

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: May 29, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Pegasus Protein LLC
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Serial No. 88616931
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Dean D. Niro of Vitale, Vickery, Niro, Solon & Gasey, LLP,
for Pegasus Protein LLC.

Katherine Welch, Trademark Examining Attorney,¹ Law Office 129,
Pamela Willis, Managing Attorney.

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Notice of Correction

By the Board:

On May 21, 2024, the Board mailed a final decision in this matter. It has since come to the Board's attention that there are several typographical errors in the decision, as issued; namely the following:

On page 2, line 4 of the decision, the word "for" should appear before the word "Topical"; on page 4, line 8, the period after the word "entirety" should be a comma; on page 7, footnote 9, the term "Office Action" should be added after the date; on page

¹ The Application was examined by Trademark Examining Attorney Kim Saito, but was subsequently reassigned to Ms. Welch for purposes of the appeal.

11, footnote 20, the citation to *In re Thor Tech* should not be abbreviated; on page 13, line 3, the word “services” should be changed to “goods”; and on page 13, line 17, the cited registrant’s mark should be referred to as PEGASUS, not PROTEIN.

The decision has been corrected to remedy these typographical errors. A corrected copy of the Board’s May 21, 2024 decision is attached.

The time for filing an appeal or commencing a civil action regarding the Board’s decision continues to run from the mailing date of the September 30, 2023 decision. *See* Trademark Rule 2.145(d), 37 C.F.R. § 2.145(d).

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Before Zervas, Dunn and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Pegasus Protein LLC, seeks to register the mark PEGASUS PROTEIN (in standard characters, PROTEIN disclaimed) on the Principal Register for the following goods, as amended during prosecution: “Powdered nutritional supplement drink mix containing protein powder” in International Class 5.³

² The Application was examined by Trademark Examining Attorney Kim Saito, but was subsequently reassigned to Ms. Welch for purposes of the appeal.

³ Application Serial No. 88616931 (“the Application”) was filed on September 13, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), and claims first use in commerce on May 16, 2019 and first use in commerce on August 19, 2019.

The Trademark Examining Attorney has refused registration on the Principal Register on the ground that Applicant's mark, for the recited goods, is likely to cause confusion under Trademark Act 2(d), 15 U.S.C. § 1052(d), with the mark PEGASUS, in standard characters and registered on the Principal Register for "Topical preparations, namely, sprays, gels and creams for enhancing sexual arousal; sexual enhancement supplements" in International Class 5.⁴

After the refusal was made final, Applicant filed a notice of appeal, and the appeal has been fully briefed. For the reasons discussed below, we reverse the refusal.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d), quoted in *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, *2 (Fed. Cir. 2023).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. duPont deNemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the "DuPont factors"), cited in *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015). "Whether a likelihood of confusion exists

⁴ Registration No. 6258891 ("the '891 Registration"); issued February 2, 2021.

between an applicant's mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors." *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (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.").

We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). "The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods." *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (internal punctuation omitted).

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) *aff'd* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810,

1812 (TTAB 2014)).

Applicant's mark, again, is PEGASUS PROTEIN, Registrant's mark is PEGASUS, and both are in standard characters. The Examining Attorney argues that the marks are similar in appearance, sound, meaning and overall commercial impression for several reasons.

"First," she asserts, "the proposed mark incorporates the entirety of the registered mark."⁵ In cases such as this, where Applicant has incorporated the registered mark in its entirety, a likelihood of confusion has frequently been found. "When one incorporates the entire arbitrary mark of another into a composite mark, the inclusion of a significant, nonsuggestive element will not necessarily preclude a likelihood of confusion. An inclusion of a merely suggestive or descriptive element, of course, is of much less significance in avoiding a likelihood of confusion." *Wella Corp. v. Cal. Concept Corp.*, 558 F.2d 1019, 194 USPQ 419, 422 (CCPA 1977) (CALIFORNIA CONCEPT and surfer design is similar to the mark CONCEPT). *See also Coca-Cola Bottling Co. v. Seagram & Sons, Inc.*, 526 F.2d 556, 188 USPQ 105, 106 (CCPA 1975) (BENGAL LANCER and Bengal Lancer soldier design is similar to the mark BENGAL); *In re Bissett-Berman Corp.*, 476 F.2d 640, 177 USPQ 528, 529 (CCPA 1973) (E-CELL is similar to the mark E).

"Second," the Examining Attorney asserts, "the addition of the descriptive wording [PROTEIN] in the applied-for mark does not alter the commercial

⁵ 8 TTABVUE 5 (Examining Attorney's Brief).

impression of the mark from that of the registered mark.”⁶ Citing *In re Detroit Athl. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (internal quotations omitted), she rightly observes that “there is nothing improper in stating that [for rational reasons] more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.” See also *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (“It is well-established that it is improper to dissect a mark, and that marks must be viewed in their entirety. In some circumstances, however, one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark.”) (internal citations omitted).

“Third,” contends the Examining Attorney, “the wording that is identical to the registered mark appears first in Applicant’s mark, creating the strongest commercial impression.”⁷ We agree. PEGASUS, the leading and dominant word in Applicant’s mark and the only word in Registrant’s mark, in Greek Mythology, refers to “[a] winged horse that with a stroke of his hoof caused the fountain Hippocrene to spring forth from Mount Helicon.”⁸ Its meaning is arbitrary with respect to both Applicant’s and Registrant’s goods and, as the Examining Attorney further notes, consumers “are

⁶ *Id.*

⁷ *Id.* at 5-6.

⁸ See <https://www.merriam-webster.com/dictionary/Pegasus> (accessed May 13, 2024). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions, and we do so here. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019).

generally more inclined to focus on the first word, prefix, or syllable in any trademark or service mark.” See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) (“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); see also *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (stating that “it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

For these reasons, we agree that the marks PEGASUS PROTEIN and PEGASUS are similar.

B. Similarity or Dissimilarity of the Goods, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. A proper comparison of the goods “considers whether ‘the consuming public may perceive [the respective goods of the applicant and cited registrant] as related enough to cause confusion about the source or origin of the goods ...’” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1086 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002)). It is sufficient for a finding of

likelihood of confusion if relatedness is established for any goods encompassed by the identification of goods within a particular class. *See Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335 , 209 USPQ 986 (CCPA 1981).

Applicant’s goods, again, are “Powdered nutritional supplement drink mix containing protein powder,” and Registrant’s goods (relevant to this refusal) are “sexual enhancement supplements.” However, when the Application was filed, and when registration was first refused based on the ’891 Registration, Applicant’s goods were identified as “dietary and nutritional supplements.”⁹ At that time, the Examining Attorney argued that the respective goods were related “because they are all supplements” and because “Applicant’s broadly worded ‘dietary and nutritional supplements’ may be used for sexual enhancement purposes.”¹⁰ To support her contentions, she provided a printout from Walgreens (walgreens.com) that lists 61 supplements under the heading “Men’s Sexual Wellness Supplements”¹¹ including those highlighted below from VirMaz, Zyrexin, and Botanic Choice:¹²



⁹ September 13, 2019, Application, TSDR 2; September 2, 2022, TSDR 3.

¹⁰ September 2, 2022 Office Action, TSDR 3.

¹¹ *Id.* at 7-52.

¹² *Id.* at 28, 35, and 45.

The Examining Attorney also made of record an article from the website of the Mayo Clinic (mayoclinic.org) titled “Dietary supplements for erectile dysfunction: A natural treatment for ED?” The article discusses claims by the providers of supplements that certain herbs provide assistance with erectile dysfunction.¹³

Applicant sought to amended its identification of goods a couple of times thereafter in an attempt obviate the refusal. Applicant’s first proposal to amend its identification of goods, to “Non-dairy meal replacement protein powder,” was rejected because it exceeded the scope of Applicant’s originally identified of “Dietary and nutritional supplements.”¹⁴ Applicant’s second proposal to amend its identification of goods, to “powdered nutritional supplement drink mix containing protein powder,” was accepted. Nevertheless, the Examining Attorney was not persuaded to withdraw the refusal. She explained, “Registrant’s broadly worded sexual enhancement supplements are not limited a particular form of supplements and could contain drink mixes.”¹⁵

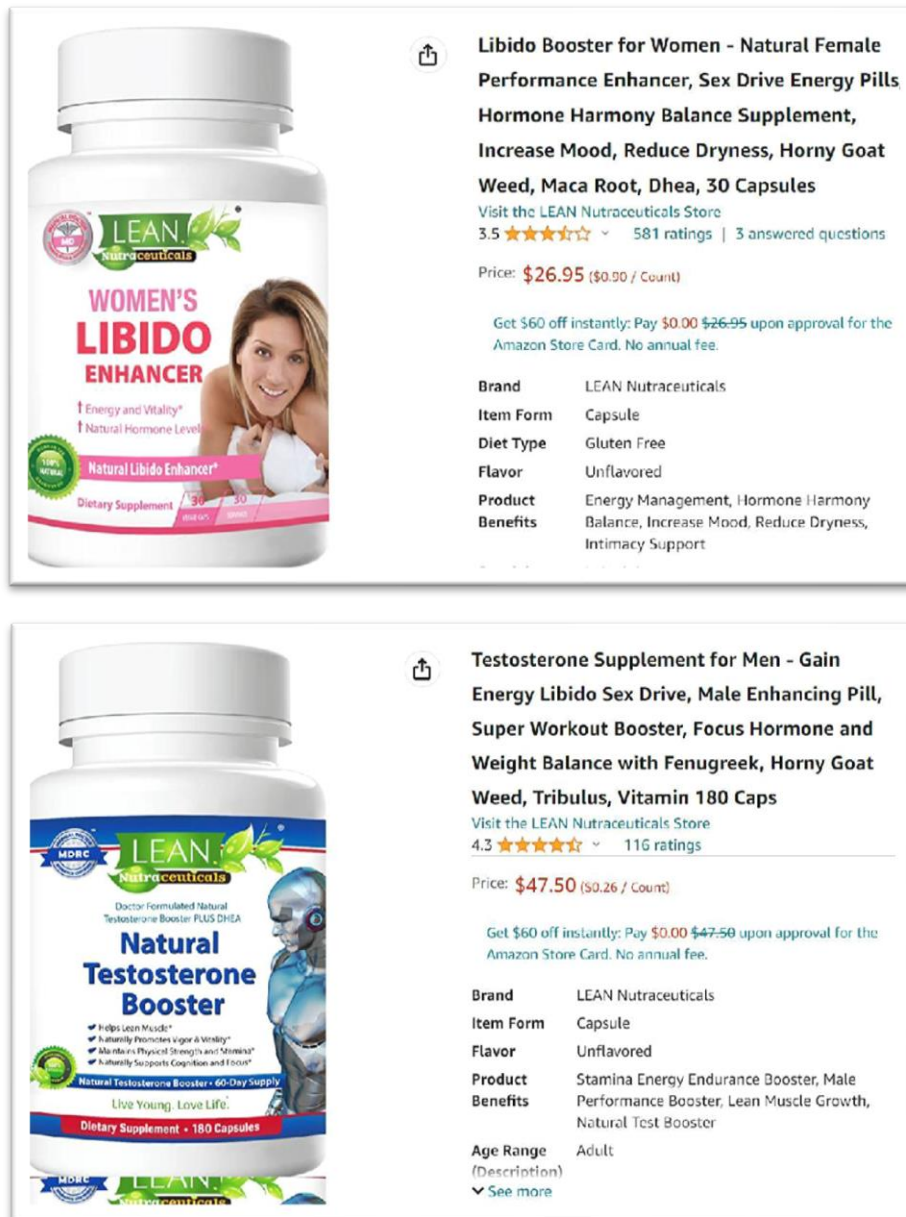
The Examining Attorney also provided additional evidence from Amazon (amazon.com), which she asserts “show[s] three different brands of supplements for sexual enhancement, two supplements including protein, and two supplements

¹³ *Id.* at 53-60.

¹⁴ March 1, 2023 Office Action Response, TSDR 1-2; March 2, 2023 Office Action, TSDR 2-3. Trademark Rule 2.71(a), 37 C.F.R. 2.71(a) provides that an applicant “may amend the application to clarify or limit, but not to broad, the identification of goods”

¹⁵ May 7, 2023 Final Office Action, TSDR 3.

appearing in a powdered drink mix.”¹⁶ The first two listings, one for “Women’s Libido Enhancer,” the other for “Natural Testosterone Booster,” both by Lean Nutraceuticals, are provided in pill form and contain “Whey Protein Hydrolysate” as one of their respective ingredients:¹⁷

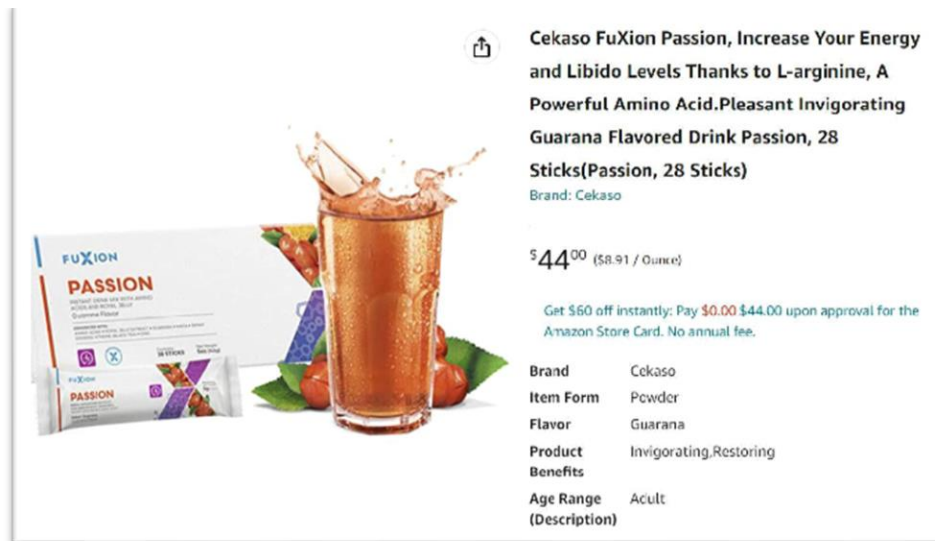


The image shows two Amazon product listings side-by-side. The top listing is for "Women's Libido Enhancer" by Lean Nutraceuticals. The product is shown in a white bottle with a pink and green label. The label features a woman's face and text including "WOMEN'S LIBIDO ENHANCER", "Energy and Vitality", "Natural Hormone Levels", and "Natural Libido Enhancer". The listing text includes: "Libido Booster for Women - Natural Female Performance Enhancer, Sex Drive Energy Pills, Hormone Harmony Balance Supplement, Increase Mood, Reduce Dryness, Horny Goat Weed, Maca Root, Dhea, 30 Capsules", a price of \$26.95, and a 3.5-star rating. The bottom listing is for "Natural Testosterone Booster" by Lean Nutraceuticals. The product is shown in a white bottle with a blue and green label. The label features a muscular man's torso and text including "Natural Testosterone Booster", "Helps Lean Muscle", "Increases Physical Strength and Stamina", and "Supports Cognitive and Focus". The listing text includes: "Testosterone Supplement for Men - Gain Energy Libido Sex Drive, Male Enhancing Pill, Super Workout Booster, Focus Hormone and Weight Balance with Fenugreek, Horny Goat Weed, Tribulus, Vitamin 180 Caps", a price of \$47.50, and a 4.3-star rating.

¹⁶ 8 TTABVUE 8 (Examining Attorney’s Brief).

¹⁷ May 7, 2023 Final Office Action, TSDR 6-38.

Another product, “FuXion Passion” by Cekaso, is provided in powder form and does not indicate whether it contains protein:¹⁸



A third product, “Slay all day” by Apothékary, is also provided in powder form and also does not indicate whether it contains protein:¹⁹



¹⁸ *Id.* at 39-49.

¹⁹ *Id.* at 50-60.

The Examining Attorney concludes, based on the foregoing, that:

The third-party Internet evidence shows that applicant's goods and registrant's goods are closely related and travel through similar trade channels to the same classes of consumers in the same fields of use. Thus, upon encountering registrant's mark used for sexual enhancement supplements and applicant's mark used for protein powder drink mix, consumers are likely to be confused and mistakenly believe that the respective goods emanate from the same source.²⁰

Applicant disputes that Applicant's and Registrant's respective goods are related simply because they are both supplements and therefore fall within the same industry. Applicant cites an unpublished Federal Circuit case, *PC Club v. Primex Techs., Inc.*, 32 Fed. Appx. 576 (Fed. Cir. 2002), for the principle that goods are not related merely "because they coexist in the same broad industry." *Id.* at 578-79 (internal citation omitted). We agree that the evidence the Examining Attorney has submitted is insufficient to support a finding that the goods are related.

According to the MERRIAM-WEBSTER DICTIONARY, a "supplement" is "something added to complete a thing, make up for a deficiency, or extend or strengthen the whole."²¹ A "dietary supplement" is "a product taken orally that contains one or more ingredients such as vitamins or amino acids) that are intended to supplement one's diet and are not considered food."²² That definition is quite broad, and encompasses virtually every non-food product that one can ingest. It is well established that "there

²⁰ 8 TTABVUE 8-9 (Examining Attorney's Brief).

²¹ See <https://www.merriam-webster.com/dictionary/supplement> (accessed May 13, 2024). See also *In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1638 & n.10 (TTAB 2009) (noting that it is proper to consider extrinsic evidence in the nature of dictionary entries to define the terminology used to describe the goods).

²² See <https://www.merriam-webster.com/dictionary/dietary%20supplement> (accessed May 13, 2024).

can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto.” TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) (Nov. 2023). *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) (regarding clothing). We thus cannot assume that all dietary supplements are related.

We are also not persuaded that the goods are related because two of the sexual enhancement supplements found by the Examining Attorney contain protein, and Applicant’s goods are protein drink mixes. Taking one of those supplements, “Women’s Libido Enhancer” by Lean Nutraceuticals,²³ as an example, we can see from the Amazon listing that “Why Protein Hydrosylate” is just one of at least 18 active ingredients.²⁴ Thus, contrary to the Examining Attorney's position, the record does not show that “enhancement supplements often contain protein and come in powdered drink form,”²⁵ such that an inference could therefore reasonably be drawn that the relevant public has been exposed to encountering, under the same mark, both protein drink and sexual enhancement supplements goods. Nor does it show, as

²³ May 7, 2023 Final Office Action, TSDR 6-22.

²⁴ *Id.* at 14.

²⁵ 8 TTABVUE 8 (Examining Attorney’s Brief).

the Examining Attorney claims, that such goods are “closely related and travel through similar trade channels to the same class of consumers in the same fields of use.”²⁶ Nevertheless, based on the identification of goods, we find that the relevant consumers of both Applicant’s and Registrant’s goods are members of the general public and that the classes of consumers therefore overlap.

In view of the foregoing, we find that the Examining Attorney has not made a prima facie showing that the respective goods or channels of trade are related for purposes of likelihood of confusion.

C. Conclusion

We have carefully considered all of the evidence made of record, as well as all of the arguments related thereto. *In re Charger Ventures*, 2023 USPQ2d 451, at *7. We find that, the marks are similar and that the purchasers overlap. The Examining Attorney has not persuaded us that the goods or trade channels are related. Because in any likelihood of confusion analysis, a key consideration is the similarities between the goods, *see In re Chatam Int’l.*, 71 USPQ2d at 1945-46, we conclude that the Examining Attorney has not established that a likelihood of confusion exists between Applicant’s mark PEGASUS PROTEIN and Registrant’s mark PEGASUS in Registration No. 6258891 for the goods identified therein.

Decision: The refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), is reversed.

²⁶ *Id.* at 9-10.