

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 12, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE  
Trademark Trial and Appeal Board

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*In re Plant Therapy, LLC*

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Serial No. 88722907

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Chris Herzinger for Plant Therapy, LLC.

Michael P. Keating, Trademark Examining Attorney, Law Office 101,  
Ronald R. Sussman, Managing Attorney.

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Before Zervas, Lykos and Adlin,  
Administrative Trademark Judges.

Opinion by Adlin, Administrative Trademark Judge:

Applicant Plant Therapy, LLC seeks to register on the Principal Register the mark MUSCLE AID, in standard characters (MUSCLE disclaimed), for “essential oils; scented oils.”<sup>1</sup> The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant’s mark so resembles an identical mark (MUSCLE AID in standard characters, MUSCLE disclaimed), previously registered for “blended liquid mineral dietary supplements

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<sup>1</sup> Application Serial No. 88722907, filed December 11, 2019 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on a claimed date of first use anywhere and in commerce on March 10, 2015.

and nutritional dietary supplements,”<sup>2</sup> that it is likely to cause confusion. After the refusal became final, Applicant appealed; the appeal is fully briefed.

## **I. Likelihood of Confusion**

Our determination under Section 2(d) is based on an analysis of all of the probative evidence of record 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) (setting forth factors to be considered); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor about which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See 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.”).

### **A. The Marks**

Even though the marks are identical (MUSCLE AID in standard characters), and Applicant concedes that they “may be the same for purposes of appearance and sound,” Applicant contends that “they do not have the same connotation, commercial impression or meaning.” 4 TTABVue 5. Specifically, Applicant contends that its mark “means therapeutic relief to muscles,” while Registrant’s “invokes a nutritional

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<sup>2</sup> Registration No. 3092699, issued May 16, 2006; renewed.

additive” and thus “means additional nutrients to muscles.” *Id.*

We find these purported differences insignificant, because the connotation of “therapeutic relief to muscles” is broad enough to encompass relief to muscles by means of “additional nutrients.” In fact, MUSCLE AID conveys that Applicant’s product helps muscles, and could include, for example, massage, heat, or other forms of “therapeutic relief” for muscles, such as relief through Applicant’s essential oils or Registrant’s dietary supplements. Whether Applicant’s essential oils and Registrant’s dietary supplements are sufficiently related for confusion to be likely is our next inquiry, but does not impact this one, when both marks obviously convey the same meaning and commercial impression, that Applicant’s and Registrant’s goods aid muscles.

Because the marks are identical in appearance, sound, meaning and commercial impression, this factor not only weighs heavily in favor of finding a likelihood of confusion, but also reduces the degree of similarity between the goods required to support a finding of likelihood of confusion. *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *Time Warner Ent. Co. v. Jones*, 65 USPQ2d 1650, 1661 (TTAB 2002); and *In re Opus One Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001).

**B. The Goods, Channels of Trade, Classes of Consumers and Consumer Care in Purchasing**

Before comparing Applicant’s identified goods to those in the cited registration, we should point out that Applicant’s arguments about the goods and their channels of trade misapprehend the applicable law. Specifically, Applicant focuses on the goods

it and Registrant actually offer in the marketplace, and their actual channels of trade and consumers. While those considerations are typically critical in infringement cases, they are of little relevance here.

Indeed, when the issue is registration, as opposed to use, we are constrained to focus on the goods as they are identified in the involved application and cited registration, without regard to Applicant's or Registrant's actual use of the marks. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) ("It is well established that the Board may not read limitations into an unrestricted registration or application.") (quoting *SquirtCo*, 216 USPQ at 940). According to the Federal Circuit,

[i]t was proper, however, for the Board to focus on the application and registrations rather than on real-world conditions, because "the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed." Even assuming there is no overlap between Stone Lion's and Lion's current customers, the Board correctly declined to look beyond the application and registered marks at issue. An application with "no restriction on trade channels" cannot be "narrowed by testimony that the applicant's use is, in fact, restricted to a particular class of purchasers." ...

*Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)); *In re Jump Designs LLC*, 80

USPQ2d 1370, 1374 (TTAB 2006) (unrestricted and broad identifications are presumed to encompass all goods of the type described).

The same principles apply to Applicant's arguments about relevant consumers' sophistication and care and the conditions of sale:

Stone Lion effectively asks this court to disregard the broad scope of services recited in its application, and to instead rely on the parties' current investment practices. This would be improper because the services recited in the application determine the scope of the post-grant benefit of registration. "[R]egistration provides the registrant with prima facie evidence of ... the registrant's 'exclusive right' to use the mark on or in connection with *the goods and services specified in the certificate of registration.*" *U.S. Search LLC v. U.S. Search.com Inc.*, 300 F.3d 517, 524 [63 USPQ2d 2013] (4th Cir. 2002) (emphasis added); *see also* 15 U.S.C. § 1115(a) (the registration is prima facie evidence of the registrant's exclusive right to use the mark "in connection with the goods or services specified in the registration") .... Parties that choose to recite services in their trademark application that exceed their actual services will be held to the broader scope of the application. *See Octocom Sys.*, 918 F.2d at 943 (stating that a broad application "is not narrowed by testimony that the applicant's use is, in fact, restricted") ... the Board properly considered *all* potential investors for the recited services, including ordinary consumers seeking to invest in services with no minimum investment requirement. Although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based "on the least sophisticated potential purchasers."

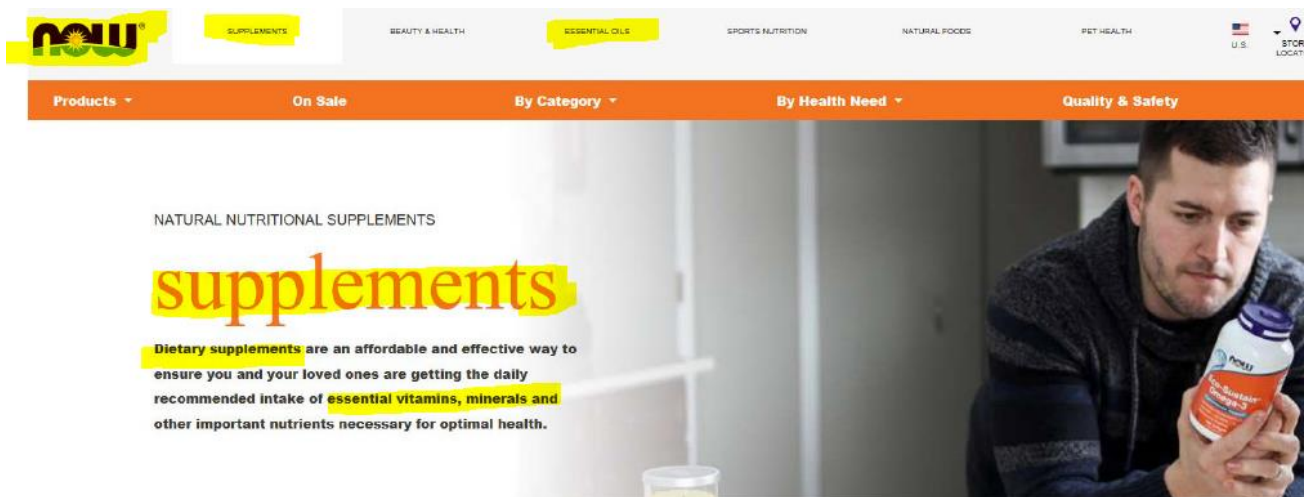
*Stone Lion*, 110 USPQ2d at 1162-63 (some citations omitted). We thus consider the involved application and cited registration to cover all goods of the type identified, sold to all usual purchasers for those goods, and through all usual channels of trade. We may not consider any argument that Applicant's or Registrant's actual goods or

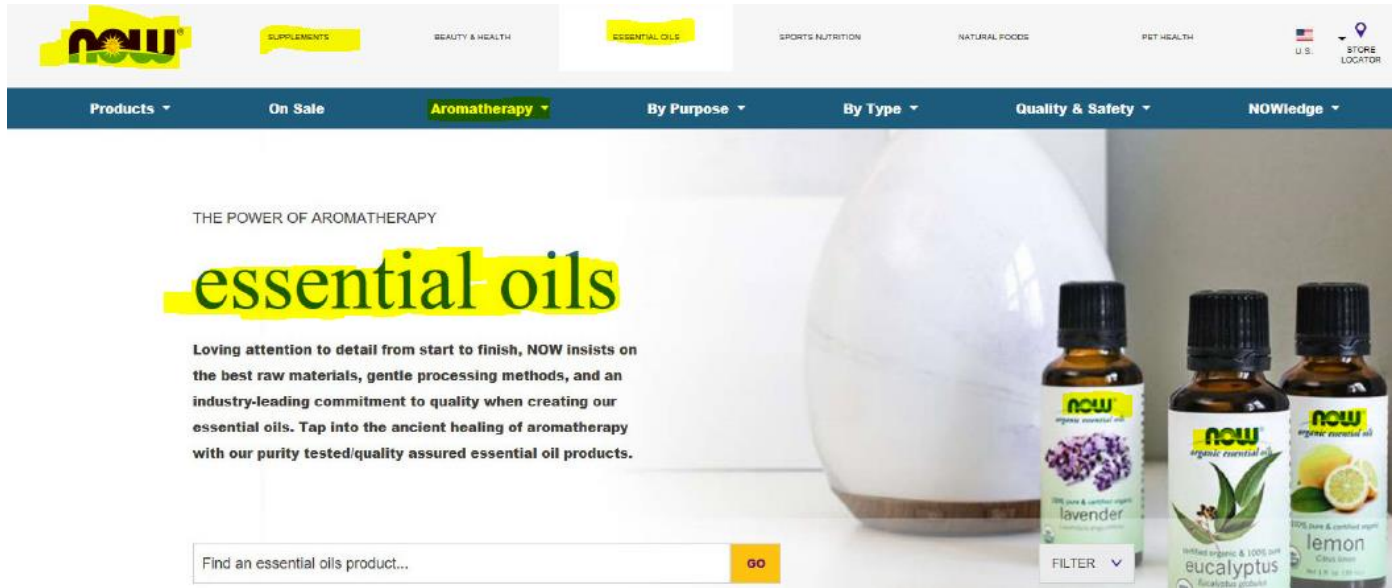
practices are in fact different. With this in mind, we now turn to the specific goods and services, channels of trade, classes of consumers and consumer care.

### 1. The Goods, Channels of Trade and Classes of Consumers

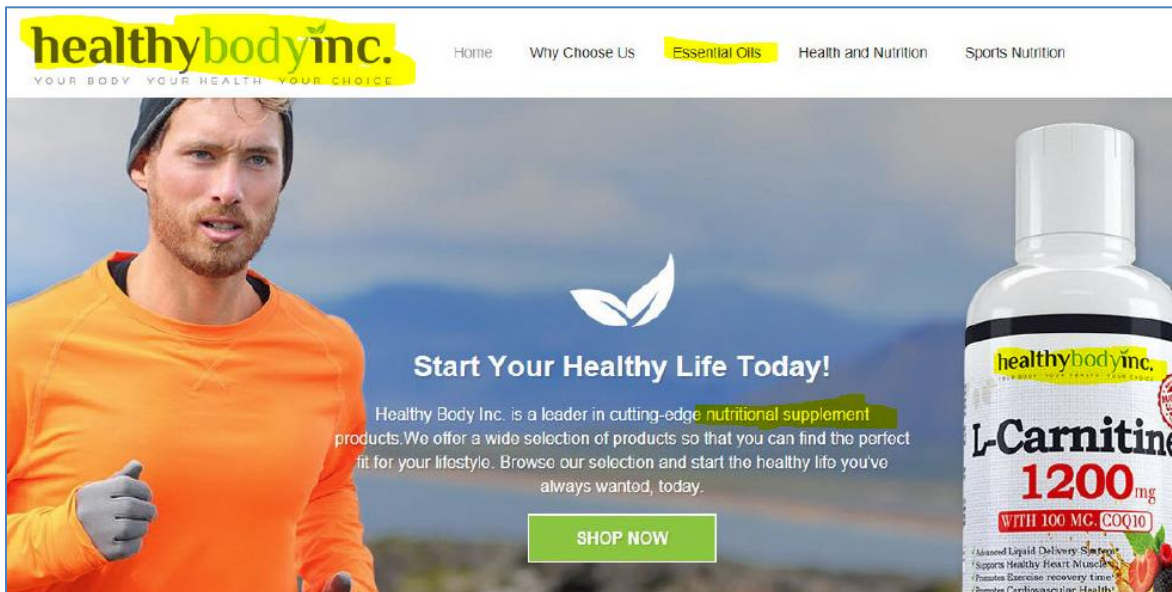
The Examining Attorney has established through Internet printouts that third parties use the same mark for dietary or nutritional supplements on the one hand, and essential oils (often used for skin care or aromatherapy) on the other. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (crediting relatedness evidence showing that third parties use the same mark for the goods and services at issue because “[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 that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”). In addition, at least one third party offers dietary supplements which feature essential oils as ingredients.

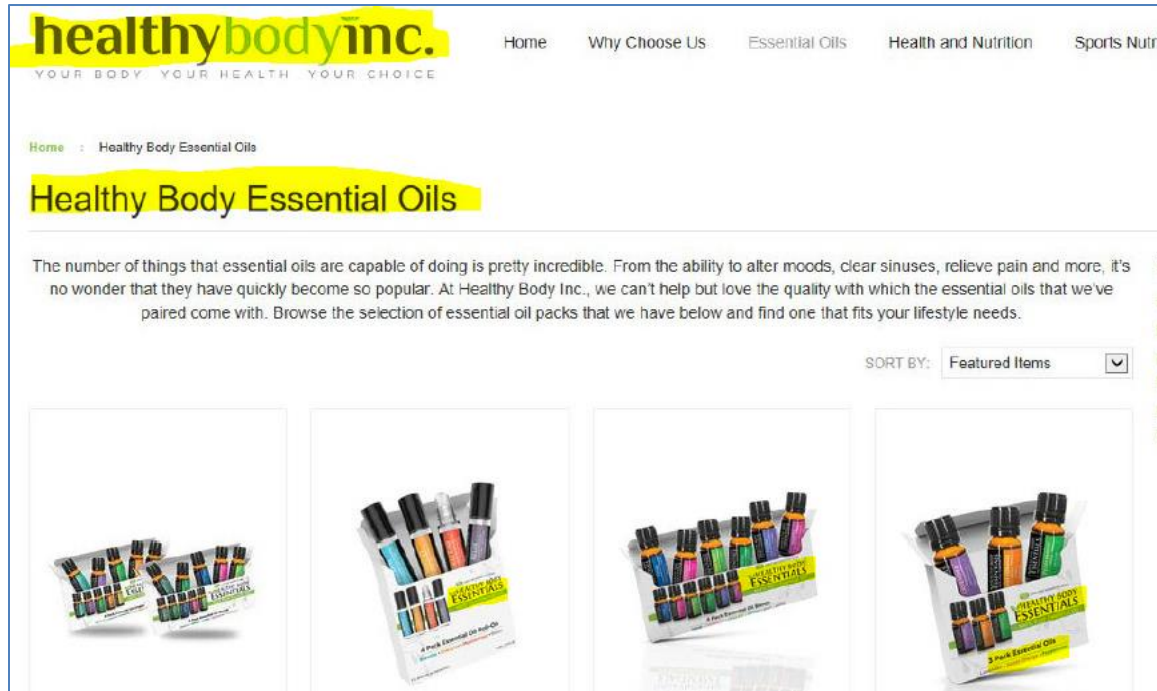
For example, Now Foods offers dietary supplements and essential oils under its NOW mark:





March 3, 2020 Office Action TSDR 32, 42. Similarly, Healthy Body Inc. uses its HEALTHY BODY mark on both dietary supplements and essential oils:





March 6, 2020 Office Action TSDR 4, 8. Rebecca's Natural Food and New Sun also offer dietary supplements and essential oils under the REBECCA'S and NEW SUN marks, respectively. April 24, 2020 Denial of Request for Reconsideration TSDR 4-26. And Rocky Mountain Oils's TOHI line of supplements includes "100% pure essential oil blends":



Our Tohi supplement line combines powerful, all-natural ingredients from around the world with Rocky Mountain Oils' 100% pure essential oil blends. We developed these supplements to solve your day-to-day health needs, whether you're looking to boost your energy or defend yourself from environmental threats.



March 3, 2020 Office Action TSDR 8. In fact, Rocky Mountain Oils indicates that the products' essential oils and other ingredients "work together synergistically to enhance the effectiveness of each vitamin, mineral or herb used in our Tohi dietary supplement line." *Id.* at 13. Thus, some dietary supplements may contain essential oils, and because essential oils are not excluded from Registrant's identification of goods, we may presume that as identified they may also include essential oils.

When we keep in mind that the marks are identical, and hence the degree of similarity between the goods required to support a finding of likelihood of confusion is reduced, *In re Shell Oil*, 26 USPQ2d at 1689, this evidence is qualitatively and quantitatively sufficient to establish that that goods are related. In fact it is not uncommon for the same marks to be used on both goods encompassed by Registrant's identification of goods, and goods encompassed by Applicant's identification of goods. Applicant essentially concedes the point, stating that it "may be the case at times" that dietary supplements and essential oils are offered under the same marks. April 8, 2020 Request for Reconsideration TSDR 1. *See In re Detroit Athletic*, 128 USPQ2d at 1050 (Fed. Cir. 2018); *Hewlett-Packard Co.*, 62 USPQ2d at 1004.

Applicant argues, however, that the goods have different "purposes," and that they are consumed and used differently, because essential oils are inhaled or applied to the skin and body for therapeutic purposes, whereas dietary supplements are taken orally and "complete or add to one's nourishment." 4 TTABVUE 5-10. These methods of consumption are not particularly relevant because the products' "purpose" is, as made clear by Applicant's and Registrant's identical marks, the same – to aid

muscles. Moreover, even Applicant's description of the methods of use overstates the reality, because as the record shows, and Applicant concedes, some dietary supplements taken orally contain essential oils. *See* 4 TTABVUE 7-8.<sup>3</sup>

Applicant also argues that the "form and size" and "duration"<sup>4</sup> of the goods are different. *Id.* at 10-12. While this may be true with respect to Applicant's and Registrant's goods currently on offer in the marketplace, neither Applicant's nor Registrant's identification of goods contains any limitations as to form, size or "duration," and these distinctions are therefore irrelevant. In fact, the record makes clear that the same third-party marks are used for both essential oils and dietary supplements which have different forms, sizes and "duration."<sup>5</sup>

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<sup>3</sup> Applicant relies on an apparently self-generated list of hyperlinks to articles which purportedly address and warn against the use of essential oils in dietary supplements. April 8, 2020 Request for Reconsideration TSDR 4-5. However, as the Examining Attorney points out, "the actual articles are not of record," and, as the Examining Attorney argues by way of analogy, even "a search results summary from an Internet search engine" (which Applicant's self-generated list is not) "has limited probative value." 6 TTABVUE 8. We have not considered the websites for which Applicant provided mere addresses/hyperlinks. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1732-33 (TTAB 2018) ("we will no longer consider Internet evidence filed by an applicant in an *ex parte* proceeding to be properly of record unless the URL and access or print date has been identified, either directly on the webpage itself, or by providing this information in a response"); *In re Mueller Sports Medicine, Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018). Indeed, the Board does not allow applicants to introduce Internet evidence merely by providing a web address or hyperlink. *In re Olin Corp.*, 124 USPQ2d 1327, 1331 n.15 (TTAB 2017) ("Because the information displayed at a link's Internet address can be changed or deleted, merely providing a link to a website is insufficient to make information from that site of record."); *In re HSB Solomon Associates LLC*, 102 USPQ2d 1269, 1274 (TTAB 2012) ("reference to a website's internet address is not sufficient to make the content of that website or any pages from that website of record").

<sup>4</sup> By "duration," Applicant means that "[a] bottle of essential oil is going to last much longer than a bottle of liquid dietary supplements." 4 TTABVUE 12. The relevance of this distinction to the question of source confusion is not explained.

<sup>5</sup> Applicant's argument that the third-party evidence is not probative because the supplements on which the Examining Attorney relies are not in liquid form, while

As for the goods' channels of trade and classes of consumers, the evidence cited above showing that various third parties focused on health and "wellness" offer both dietary supplements and essential oils in the same channels of trade to the same consumers establishes that they overlap. These factors also weigh in favor of finding a likelihood of confusion.

## **2. Consumer Care**

We accept Applicant's argument that "consumers will likely exercise more care when purchasing health products." 4 TTABVUE 12-13. *See Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1744 (TTAB 2014) ("Low prices do not necessarily imply a low degree of consumer care in the selection of dietary supplements where the prospective consumers would be expected to exercise a reasonable degree of care regarding the products that they ingest to improve their health."). This factor weighs against finding a likelihood of confusion.

### **C. Lack of Actual Confusion**

Applicant points only to its claimed date of first use (March 10, 2015) as "evidence" of concurrent use of the marks for a substantial period of time without actual confusion. Applicant's reliance on its alleged date of use in its application is misplaced, because it is an allegation, not actual evidence (such as an affidavit or declaration) regarding the nature or extent of Applicant's use of its mark, or the

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Registrant's goods are, is not well taken. Even if we agreed that the record established that the cited registration covers only liquid supplements and that the third-party supplements cited by the Examining Attorney are in a different form, the point remains that essential oils and supplements are offered under the same marks, and the purpose of both Applicant's and Registrant's goods is to aid muscles. In any event, Applicant concedes that some of the cited third-party supplements are also in liquid form. 4 TTABVUE 16.

nature or extent of Registrant’s use of the cited mark. Trademark Rule 2.122(b)(2) (“The allegation in an application for registration, or in a registration, of a date of use is not evidence on behalf of the applicant or registrant; a date of use of a mark must be established by competent evidence.”); *cf. In re Guild Mtg. Co.*, 2020 USPQ2d 10279 \*6 (TTAB 2020) (“The eighth du Pont factor, by contrast – “[t]he length of time during and conditions under which there has been concurrent use without evidence of actual confusion,” *see du Pont*, 177 USPQ at 567 – requires us to look at actual market conditions, to the extent there is evidence of such conditions of record.”). In any event, a lack of evidence of actual confusion carries little weight in an ex parte case such as this. *Majestic Distilling*, 65 USPQ2d at 1205. “[I]t is unnecessary to show actual confusion in establishing likelihood of confusion.” *Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 396 (Fed. Cir. 1983). This factor is neutral.<sup>6</sup>

## II. Conclusion

The marks are identical, and the goods are related and travel in the same channels of trade to the same consumers. These factors outweigh any purchaser care or sophistication. *See, In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986); *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970); *see also, HRL Associates, Inc. v. Weiss*

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<sup>6</sup> We are not persuaded by Applicant’s argument that Registrant’s failure to challenge Applicant’s use of MUSCLE AID weighs against finding a likelihood of confusion. 4 TTABVUE 15. Among other things, there is no evidence that, or way to know whether, Registrant is even aware of Applicant’s use of the mark.

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*Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods). Confusion is likely.

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