

This Opinion is Not a
Precedent of the TTAB

Mailed: April 12, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Malaga Imports, LLC

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Serial No. 90041414

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Malaga Imports, LLC, pro se.

Jason R. Nehmer, Trademark Examining Attorney, Law Office 121,
Richard White, Managing Attorney.

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Before Bergsman, Larkin, and Johnson,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Malaga Imports, LLC (“Applicant”), appearing pro se, seeks registration on the Principal Register of the standard-character mark PROBASE NUTRITION (NUTRITION disclaimed) for goods ultimately identified as “Collagen peptides for use as a nutritional supplement” in International Class 5.¹

¹ Application Serial No. 90041414 was filed on July 8, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claimed first use of the mark and first use of the mark in commerce at least as early as April 15, 2020. The ultimate goods identification was accepted by the Examining Attorney on remand of the application following Applicant’s appeal of the final refusal to register.

The Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the standard-character mark BASE NUTRITION (NUTRITION disclaimed), registered on the Principal Register for numerous goods in International Class 5, including "Dietary and nutritional supplements," as to be likely, when used on the "Collagen peptides for use as a nutritional supplement" identified in the application, to cause confusion, to cause mistake, or to deceive.

When the refusal to register was made final, Applicant appealed and requested reconsideration, which was denied. The case is fully briefed.² We affirm the refusal to register.

I. Record on Appeal³

The record on appeal includes Applicant's two specimens of use,⁴ the first of which we reproduce in part below:

² Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant's brief appears at 4 TTABVUE and its reply brief appears at 15 TTABVUE. The Examining Attorney's brief appears at 14 TTABVUE.

³ Citations in this opinion to the application record are to pages in the USPTO's Trademark Status and Document Retrieval ("TSDR") database.

⁴ July 8, 2020 Specimen; September 10, 2020 Specimen.



USPTO electronic records regarding the cited registration;⁶ a page from the website of the owner of the cited registration;⁷ pages from the Walmart and Amazon websites resulting from a search on the term “base nutrition;”⁸ pages from third-party websites displaying and discussing Applicant’s goods;⁹ and webpages regarding collagen peptides.¹⁰

II. Analysis of Refusal

Section 2(d) of the Trademark Act prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent

⁵ July 8, 2020 Specimen.

⁶ September 10, 2020 Office Action at TSDR 2-4.

⁷ September 10, 2020 Response to Office Action at TSDR 3.

⁸ September 22, 2020 Response to Office Action at TSDR 2-5, 11-12, 18-19.

⁹ *Id.* at TSDR 6-10, 13-17.

¹⁰ August 19, 2021 Office Action at TSDR 2-16; September 8, 2021 Final Office Action at TSDR 2-16.

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).

Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., 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 or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *29 (TTAB 2021) (citing *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)).

A. Similarity or Dissimilarity of the Goods and Channels of Trade

“We begin with the second and third *DuPont* factors, which respectively consider ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,’ and ‘the similarity or dissimilarity of established, likely-to-continue trade channels.’” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *19 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567)). “Apparently

conceding the issue, Applicant did not address these *duPont* factors in its brief, so we offer only a brief explanation of our conclusion.” *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

The cited registration includes goods broadly identified as “dietary and nutritional supplements.”¹¹ “[W]here the goods in an application or registration are broadly described, they are deemed to encompass ‘all the goods of the nature and type described therein.’” *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1413 (TTAB 2018) (quoting *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006)). By definition, the goods identified in the application as “Collagen peptides for use as a nutritional supplement” are a type of “nutritional supplements,” and are thus subsumed within the broad identification of “dietary and nutritional supplements” in the cited registration, making these goods legally identical. *In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at *4 (TTAB 2020). The “second *DuPont* factor thus strongly supports a finding of a likelihood of confusion.” *Id.*

“Because the goods are legally identical, and there are no limitations in the respective identifications as to the channels of trade or classes of customers, we must also presume that the channels of trade and classes of consumers are identical.” *Id.*

¹¹ “The Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods” in the cited registration. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020). “[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.” *Id.*, at *4 (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015); see also *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

“The third *DuPont* factor thus also strongly supports a finding of a likelihood of confusion.” *Id.*

B. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *Sabhnani*, 2021 USPQ2d 1241, at *25 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (internal quotation omitted)).

“The proper test regarding similarity ‘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.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018)) (internal quotation omitted).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than specific impression of marks.” *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are purchasers of nutritional supplements. “Because the identifications of goods in the [cited registration and application] do not include any

restrictions or limitations regarding channels of trade, classes of consumers, or prices, these purchasers . . . are ordinary consumers.” *Id.*, at *27.

“Because the identified goods are identical in part, a lesser degree of similarity between the marks is required for confusion to be likely.” *Id.* (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *New Era*, 2020 USPQ2d 10596, at *14).

Applicant argues that its mark PROBASE NUTRITION “looks very different from the familiar term ‘BASE NUTRITION’ that the average consumer would understand to mean ‘nutrition that forms the base of one’s dietary intake,’” because “this phrase can be easily understood as a whole immediately upon sight whereas, because ‘PROBASE’ is not a familiar word, the same cannot be said for PROBASE NUTRITION.” 4 TTABVue 8. Applicant cites a number of cases in which it claims that “the familiar versus unfamiliar comparison was made and while it may not have been the only factor which influenced those decisions, it was found to be highly significant in reaching the decision that confusion was unlikely to occur.” *Id.* at 9. Applicant further argues that “[t]he logic behind the decisions is clear. One recognizes instantly that which is familiar. Conversely, that which is unfamiliar would be given closer scrutiny and in this way could be distinguished from the familiar.” *Id.*

Applicant also argues that “[a]lthough the letters ‘BASE’ are part of both Applicant’s Mark and the Cited Mark, they are so integrated into the whole of the Applicant’s Mark, PROBASE, such that they ‘lose their individual identity therein.’”

Id. (quoting *Castle & Cooke, Inc. v. Oulevay, S.A.*, 370 F.2d 359, 152 USPQ 115 (CCPA 1967) (finding FARENDOLE and DOLE to be dissimilar)).

The Examining Attorney responds that “the applied for mark merely adds on the word ‘PRO’ to the registered mark,” and that “[a]dding a term to a registered mark generally does not obviate the similarity between the compared marks, as in the present case, nor does it overcome the likelihood of confusion under Section 2(d).” 14 TTABVUE 11. He claims that “the marks are identical in part, by virtue of the wording ‘BASE NUTRITION.’” *Id.*

The Examining Attorney also argues that

the connotation and commercial impression of the marks are highly similar. If anything, the wording “PRO” is likely to signal to consumers that the goods are of a “pro”fessional grade. Thus, consumers would see “BASE NUTRITION” and “PROBASE NUTRITION” as two different grades of goods offered by the same source, reinforcing the likelihood of confusion. Even if potential purchasers realize the apparent differences between the marks, they could still reasonably assume, due to the overall similarities in sound, appearance, connotation, and commercial impression in the respective marks, that applicant’s goods sold under the “PROBASE NUTRITION” mark constitute a new or additional product line from the same source as the goods and services sold under the “BASE NUTRITION” mark with which they are acquainted or familiar, and that applicant’s mark is merely a variation of the registrant’s mark.

Id. at 12.

We agree with the Examining Attorney that the marks are similar. PROBASE NUTRITION and BASE NUTRITION are both standard character marks and as such “each could be used in any typeface, color, or size, including the same stylization actually used or intended to be used by the other party, or one that minimizes the

differences or emphasizes the similarities between the marks.” *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1823 (TTAB 2015) (citing *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1258-59 (Fed. Cir. 2011)). Accordingly, we must assume that Applicant’s PROBASE NUTRITION mark could be displayed in a manner that emphasizes the compound word PROBASE over the disclaimed word NUTRITION, and separates the two elements of the compound word, “PRO” and “BASE,” in exactly the manner in which Applicant displayed its mark in its first specimen of use shown in part below:



The record shows that the cited standard-character mark BASE NUTRITION has similarly been displayed by the registrant in a manner that emphasizes the word BASE over the word NUTRITION, as shown below:



The BASE NUTRITION and PROBASE NUTRITION marks are far more similar than dissimilar in appearance and sound due to the common presence of the words BASE NUTRITION, and, with respect to the marks’ connotations and commercial

¹² July 8, 2020 Specimen of Use at TSDR 1.

¹³ September 10, 2020 Response to Office Action at TSDR 3.

impressions, Applicant's PROBASE NUTRITION collagen peptide nutritional supplements could readily be viewed as an extension of, or a particular product within, the registrant's line of BASE NUTRITION nutritional supplements.

In that regard, the Board has long recognized that “[t]he word ‘PRO’ has a laudatory connotation as applied to most products and services indicating that they are utilized by professionals or are of professional quality.” *New Era*, 2020 USPQ2d 10595, at *14-15 (quoting *BAF Indus. v. Pro Specialties, Inc.*, 206 USPQ 166, 175 (TTAB 1980)). The addition of the prefix “PRO” to the word BASE in the PROBASE NUTRITION mark could readily be understood by a consumer familiar with the cited BASE NUTRITION mark to identify an especially potent or “professional quality” version of the registrant's BASE NUTRITION line of nutritional supplements, particularly if the standard-character PROBASE NUTRITION mark were displayed, as Applicant displayed it in its first specimen of use, as ProBase Nutrition.

It is also plausible that the prefix PRO in Applicant's mark PROBASE NUTRITION would “suggest the term protein,” *Gen. Mills, Inc. v. Bowman Dairy Co.*, 127 USPQ 65, 66 (TTAB 1960), in the context of the “Collagen peptides for use as a nutritional supplement” identified in the application, because the record shows that collagen is a protein,¹⁴ and Applicant's goods have been described as a “Peptide Protein Powder.”¹⁵

¹⁴ September 22, 2020 Response to Office Action at TSDR 6-7.

¹⁵ *Id.* at TSDR 11.

In either instance, we agree with the Examining Attorney that consumers familiar with the cited BASE NUTRITION mark who separately encounter Applicant's mark PROBASE NUTRITION for identical goods could readily conclude that Applicant's "goods sold under the 'PROBASE NUTRITION' mark constitute a new or additional product line from the same source as the goods and services sold under the 'BASE NUTRITION' mark with which they are acquainted or familiar, and that [A]pplicant's mark is merely a variation of the registrant's mark." 14 TTABVUE 12.

The marks are similar in appearance, sound, and connotation and commercial impression, particularly taking into account that the identity of the goods with which they are used reduces the degree of similarity required for confusion to be likely. The first *DuPont* factor supports a finding of a likelihood of confusion.

C. Summary of *DuPont* Factors

All of the pertinent *DuPont* factors point to a likelihood of confusion. The goods, channels of trade, and classes of purchasers are identical, and the standard-character marks BASE NUTRITION and PROBASE NUTRITION are similar. We find, on the basis of the record as a whole, that it is likely that a consumer familiar with the cited BASE NUTRITION mark for nutritional supplements who separately encounters Applicant's PROBASE NUTRITION mark for a particular subset of nutritional supplements consisting of collagen peptides is likely to believe mistakenly that the PROBASE NUTRITION goods originate with, or are authorized or sponsored by, the owner of the cited BASE NUTRITION mark.

Decision: The refusal to register is affirmed.