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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*CBH International, LLC*

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Application Serial No. 90157017

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Daniel H. Bliss of Howard & Howards Attorneys PLLC for CBH International, LLC.

Brian Gibbons, Trademark Examining Attorney, Law Office 106,  
Mary Sparrow, Managing Attorney.

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Before Cataldo, Bergsman, and Goodman,  
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

CBH International, LLC (“Applicant”) seeks registration on the Principal Register of the mark UNCLE BUD’S HEMP & CBD (in standard characters) for the goods identified below:

Non-medicated skincare products, namely, skin moisturizers, skin lotions, skin creams, skin serums, and skin washes, all of the foregoing excluding essential oils and non-medicated beard care preparations, all of the foregoing containing hemp with less than 0.3% THC on a dry weight basis or CBD derived from industrial hemp with

no more than 0.3% THC on a dry weight basis, in International Class 3.<sup>1</sup>

Applicant disclaims the exclusive right to use the terms “Hemp” and “CBD.”

The Examining Attorney refused to register 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 registered mark UNCLE BUDDY’S (in standard characters) for “non-medicated beard care preparations, namely, beard balm, beard oil,” in International Class 3, as to be likely to cause confusion.<sup>2</sup>

When we cite to the record, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format by page number (e.g., January 21, 2021 Office Action (TSDR 24)). When we cite to the briefs, we refer to TTABVUE, the Board’s docketing system, by docket number and page number (e.g., 10 TTABVUE 3).

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[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.

We base our determination under Section 2(d) on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of

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<sup>1</sup> Application Serial No. 90157017 was filed September 3, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s intent to use the mark in commerce.

<sup>2</sup> Registration No. 5894847 registered October 29, 2019.

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, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists 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 discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA

1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *In re Embiid*, 2021 USPQ2d 577, at \*10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)); *see also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“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.”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

### **I. The similarity or dissimilarity of the marks**

We turn first to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entireties as to 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) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test 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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980). Because Applicant is seeking to register its mark for “non-medicated skincare products, namely, skin moisturizers, skin lotions, skin creams, skin serums, and skin washes” derived from hemp, the average customer is an ordinary consumer.

As noted above, the mark in the cited registration is UNCLE BUDDY’S (in standard characters) and Applicant is seeking to register the mark UNCLE BUD’S HEMP & CBD.

The dominant part of Applicant's mark is the name "Uncle Bud's." There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). In this appeal, there are two reasons for finding the name "Uncle Bud's" to be the most prominent part of Applicant's mark.

First, UNCLE BUD'S is the first part of Applicant's mark. The lead element in a mark has a position of prominence; it is likely to be noticed and remembered by consumers and so as to play a dominant role in the mark. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée 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); *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).

Second, word "Hemp" and "CBD" are merely descriptive and Applicant has disclaimed the exclusive right to use them. It is well-settled that disclaimed, descriptive matter may have less significance in likelihood of confusion

determinations because consumers will tend to focus on the more distinctive parts of marks. *See Detroit Athletic Co.*, 128 USPQ2d at 1050 (citing *Dixie Rests.*, 41 USPQ2d at 1533-34); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *Nat’l Data Corp.*, 224 USPQ at 752); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression.”).

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 2020) defines “Bud,” *inter alia*, as “a single flower of a cannabis plant, especially a female flower” and “friend; chum. Used as a form of familiar address; especially for a man or boy: *Move along, bud.*”<sup>3</sup> It defines “Buddy” as “friend or comrade; chum. Used as a form of familiar address; especially for a man or boy: *Watch it, buddy.*”<sup>4</sup>

Because “Bud” is a shortened form of “Buddy,” it is likely that some consumers will refer to Registrant’s UNCLE BUDDY as UNCLE BUD or UNCLE BUD’S. “[U]sers of language have a universal habit of shortening full names – from haste or laziness or just economy of words. Examples are: automobile to auto; telephone to phone; necktie to tie; gasoline service station to gas station.” *In re Abcor Dev. Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (J. Rich, concurring) (explaining that it is “inevitable” that consumers will call a gas monitoring badge a gas badge).

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<sup>3</sup> January 21, 2021 Office Action (TSDR 13).

<sup>4</sup> *Id.* at TSDR 14.

[C]ompanies are frequently called by shortened names, such as Penney's for J.C. Penney's, Sears for Sears and Roebuck (even before it officially changed its name to Sears alone), Ward's for Montgomery Ward's, and Bloomies for Bloomingdales.

*Marshall Field & Co. v. Mrs. Fields Cookies*, 25 USPQ2d 1321, 1333 (TTAB 1992); see also *In re Bay State Brewing*, 117 USPQ2d 1958, 1961 (TTAB 2016) (holding it is reasonable for consumers to drop the highly descriptive term "Blonde" when calling the TIME TRAVELER BLONDE beer); *Big M Inc. v. The United States Shoe Co.*, 228 USPQ 614, 616 (TTAB 1985) ("[W]e cannot ignore the propensity of consumers to often shorten trademarks and, in the present case, this would be accomplished by dropping the 'T.H.' in referring to registrant's stores [T.H. MANDY].").

That some of Applicant's customers may perceive UNCLE BUD'S as referring to a cannabis flower does not mean that they will not recognize UNCLE BUD'S as a shortened form for UNCLE BUDDY'S or that they will not associate the source of UNCLE BUDDY'S beard oil with UNCLE BUD'S HEMP & CBD skincare preparations because of the similarity of the marks.

Applicant contends that the marks are not similar because they are visually different and they sound different.<sup>5</sup> Applicant also asserts that the meaning and commercial impression engendered by the marks are different.

As to the connotation, Applicant's UNCLE BUD'S HEMP & CBD is different in connotation from [UNCLE BUDDY'S]. The connotation of "bud's" may be a bud of a plant. The connotation of "hemp" is "a tall widely cultivated Asian herb". The connotation of "hemp" is "a tall widely cultivated Asian herb". The connotation of CBD is

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<sup>5</sup> Applicant's Brief, p. 6 (10 TTABVUE 7).



“cannabidiol”. The connotation of “buddy” is “companion or friend”. [UNCLE BUDDY’S] lacks the connotation of “the brother of one’s father or mother of a bud of a tall widely cultivated Asian herb” that Applicant’s mark adds. Applicant’s mark lacks that connotation of “the brother of one’s father’s or mother’s companion or friend” that [UNCLE BUDDY] adds.<sup>6</sup>

We agree that the marks are not identical. Some consumers may perceive the differences between UNCLE BUD’S HEMP & CBD as referring to a plant and Registrant’s UNCLE BUDDY’S as referring to a friend. But “[e]xact identity is not necessary to generate confusion as to source of similarly-marked products.” *Bridgestone Ams. Tire Operations LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012). The public does not scrutinize marks. *See B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 220 USPQ 539, 540 (TTAB 1983) (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”).

We find the resemblance between the marks is striking enough to cause one seeing Applicant’s UNCLE BUD’S HEMP & CBD to assume that there is some connection, association or sponsorship with Registrant’s UNCLE BUDDY’S. Thus, when

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<sup>6</sup> Applicant’s Brief, pp. 6-7 (6 TTABVUE 7-8).

comparing the marks in their entireties, they are similar in sound, connotation and commercial impression.

This *DuPont* factor weighs in favor of finding a likelihood of confusion.

## **II. The similarity or dissimilarity and nature of the goods**

As noted above, Applicant is seeking to register its mark for “non-medicated skincare products, namely, skin moisturizers, skin lotions, skin creams, skin serums, and skin washes” derived from hemp. The cited mark is registered for “non-medicated beard care preparations, namely, beard balm, beard oil.”

Beard oil is a cosmetic product for men that is used to nourish both the skin under the beard and the beard itself in order to keep it “soft, shiny, and smooth.” Beard oil mimics the natural oils produced by skin, such as sebum, and composed mainly of carrier oils and essential oils.

### **Ingredients**

Beard oil products are a blend of various ingredients, such as jojoba oil, argan oil, coconut oil, grape seed oil, hempseed oil that are used to address specific beard problems such as itching, sensitive skin or dryness by going straight to the follicle in a similar fashion to hair conditioner. ...

### **Benefits**

Beard oil acts as a moisturizer that goes straight to the hair follicle and restricts hair from growing brittle, especially in cold, windy environments as these weather conditions cause the natural moisture of the beard areas to wick. Hydration around this area helps prevent flaking, dandruff and skin dryness. Some brands of beard oil may contain vitamins or nutrients such as Vitamin E. This moisturization prevents general itchiness and irritation of the skin under the beard.

Beard oil also works below the surface of the skin by working as a grooming tool, making the beard itself more manageable, neat and smooth.<sup>7</sup>

The Examining Attorney submitted the third-party evidence of use listed below to prove that Applicant's skin moisturizers, skin lotions, skin creams, skin serums, and skin washes" are related to Registrant's "non-medicated beard care preparations, namely, beard balm, beard oil." Third-party websites showing the same mark used for the products at issue is probative to demonstrate that Applicant's goods and Registrant's goods are related for likelihood of confusion purposes. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (relatedness supported by evidence that third parties sell both types of goods under same mark, showing 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, 1005 (Fed. Cir. 2002) (evidence that consumers encounter one mark designating a single source for the services of both parties supports a finding that the services are related); *In re Integrated Embedded*, 120 USPQ2d 1504, 1514-15 (TTAB 2016) (websites made of record by examining attorney "demonstrate[d] that services of the type offered by both Applicant . . . and Registrant are marketed and sold together online under the same marks" and "[s]uch evidence is sufficient to find that the services at issue are related.").

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<sup>7</sup> "Beard oil," Wikipedia.org attached to the January 21, 2021 Office Action (TSDR 15).

- KIEHL'S (kiehls.com) beard oil and face moisturizers, serums, and cleansers, including cannabis seed oil herbal face oil and cleanser;<sup>8</sup>
- JACK BLACK (getjackblack.com) beard oil, face moisturizer, hydrating body lotion, skin serum, including CBD+HA serum;<sup>9</sup>
- BAXTER OF CALIFORNIA (baxterofcalifornia.com) beard oil, moisturizer, body lotion, skin serum, and deep cleansing bar (with hemp grass);<sup>10</sup>
- PROMISE (promiseprestige.com) CBD infused moisturizer body lotion and beard oil;<sup>11</sup>
- EVERY MAN JACK (everymanjack.com) face scrubs and lotions and beard oil and body wash with hemp;<sup>12</sup>
- BARRELLI BARBER (barbellibarber.com) hemp beard oil and hemp moisturizing cream;<sup>13</sup> and
- SCOTCH PORTER (scotchporter.com) beard wash, conditioner, balm, and serum and SCOTCH PORTER face lotion and scrub.<sup>14</sup>

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<sup>8</sup> January 21, 2021 Office Action (TSDR 61-66). Kiehl's advertises that its beard oil nourishes the skin underneath the beard and that it diminishes dryness. *Id.* at TSDR 61.

<sup>9</sup> *Id.* at TSDR 67-71. JACK BLACK advertises that its beard oil prevents dry, itchy skin. *Id.* at TSDR 67.

<sup>10</sup> *Id.* at TSDR 72-76. Baxter advertises that its beard oil moisturizes the skin underneath the beard. *Id.* at TSDR 72.

<sup>11</sup> March 15, 2021 Office Action (TSDR 51-52).

<sup>12</sup> *Id.* at TSDR 53-54.

<sup>13</sup> *Id.* at TSDR 56-57.

<sup>14</sup> October 22, 2021 Denial of Request for Reconsideration (TSDR 59-69).

The Examining Attorney also submitted copies of third-party registrations for both beard oil and “skin moisturizers, skin lotions, skin creams, skin serums, and skin washes.” Third-party registrations based on use in commerce that individually cover a number of different goods may have probative value to the extent that they serve to suggest that the listed goods are of a type that may emanate from the same source. *In re Country Oven, Inc.*, 2019 USPQ2d 443903, \*8 (TTAB 2019); *Joel Gott Wines LLC v. Rehoboth Von Gott Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993). The third-party registrations and the relevant goods are listed below:<sup>15</sup>

MARK	REG. NO.	GOODS
B	5872105	Skin cleansers; lotions; nourishing creams; serums for use on hair, body, skin, eyes, and lips; hair conditioner and oils; beard oil
M	5998599	Body wash, skin wash, creams, lotions, and serums; beard oil
ZENFUL SENSES	6128733	Beard oil; skin creams, serums and cleansers
HOOD NATURALS	6252835	Hair oils and conditioners; lotions for face and body care; beard oil
ASIA EL ARTISAN BODY CARE	6220518	Beard oil; skin lotion
CAMAMU	6228489	Beard oil; body salves, face cream and serums; skin cleansers; hand cream
MR MEMPHIS RESERVE	6161668	Beard oil; skin and face creams; moisturizers
556 BODY OPS	6181464	Beard oil; non-medicated skin care preparations
LEAP	6124199	Beard oil; fascial and body cleansers, moisturizers, lotions

<sup>15</sup> January 21, 2021 Office Action (TSDR 16-60); March 15, 2021 Office Action (TSDR 8-50); October 22, 2021 Denial of Request for Reconsideration (TSDR 10-58).

<b>MARK</b>	<b>REG. NO.</b>	<b>GOODS</b>
PRODJIN	6277650	Beard oil; skin serums; non-medicated skin care preparations; face and body creams; moisturizers
LUCKCBD	6024729	Beard oil; skin care preparations, namely, body balm; skin conditioning creams for cosmetic purposes; body lotions; all derived from hemp
LUXURY LIFESTYLE PRODUCTS BY STACKS CUTTIN DAT	6511975	Beard oil; skin and body lotions
STRELLALAB	6067215	Beard oil; skin serum
BRYAN & CAND NEW YORK	6165678	Beard oil; body creams, lotions, scrubs, and serums
AUXO GARDENS	6160085	Beard oil; non-medicated skin care preparations, namely, creams, lotions, balms, oils, washes, salves, scrubs, toners
MIWEE	6233269	Beard oil; aloe vera preparations for cosmetic purposes
LATIKA	6266219	Beard oil; non-medicated skin care preparations, namely, creams, lotions, and cleansers
BUCKING BEARDS BB	6291254	Beard oil; skin lotions
EXOTIC AROMAS FRAGRANCES	6443291	Beard oil; skin care preparations, namely, body balm
AVENTUS	6507439	Beard oil; non-medicated skin care preparations
MY NUTRIALITY	6517310	Beard oil; non-medicated skin care preparations in the nature of oils, serums, tones, emollients, creams, and lotions

Applicant contends that the goods are not related because “[t]he nature of Applicant’s goods is skincare lotions and creams containing hemp or CBD” while the “[t]he nature of the registrant’s goods is beard care preparations.”<sup>16</sup> In addition,

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<sup>16</sup> Applicant’s Brief, pp. 8-9 (10 TTABVue 9-10).

Applicant's description of goods specifically excludes "non-medicated beard care preparations."<sup>17</sup>

Consumers would be aware that the goods are not sufficiently related because Applicant's goods specifically exclude non-medicated beard care preparations and contain hemp with less than 0.3% THC on a dry weight basis or CBD derived solely from industrial hemp with no more than 0.3% on a dry weight basis.<sup>18</sup>

Applicant also asserts that the goods are not competitive because Registrant's beard care preparations are not derived from hemp.<sup>19</sup>

That Registrant's goods are not derived from hemp is not relevant in our analysis of the similarity or dissimilarity of the goods. Registrant's description of goods - "non-medicated beard care preparations, namely, beard balm, beard oil" - has no restrictions or limitations and, therefore, it is broad enough to include beard care preparations derived from hemp. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013) (applying the principle that "registration encompasses all goods or services of the type described); *Monster Energy v. Lo*, 2023 USPQ2d 87, at \*15-16 (TTAB 2023); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) ("Applicant's broadly worded identification of 'furniture' necessarily encompasses Registrant's narrowly identified 'residential and commercial furniture.'").

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<sup>17</sup> *Id.* at p. 9 (10 TTABVUE 10).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at p. 10 (10 TTABVUE 11).

That Applicant's goods are skincare products derived from hemp while Registrant's goods are beard care preparations does not, in and of itself, mean that consumers will not perceive them as being related. The issue is not whether purchasers would confuse the parties' goods, but rather whether there is a likelihood of confusion as to the source of these goods. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods.”); *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1737 (TTAB 2018) (“the test is not whether consumers would be likely to confuse these goods, but rather whether they would be likely to be confused as to their source.”); *In re Cook Med. Tech. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012).

That Applicant's description of goods excludes beard care preparations does not affect consumer perception because consumers are not aware of descriptions of goods. *See In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (“[t]he purchasing public is not aware of registrations reposing in the Patent [and Trademark] Office”) (citing *See Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973)).

Finally, Applicant's contentions do not rebut the third-party Internet evidence and third-party registration evidence showing that the same entities use (or may use in the case of the registrations) the same mark to identify the goods at issue. In fact, in many of the third-party websites and registrations, both beard oil and skincare



preparations are derived from hemp. In addition, the third-party website evidence and the Wikipedia entry indicate that beard oil is used to moisturize and treat the skin under a beard.

We find that the goods are related and, therefore, the similarity or dissimilarity and nature of the goods is a *DuPont* factor that weighs in favor of finding likelihood of confusion.

### **III. Established, likely-to-continue channels of trade and classes of consumers**

The third-party webpages show that companies that manufacture and sell skin care products and beard care preparations offer their products through their own websites. Moreover, nothing precludes a consumer of skin care products from purchasing beard care preparations and vice versa.

Applicant contends that because Registrant's goods are not derived from hemp, Applicant's skin care preparations and Registrant's beard care preparations are not offered in the same channels of trade. As indicated above, Registrant's description of goods is broad enough to encompass beard preparations derived from hemp. Notwithstanding Applicant's argument regarding the actual scope of its own and the cited Registrant's commercial use of its mark, we may not limit, by resort to extrinsic evidence, the scope of goods as identified in the cited registration. *E.g.*, *Dixie Rests.*, 41 USPQ2d at 1531; *In re Fisher Scientific Co.*, 440 F.2d 43, 169 USPQ 436, 437 (CCPA 1971); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 n.18 (TTAB 2018) (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”); *see also In re Bercut-Vandervoort & Co.*,

229 USPQ 763, 764 (TTAB 1986) (evidence that relevant goods are expensive wines sold to discriminating purchasers must be disregarded given the absence of any such restrictions in the application or registration).

We find that the products are offered in some of the same channels of trade to some of the same classes of consumers and, therefore, the established, likely to continue channels of trade is a *DuPont* factor that weighs in favor of finding likelihood of confusion.

#### **IV. The conditions under which and consumers to whom sales are made**

Applicant contends that consumers of beard care preparations and skin care products are “experienced, knowledgeable purchasers” who “are careful, sophisticated purchasers.”<sup>20</sup> Therefore, their degrees of purchasing care is high.<sup>21</sup>

There are at least two problems with Applicant’s contention. First, there is no evidence in the record regarding the purchasing process, including the degree of care with which consumers select skin care products and beard care products. We have no foundational information about counsel’s investigation of, or understanding of the marketing and use of the products at issue that would put him in a position to make statements regarding the thought process of customers, which in this case is central to Applicant’s contention that consumers exercise such a high degree of care that the likelihood of confusion will be minimized. *See In re U.S. Tsubaki, Inc.*, 109 USPQ2d

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<sup>20</sup> Applicant’s Brief, pp. 11-12 (10 TTABVUE 12-13).

<sup>21</sup> *Id.* at p. 12 (10 TTABVUE 13).

2002, 2006 (TTAB 2014). As the Federal Circuit has stated numerous times, “Attorney argument is no substitute for evidence.” *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

Second, while many consumers for skin care products and beard care preparations may exercise a high degree of purchasing care, we cannot exclude consumers who are merely looking for a basic product. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1163-64 (Fed. Cir. 2014) (recognizing Board precedent requiring consideration of the “least sophisticated consumer in the class”); *see also In re Sailerbrau Franz Sailer*, 23 USPQ2d 1719, 1720 (TTAB 1992) (finding that not all purchasers of wine may be discriminating because while some may have preferred brands, “there are just as likely to be purchasers who delight in trying new taste treats.”).

We find that the degree of care is a neutral *DuPont* factor.

## V. Conclusion

Because the marks are similar, the goods are related, and are offered in some of the same channels of trade to some of the same classes of consumers, we find that Applicant’s mark UNCLE BUD’S HEMP & CBD mark for skincare products derived from hemp is likely to cause confusion with the registered mark UNCLE BUDDY’S for “non-medicated beard care preparations, namely, beard balm, beard oil.”

**Decision:** We affirm the refusal to register Applicant’s mark UNCLE BUD’S HEMP & CBD.