JACK, Registration No. 5851260 for "dietary supplements; personal lubricants." TSDR 77-78.

The Examining Attorney also submitted webpages from nine third-party online retailers, to show that vaginal moisturizers and personal lubricants are commonly provided and marketed by the same companies that provide and market dietary or nutritional supplements, and that these goods are found in the same channels of trade. "[I]t is settled that evidence of third-party use of the same mark for an

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[6] June 3, 2020, Final Office Action, TSDR 51-81.

applicant's identified goods and services (or similar goods or services) on the one hand, and an opposer's (or registrant's) identified goods and services (or similar goods and services) on the other, may establish a relationship between those goods and services." *Ricardo Media,* 2019 USPQ2d 311355 at *3. *See also In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) ("[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both"); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence of third-party use of the same mark and goods "is relevant to a relatedness analysis").

Examples of such third-party use include:

- At https://www.mylola.com, LOLA advertises a personal lubricant that "maintains a healthy vaginal PH balance," and a daily multivitamin designed to "prevent your painful PMS symptoms."[7]

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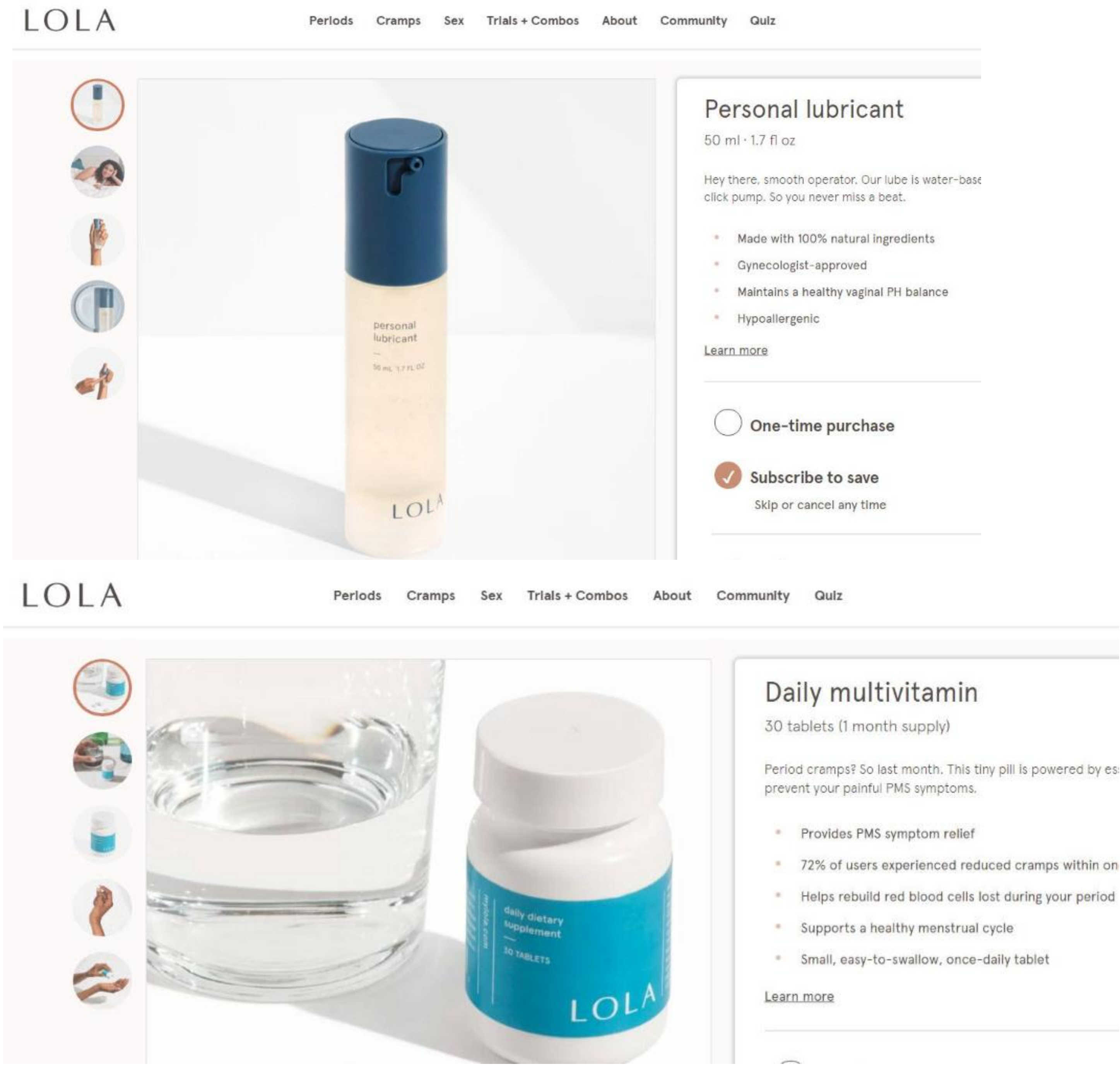
[7] December 6, 2019, Office Action, TSDR 7 and 8.



- At https://goodcleanlove.com, GOOD Clean Love offers personal lubricants and a "BiopHresh Vaginal Probiotic Supplement" under the GOOD mark.[8]

[8] December 6, 2019, Office Action, TSDR 10 and 14.

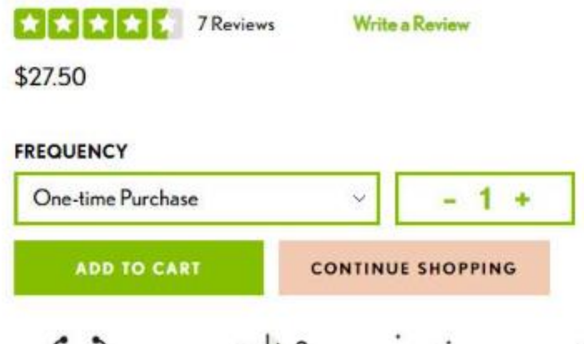
Almost Naked Organic Personal Lubricant - 1.5 oz. (2-Pack)

$12.99

Sensual Essentials Kit

$19.99

BiopHresh Vaginal Probiotic Supplement

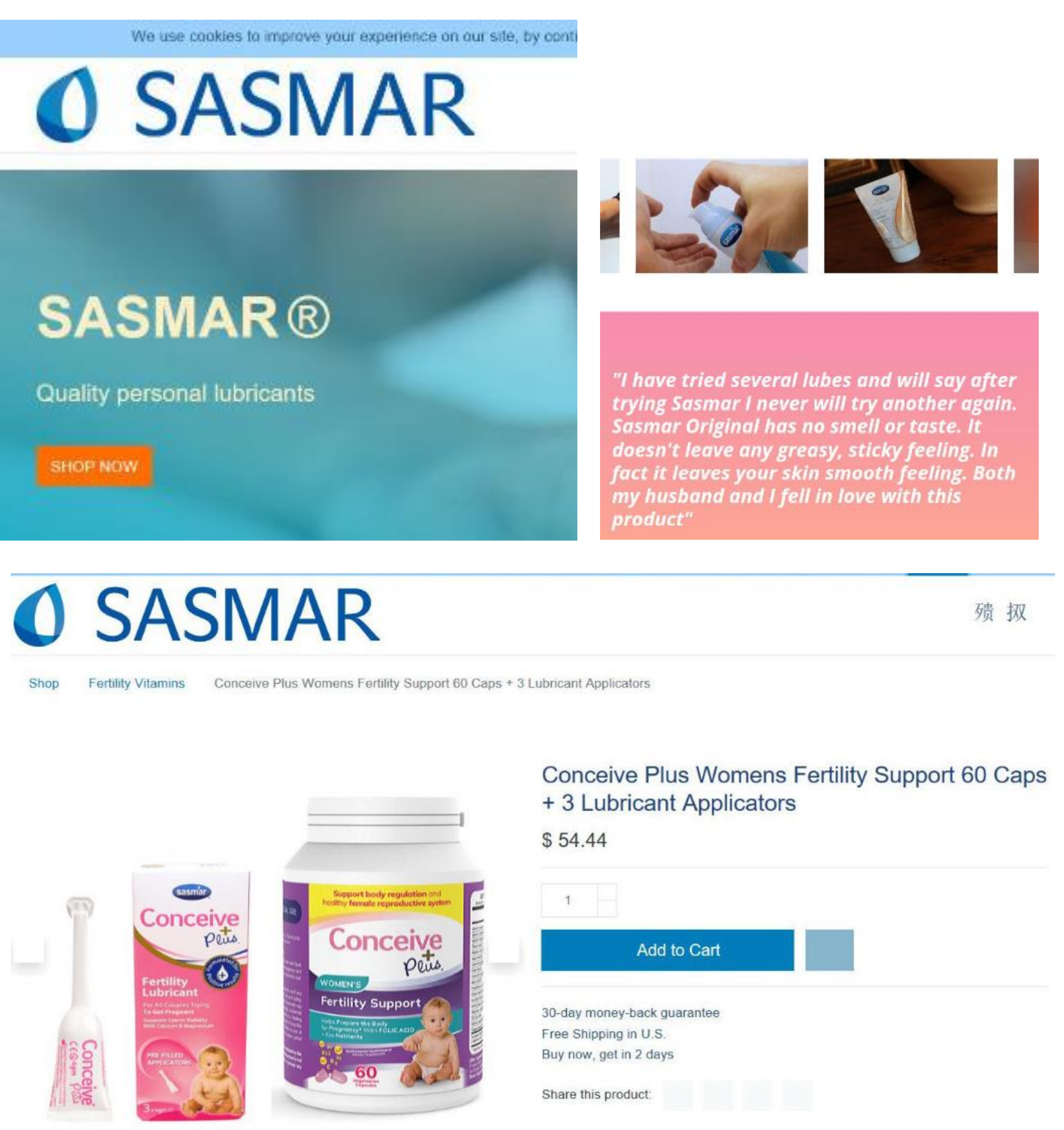


- At https://www.nutrablast.com, Nutrablast offers VAGISOFT vulva care & intimate skin cream and Feminine Balance Complex vaginal dietary supplements.[9]

[9] June 3, 2020 Office Action, TSDR 7 and 2. On the Feminine Balance Complex bottle, under the words "60 CAPSULES," appears: DIETARY SUPPLEMENT. *Id.* at 2.

- At https://www.sasmar.com, Sasmar sells "quality personal lubricants" and "fertility vitamins" under the mark SASMAR.[10]

[10] January 6, 2021, denial of Request for Reconsideration, TSDR 32-33 and 35.



- At https://amatalife.com, Amata Life offers vaginal moisturizers and dietary supplements for men's health.[11]

[11] January 6, 2021 denial of Request for Reconsideration, TSDR 42 and 46-47.

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Skin Care
Gifts & Relaxation
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Get Back the Joy of Intimacy and Promote Vaginal Health.

Amata LIFE
Pueraria Mirifica Plus
WARMING
Vaginal Moisturizer
Moisturizing
Soothing
Amata LIFE
Pueraria Mirifica Plus
WARMING
Vaginal Moisturizer
Moisturizing
Soothing
Puresterol

Amata LIFE
Pueraria Mirifica Plus
Vaginal Moisturizer
Moisturizing
Soothing
Amata LIFE
Pueraria Mirifica Plus
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17 reviews

$29.95

Applicant argues that the Examining Attorney's finding of relatedness was overly broad. Arguing that the goods are unrelated "as to their ultimate use, and the fact that these goods could be made available in the same field or industry would not of itself provide a basis for regarding them as related," Applicant asserts that "even if products are sold in the same field or industry, the more appropriate test would be the primary function of each party's business." 9 TTABVUE 16. However, there is no indication in either Applicant's or Registrant's identification of goods of the "primary function of each party's business." That Applicant's primary business is asserted to be goods that "aid in sexual pleasure," 9 TTABVUE 14, or that Registrant's goods are asserted to be otherwise, is not of record. Accordingly, Applicant's argument is unpersuasive. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) ("Attorney argument is no substitute for evidence.") (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1284, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)); *see also In re U.S. Tsubaki, Inc.*, 109 USPQ2d 2002, 2006 (TTAB 2014) (finding that there was no proof to support the statements in the record by counsel).

Applicant argues that "an ingestible product like dietary supplements would never be confused with personal lubricants. Dietary supplements are taken orally and intended to supplements one's diet. Whereas, Applicant's goods are not to be taken orally and are not diet related." 9 TTABVUE 14. Applicant's argument fails for several reasons. First, "[t]he issue is not whether purchasers would confuse the goods, but rather whether there is a likelihood of confusion as to the source of these goods." *In re Ox Paperboard, LLC*, "2020 USPQ2d 10878, at *5 (TTAB 2020) *cited in In re*

Embiid, 2021 USPQ2d 577, at *28 n.39 (TTAB 2021). Secondly, there is no evidence that all dietary supplements are taken orally, and Registrant's goods are not restricted by the manner in which they may be consumed. *See In re Midwest Gaming & Ent. LLC,* 106 USPQ2d 1163, 1165 (TTAB 2013) (citing *In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008) ("it is the identification of goods that controls, not what extrinsic evidence may show about [their] specific nature").

As the third-party registration and use evidence clearly demonstrates, the same companies commonly provide both Applicant's and Registrant's goods under the same mark, and confusion as to the source of these goods is therefore likely.

Applicant argues that despite the third-party evidence discussed above, the USPTO has recognized that the goods at issue are unrelated, based on the co-existence on the Register of five pairs of the same or similar registered marks, each pair owned by a set of two different entities:[12]

- GRIZZLY BITES ("BITES" disclaimed) for "nutritional supplement energy bars" and GRIZZLY for "personal lubricants."
- SUSTAIN NATURAL ("NATURAL" disclaimed) for personal lubricant" and SUSTAIN for "dietary and nutritional supplements."

[12] May 18, 2020 Response to Office Action, TSDR 8-27. Applicant also submitted copies of pairs of registrations purporting to show a relationship between personal lubricants and analgesics. Since none of Registrant's goods would be considered analgesics, this latter group is of no probative value and has been disregarded. Even if we considered Registrant's "dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes" to be an analgesic, consideration of the evidence would not change the result in this case.

- RESTORE for "gels for use as personal lubricant" and RESTORE for "dietary and nutritional supplements."
- CLOSER for "personal lubricants" and CLOSER CAPS ("CAPS" disclaimed) for "nutritional supplements."
- VOLT for "personal lubricants" and VOLT for "dietary and nutritional supplements."

The Examining Attorney responds that the third-party registrations are not evidence that the marks are in use or that the public is familiar with them. She also notes that prior registrations do not bind the USPTO and lack probative value as to the refusal in this case, because "each case must be decided on its own set of facts." *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012).

We agree with the Examining Attorney. "[T]hird party registrations are not evidence that the marks depicted therein are in use or that the public is aware of them." *In re Pedersen,* 109 USPQ2d 1185, 1196 (TTAB 2013); *see also Olde Tyme Foods Inc. v. Roundy's Inc.* 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Moreover, here there are only ten (five pairs) of registrations in number. *Cf. Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.,* 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (at least fourteen relevant third-party uses or registrations of record); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (at least twenty-six relevant third-party uses or registrations of record). Further, it is settled that the Board is not bound by the allowance of prior registrations, even if they have some characteristics that may appear relevant to this case. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001).

Finally, Applicant's five pairs of third-party registrations do not present a complete picture of the USPTO's examination practice regarding these types of goods, in light of the much larger number of third-party registrations presented by the Examining Attorney demonstrating that the goods are related. *Cf. In re Thor Tech, Inc.,* 113 USPQ2d 1546, 1549 (TTAB 2015) (applicant's fifty sets of co-existing third-party registrations were weighed against only two registrations submitted by examining attorney showing similarity of goods). Nor do we know whether any agreement exists between any of the prior registrants, such as a consent or license agreement, that mitigates against the relevancy of these registrations. For these reasons, Applicant's third-party evidence is insufficient to show that Applicant's personal lubricants are unrelated to Registrant's supplements.

Turning to the trade channels and classes of consumers, because the identifications in the application and cited registration have no restrictions on channels of trade or classes of consumers, we must presume that Applicant's vaginal moisturizers and personal lubricants, and the cited registration's supplements, travel in all channels of trade appropriate for those goods, such as drugstores, supermarkets, and similar retail outlets, and that they are available to all relevant buyers. *See Hewlett-Packard*, 62 USPQ2d at 1005. The third-party website evidence discussed above establishes that at least some of the trade channels and classes of consumers are the same and that the classes of consumers include members of the general public.

Accordingly, the second and third *DuPont* factors favor a finding of likelihood of

confusion.

D. Consumer Sophistication

"The fourth *DuPont* factor considers '[t]he conditions under which and buyers to whom sales are made, i.e. 'impulse' vs. careful, sophisticated purchasing.'" *Stone Lion*, 110 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567). Applicant argues that as "Registrant's supplements involve maintaining health, consumers will be deliberate about their purchasing decisions." 9 TTABVUE 17. Likewise, Applicant suggests that its consumers are sophisticated because "Applicant's goods are FDA approved," and are "created by an OBGYN using FDA accepted formulations." *Id.* at 18.

The documents regarding FDA approval, submitted by Applicant with its December 2, 2020 Response to Office Action, TSDR 72-77, do not prove that Applicant's goods require FDA approval. We accept, however, that some of Applicant's and Registrant's customers may be discerning consumers because the goods may be ingested or used intimately. Nonetheless, Board precedent requires our decision to be based "on the least sophisticated potential purchasers." *Stone Lion*, 110 USPQ2d at 1163. Here, relevant purchasers include ordinary consumers with no particular sophistication.

Accordingly, the fourth *DuPont* factor is neutral.

II. Conclusion

Overall, the marks are similar in appearance, sound, connotation and commercial impression. Applicant's goods are related to Registrant's goods, and will travel through the same trade channels to the same classes of purchasers, including

ordinary consumers of average sophistication. Although some consumers may be discerning, this factor is outweighed by the other factors. There is a likelihood of confusion among relevant purchasers.

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