

This Opinion is Not a
Precedent of the TTAB

Mailed: October 9, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Cratus Enterprises LLC dba Vintage Muscle

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Serial No. 90873360
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Preston P. Frischknecht of Project CIP,
for Cratus Enterprises LLC dba Vintage Muscle.

Katina J. Joiner, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

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Before Greenbaum, Cohen, Brock,
Administrative Trademark Judges.

Opinion by Cohen, Administrative Trademark Judge:

Cratus Enterprises LLC dba Vintage Muscle (“Applicant”) seeks registration on the Principal Register of the standard-character mark VINTAGE MUSCLE for goods ultimately identified as “nutritional and health food supplements featuring anabolic precursor and pro-hormone formulations” in International Class 5.¹

¹ Application Serial No. 90873360 (the “Application”) was filed on August 9, 2021 based upon Applicant’s allegation of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). On June 22, 2022, Applicant filed an Allegation of Use and amended the filing basis to Section 1(a) of the Trademark Act, 15 U.S.C.

The Trademark 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 Applicant's mark so resembles the standard-character mark VINTAGE BURN ("Cited Mark"), registered on the Principal Register for "dietary and nutritional supplements" in International Class 5² as to be likely, when used in connection with the goods identified in the Application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney issued a final refusal under Section 2(d), Applicant filed a notice of appeal and a request for reconsideration, which was denied. Thereafter, the Examining Attorney requested and the Board granted remand to address a new issue raised by Applicant in its request for reconsideration. Ultimately, the Examining Attorney issued a "Continuation of Final Office Action," maintaining and continuing the Section 2(d) refusal, and returned the application to the Board for resumption of the appeal.³ The appeal resumed and is fully briefed. We affirm the refusal to register.⁴

§ 1051(a), based upon Applicant's claim of first use anywhere and in commerce of January 4, 2020. No claim is made to the exclusive right to use MUSCLE apart from the mark as shown.

² Registration No. 5950262 (the "Registration") issued on December 31, 2019.

³ 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 WL 2853282, at *1 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 appeal brief appears at 4 TTABVUE and its reply brief appears at 7 TTABVUE. The Examining Attorney's brief appears at 6 TTABVUE.

⁴ This opinion is issued as part of an internal Board pilot citation program on broadening acceptable forms of legal citation in Board cases. The citation form in this opinion is in a form provided in Section 101.03(a) of the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") (2024). This decision cites decisions of the U.S. Court of Appeals for

I. Initial Matters

Applicant attached new evidence to its appeal and reply briefs. Specifically, Applicant attached a declaration from its CEO, Jared Van Yperen to its appeal brief.⁵ To its reply brief, Applicant attached various Internet printouts from VITACOST.COM, GNC.COM and NOWFOODS.COM.⁶

Rule 2.142(d) of the Trademark Rules of Practice, 37 C.F.R. § 2.142(d), states that the “record should be complete prior to the filing of an appeal” and “[e]vidence should not be filed with the Board after the filing of an appeal.” Because the Van Yperen declaration was submitted for the first time after this appeal was filed, it is untimely. Therefore, we do not give this evidence, or any arguments based on it, any consideration. *See In re Inn at St. John’s, LLC*, Ser. No. 87075988, 2018 WL 2734893, at *2 (TTAB 2018).

As to the Internet printouts from VITACOST.COM, GNC.COM and NOWFOODS.COM, Applicant argues that the Examining Attorney submitted only portions of these websites with the July 28, 2022 Final Office Action and Applicant now submits the entirety of those websites for our consideration.⁷ If the applicant or the examining

the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the page(s) on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board and the Director of the USPTO, this opinion employs citations to the Westlaw legal database (“WL”) and, in the initial full citation of a case, also identifies the number of the Board proceeding. The Board’s decisions issued since 2008 are available in TTABVUE. Practitioners should also adhere to the citation practice set forth in TBMP § 101.03(a).

⁵ 6 TTABVUE 22-23.

⁶ 14 TTABVUE 5-6, 12-92.

⁷ *Id.* at 5-6.

attorney submits excerpts from articles during examination, the non-offering party may submit the complete article, even if such submission is made after the appeal is filed. *See In re Bed & Breakfast Registry*, 791 F.2d 157, 161 (Fed. Cir. 1986) (if only a portion of an article is submitted, that portion is not thereby insulated from the context from whence it came); TBMP §1207.01. However, attaching the Internet printouts to Applicant's reply brief does not make this evidence of record. Rather, Applicant should have submitted a separately captioned request for remand with the evidence attached, which, if granted, would allow the Examining Attorney to consider this new evidence.⁸ Trademark Rule 2.142(d)(1) ("In an appeal from a refusal to register, if the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a request to the Board to suspend the appeal and to remand the application for further examination."). Applicant did not and so, we do not give this evidence, or any arguments based on it, any consideration.

II. Section 2(d) Refusal⁹

"The Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion [or] mistake, or to deceive." *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination

⁸ Nor did Applicant request remand in the body of its appeal brief (a practice the Board discourages, but which we would have considered).

⁹ Citations in this opinion to the Application record are to pages in the USPTO's Trademark Status & Document Retrieval ("TSDR") online database.

of the likelihood of confusion under Section 2(d) of the Trademark Act 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, 1361 (CCPA 1973) (“*DuPont*”); *Charger Ventures*, 64 F.4th at 1379. We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (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. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976). Applicant addresses these two key factors;¹⁰ argues that VINTAGE BURN is entitled to a narrow scope of protection because of the “use and registration of very similar marks on very similar goods, namely, foods, beverages, and supplements thereof that people consume,”¹¹ which references the sixth *DuPont* factor, the “number and nature of similar marks in use on similar goods,” *DuPont*, 476 F.2d at 1361; argues that the customers are likely to exercise care in purchasing supplements,¹² invoking the fourth *DuPont* factor, the “conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing,” *id.*; and argues that the marks have co-existed for “close to 3 years,”¹³ invoking the eighth *DuPont* factor, the

¹⁰ 6 TTABVUE 12-16, 20-21.

¹¹ *Id.* at 16.

¹² *Id.* at 20.

¹³ *Id.* at 21.

“length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *Id.*

We address each of these factors.

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

“The second *DuPont* factor ‘considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.’” *In re Embiid*, Ser. No. 88202890, 2021 WL 2285576, at *10 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361)).

“In analyzing the [goods], the Board ‘considers ‘the similarity or dissimilarity and nature of the [goods] as described in an application or registration.’” *In re OSF Healthcare Sys.*, Ser. No. 88706809, 2023 WL 6140427, at *4 (TTAB 2023) (quoting *Embiid*, 2021 WL 2285576, at *10) (internal quotation omitted). The “Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods” to affirm the refusal. *In re St. Julian Wine Co.*, Ser. No. 87834973, 2020 WL 2788005, at *5 (TTAB 2020). The issue here is not whether consumers would confuse the goods, but whether there is a likelihood of confusion as to the source of those goods. *L’Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 WL 1267956, at *5 (TTAB 2012). If an application or registration describes goods or services broadly, and there is no limitation as to their nature, it is presumed that the goods or services “encompass[] all goods or services of the type described.” *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1373 (Fed. Cir. 2013); see also *In re Solid State Design Inc.*, Ser. No. 87269041, 2018 WL 287909, at

*6 (TTAB 2018) (“[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.”) (internal quotes omitted).

Applicant argues that the goods are not identical because “dietary and nutritional supplements are not anabolic precursor and pro-hormone formulations.”¹⁴ This argument ignores that both the Application and Registration identify nutritional supplements. While Applicant narrows its goods with the inclusion of “featuring anabolic precursor and pro-hormone formulations,” this is not dispositive. Here, the broadly identified goods in the Registration, “dietary and **nutritional supplements**,” (emphasis added) encompass Applicant’s more narrowly identified goods, “**nutritional** and health food **supplements** featuring anabolic precursor and pro-hormone formulations”¹⁵ (emphasis added). *See St. Julian Wine Co.*, 2020 WL 2788005, at *5; *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 WL 6170483, at *2 (TTAB 2019) (quoting *Sw. Mgmt., Inc. v. Ocinomled, Ltd.*, Conc. Use No. 94002242, 2015 WL 4464550, at *17 (TTAB 2015) (“[w]here the identification of services is broad, the Board ‘presume[s] that the services encompass all services of the type identified’”). On the face of the respective identifications, the Cited Mark is registered for goods which are broad enough to include the specific goods identified in the Application. Thus, the goods are, at a minimum, in-part legally identical.

¹⁴ *Id.* at 20-21.

¹⁵ As originally identified in the Application, Applicant’s goods were “dietary and nutritional supplements; health food supplements.” August 9, 2021 Application at TSDR 1.

While we contemplate the similarity or dissimilarity of the respective goods, we also consider the third *DuPont* factor, which “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *Detroit Athletic*, 903 F.3d at 1306 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361)). In view of the partial identical nature of the goods, we presume that the relevant purchasers and channels of trade are also identical. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1372 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods’”) (citing *In re Viterra Inc.*, 671 F.3d 1358, 1362 (Fed. Cir. 2012)).

The in-part, legally identical nature of the goods identified in the Application and the Registration and their identical channels of trade and classes of purchasers, weigh heavily in favor of a finding of likelihood of confusion.

B. Strength or Weakness of the Cited Mark

We now consider the strength or weakness of the Cited Mark which helps inform us as to the mark’s scope of protection by considering the sixth *DuPont* factor. “The sixth *DuPont* factor ‘considers the number and nature of similar marks in use on similar goods,’” *Embiid*, 2021 WL 2285576, at *16 (quoting *Omaha Steaks Int’l Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1318 (Fed. Cir. 2018)), and “is a measure of the extent to which other marks weaken the assessed mark.” *Spireon, Inc. v. Flex, Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). “The Federal Circuit has held that

evidence of the extensive registration and use of a term by others can be powerful evidence of the term's weakness.” *Embiid*, 2021 WL 2285576, at *16 (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, Can. No. 92057132, 2017 WL 6336243, at *14 (TTAB 2017) (citing *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338-39 (Fed. Cir. 2015)).

“There are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th at 1362. “Conceptual strength is a measure of a mark's distinctiveness” along the spectrum of distinctiveness from generic terms to fanciful marks, *id.* (citations omitted), while commercial strength “is the marketplace recognition value of the mark.” *Id.* at 1363 (quoting 2 J. Thomas McCarthy, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION* § 11:80 (5th ed. 2023)).

“The purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks*, 908 F.3d at 1324 (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.2d 1369, 1374 (Fed. Cir. 2005) (internal quotation omitted)). The scope of protection that is accorded a mark based on its strength may narrow with proof of third-party use demonstrating weakness in the industry or third-party registrations demonstrating that a term has a normally understood and well recognized descriptive or suggestive meaning. *See Juice*

Generation, Inc. v. GS Enters. LLC, 794 F.3d 1334, 1339 (Fed. Cir. 2015); *Tao Licensing*, 125 WL 6336243, at *14 (Third-party uses may bear on the commercial weakness of a mark and third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services.”). “Use evidence may reflect commercial weakness, while third-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing*, 2017 WL 6336243, at *14.

Applicant submits over twenty third-party registrations for VINTAGE or VINTAGE-formative marks for a variety of food and food products (some of which are owned by the same entity or on the Supplemental Register) including:

- VINTAGE (Reg. No. 1994771) for a variety of goods including pharmaceutical preparations for the treatment of dental caries, reduction of fever, dietary supplementation, and sedation, and for the treatment of pain, tension headaches, convulsions, arthritis, malaria;¹⁶
- VINTAGE (Reg. No. 1091057) for seltzer water;¹⁷
- VINTAGE (Reg. No. 2552171) for drinking water;¹⁸
- VINTAGE 3 (Reg. No. 3377573) for cheese;¹⁹

¹⁶ June 22, 2022 Office Action Response at TSDR 22-23.

¹⁷ *Id.* at 24-25. Applicant submits three additional registrations for VINTAGE for seltzer water and other beverages all owned by the same entity. *Id.* at 26-31.

¹⁸ *Id.* at 32-33.

¹⁹ *Id.* at 34-35.

- VINTAGE CANDY VENDING and design (Reg. No. 6532602) for bulk vintage candy gift bag sets; cookie kits comprised of cookie making ingredients and candy;²⁰
- VINTAGE CHOICE (Reg. No. 2382362) for cheese;²¹
- VINTAGE SWEETS (Reg. No. 5078609) for fresh oranges; raw oranges; unprocessed oranges;²²
- VINTAGE VANGOGH (Reg. No. 3101628) for cheese;²³
- VINTAGE VINE (Reg. No. 4471556) for non-alcoholic cocktail mixes;²⁴
- VINTAGE CUBED ICE (Reg. No. 4003753) for ice;²⁵ and
- VINTAGE ICE CREAM (Reg. No. 5376118) for ice cream.²⁶

As discussed above, the involved goods are in-part, legally identical. Where identical goods are involved, third-party uses on other goods have no real probative value regarding a mark's or term's weakness. *Omaha Steaks*, 908 F.3d at 1326 (finding that third-party uses of OMAHA-formative marks on popcorn, alcoholic

²⁰ *Id.* at 41-42. This mark is registered on the Supplemental Register. A Supplemental Register registration is not entitled to the same presumptions afforded a registration on the Principal Register; it is "evidence of nothing more than the fact that the registration issued on the date printed thereon." *Nazon v. Ghiose*, Opp. No. 91216729, 2016 WL 3876810, at *2 (TTAB 2016). A Supplemental Register registration "is not evidence of ownership, validity, or the exclusive right to use" *In re Bush Bros. & Co.*, 884 F.2d 569, 570 n.2 (Fed. Cir., 1989).

²¹ *Id.* at 43-44.

²² *Id.* at 65.

²³ *Id.* at 69.

²⁴ *Id.* at 71.

²⁵ *Id.* at 46-47.

²⁶ *Id.* at 52. Additionally, Applicant submitted with its reply brief printouts from VITACOST.COM, GNC.COM and NOWFOODS.COM in support of its assertion that food and supplements are sold together. 14 TTABVUE 5-6, 12-92. As noted, this evidence was not properly made of record and has not been considered.

beverages, and other foods products were not probative of the weakness of the opposer's mark where both parties used their marks on meat products). As the Federal Circuit explained in *Omaha Steaks*, third-party uses on different goods "are properly understood as having no real probative value for the analysis at hand, the evidentiary universe is much smaller." *Id.*; see *Nat'l Cable Television Ass'n v. Am. Cinema Eds.*, 937 F.2d 1572, 1579 (Fed. Cir. 1991) ("ACE for canned, large peas could not escape likelihood of confusion with a prior use of ACE for canned, small peas because ACE is concurrently used by unrelated third parties on aircraft, clothing, computer services, hardware or even bread, bananas, milk and canned carrots. Properly defined, the relevant public in the example need be defined no broader than purchasers of canned peas, and the third party ACE marks outside the segment become essentially irrelevant"); *Made in Nature*, 2022 WL 2188890, at *13 (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1328-29 (Fed. Cir. 2017)). As discussed below, the "evidentiary universe" of relevant third-party marks is very small here.

Applicant made of record just one relevant third-party registration, VINTAGE (Reg. No. 1994771), for a variety of goods including "pharmaceutical preparations ... dietary supplementation" which is, at least in-part, arguably the legal equivalent of Opposer's goods, "dietary and nutritional supplements." The remainder of the third-party registrations are for food and food products but not dietary or nutritional supplements and there is nothing in the record,²⁷ aside from attorney argument, that

²⁷ Applicant urges us to "take judicial notice that supplements are sold together with food and beverages, for example, grocery stores ... as well as convenience stores." 4 TTABVUE 6; 14 TTABVUE 6. We may take judicial notice, at any time in a proceeding, of facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be

food and food products are the legal equivalent of dietary or nutritional supplements. *See Cai*, 901 F.3d at 1371 (“Attorney argument is no substitute for evidence.”) (cleaned up). Also, although the VINTAGE registration for dietary supplementation has some characteristics similar to the Application and Cited Mark, the USPTO’s allowance of this prior third-party registration does not bind the Board; we must decide each application on its own merits. *See, e.g., In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (“Applicant’s allegations regarding similar marks are irrelevant because each application must be considered on its own merits.”).

Turning next to Applicant’s use evidence, Applicant submits four third-party Internet uses of VINTAGE listed below:

- VITAGE DIET TONIC WATER, INNIT.COM, for tonic water ;²⁸
- VINTAGE LABS, VINTAGELABSCOLLECTION.com, offering various supplements for sale such as adaptogen, biotin and B-complex;²⁹
- VINTAGE NUTRITIONS, VINTAGENUTRITION.com, offering various food products such as acai bowls, protein donuts and smoothies;³⁰ and
- VINTAGE VITAMINS, INDIAMART.com, offering a vitamin C “Nutritional Supplement.”³¹

reasonably questioned. For example, we may take judicial notice of dictionary definitions, encyclopedia entries, standard reference works, translation dictionaries and of commonly known facts. *See* TBMP §1208.04. These Internet printouts are not from sources from which we will rely upon to take judicial notice. As such, we do not take judicial notice that food and beverages are sold together with supplements; however, taking judicial notice that these items are sold together would not change our decision. As explained, the relevant universe of third-party marks and uses involves nutritional supplements.

²⁸ January 27, 2023 Request for Reconsideration at TSDR 21.

²⁹ *Id.* at 22.

³⁰ *Id.* at 23.

³¹ *Id.* at 24.

Of these third-party Internet uses, only two are for supplements. Further, the third-party Internet use, VINTAGE VITAMINS, lists the Internet address as: INDIAMART.com/PRODDetail/VINTAGE-VITAMINS-EFFERVESCENT-VITAMIN-C-D3-ZN-EXPORT-23460552230.HTML. This Internet address suggests that the product is an export but does not indicate to what country it can be exported. Further, there is no price listed or manner in which the product can be purchased. The record does not establish that INDIAMART.com sells VINTAGE VITAMINS in the United States.

One third-party registration and one to two possible third-party uses of varying probative value is “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant in both” *Jack Wolfskin and Juice Generation. In re Inn at St. John’s, LLC*, 2018 WL 2734893, at *4 (four third-party registrations and no third-party uses were “a far cry from the large quantum of evidence of third-party use and third-party registrations that was held to be significant” in *Jack Wolfskin and Juice Generation*). “[I]n *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record . . . and in *Jack Wolfskin*, there were at least fourteen.” *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 WL 6072822, at *13 n.20 (TTAB 2021) (six third-party registrations) (quoting *In re Morinaga Nyugyo K.K.*, Ser. No. 86338392, 2016 WL 5219811, at *9 n.8 (TTAB 2016)). As argued by the Examining Attorney, “the third-party use evidence submitted by [A]pplicant is not probative on whether a portion or all of the [Cited] [M]ark is commercially weak and entitled to a narrow scope of

protection.”³² Thus, Applicant has not shown that VINTAGE BURN has been weakened by third-party registrations or uses of similar marks.

The Cited Mark was registered on the Principal Register without a showing of acquired distinctiveness,³³ and it is presumed to be inherently distinctive for dietary and nutritional supplements. *Made in Nature*, 2022 WL 2188890, at *12 (citing *Tea Bd. of India v. Republic of Tea, Inc.*, 2006 WL 2460188, at *21 (TTAB 2006)). We afford the Cited Mark “the normal scope of protection to which inherently distinctive marks are entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 WL 6525233, at *9 (TTAB 2017).

The sixth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

C. 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 WL 6072822, at *13 (quoting *Palm Bay Imps.*, 396 F.2d at 1371). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *Inn at St. John’s*, 2018 WL 2734893, at *5 (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*, 901

³² 13 TTABVUE 6.

³³ May 19, 2022 Office Action at TSDR 9-11.

F.3d at 1373 (internal quotation omitted)). The marks “must be considered ... in light of the fallibility of memory” *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 685 (CCPA 1977)).

Because the goods are in-part, legally identical, “a lesser degree of similarity between the marks is required for confusion to be likely.” *Id.*, at *14 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992); *New Era*, 2020 WL 2853282, at *17).

“No element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 929 F.2d 645, 647 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 1298 (CCPA 1974)). “On the other hand, in articulating reasons for reaching a conclusion on the issue 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, provided the ultimate conclusion rests on consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir. 1985).

The involved standard characters marks are VINTAGE MUSCLE (MUSCLE disclaimed) and VINTAGE BURN. VINTAGE is the first part of the mark “and, as such, it is most likely to be impressed in purchasers’ memories.” *In re Dare Foods Inc.*, Ser. No. 88758625, 2022 WL 970319, at *6 (TTAB 2022) (citing *Detroit Athletic*

Co., 903 F.3d at 1303). As argued by the Examining Attorney, because both marks begin with VINTAGE and consumers are “generally more inclined to focus on the first word, prefix, or syllable,” the marks are confusingly similar.³⁴ See *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1372 (Fed. Cir. 2005) (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because “VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label”). Additionally, because MUSCLE is disclaimed, a concession that the term is not distinctive as applied to the goods identified in the Application, the term is entitled to less weight in our analysis. See *In re Six Continents Ltd.*, Ser. No. 88430142, 2022 WL 407385, at *8 (TTAB 2022) (disclaimer of SUITES in ATWELL SUITES mark “is a concession that ‘Suites’ is not inherently distinctive”); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (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 *In re Nat’l Data Corp.*, 753 F.2d 1056, 1060 (Fed. Cir. 1985)); see also *In re Dixie Rests., Inc.*, 105 F.3d 1405 (Fed. Cir. 1997) (DELTA, not the disclaimed term CAFÉ, is the dominant portion of the mark THE DELTA CAFÉ).

³⁴ 13 TTABVUE 4.

Applicant argues that, even in light of its disclaimer of MUSCLE, VINTAGE is not the dominant portion of the mark because other third-party registrations have disclaimed VINTAGE.³⁵

“Under Section 6(a) of the Trademark Act, 15 U.S.C. § 1056(a), an applicant may be required to disclaim an unregistrable component of a mark otherwise registrable. ‘The [USPTO] can condition the registration of a larger mark on an applicant’s disclaimer of an ‘unregistrable component of a mark otherwise registrable.’” *In re Lego Juris A/S*, Ser. No. 88698784, 2022 WL 1744613, at *2 (TTAB 2022) (quoting *In re La. Fish Fry Prods, Ltd.*, 797 F.3d 1332, 1335 (Fed. Cir. 2015) (quoting 15 U.S.C. § 1056(a)). Merely descriptive terms are unregistrable under Trademark Act Section 2(e)(1), 15 U.S.C. § 1052(e)(1), and are therefore subject to disclaimer if the mark is otherwise registrable. The third-party registrations submitted by Applicant which disclaim VINTAGE do so apparently because the term was determined to be an unregistrable component of those marks when applied to the goods and services identified. Simply because other entities disclaimed VINTAGE indicating the term is not distinctive of the goods and services identified in those registrations (which we note are not dietary or nutritional supplements) does not indicate that as to the goods identified in the Application and Registration, VINTAGE, is not distinctive. *See In re Shinnecock Smoke Shop*, 571 F.3d 1171, 1174 (Fed. Cir. 2009) (“[E]ach application must be considered on its own merits.”); *In re Boulevard Entm’t Inc.*, 334 F.3d 1336, 1343 (Fed. Cir. 2003) (“the PTO must decide each application on its own merits, and

³⁵ 6 TTABVUE 14.

decisions regarding other registrations do not bind either the agency or this court”) (citing *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001)); *Six Continents Ltd.*, 2022 WL 407385, at *8 (disclaimer “is a concession that [the term] is not inherently distinctive”).

Applicant attempts to distinguish the marks by arguing that they are “visually different, have differing sounds, commercial meanings, and impressions,”³⁶ noting that the marks have a different number of syllables;³⁷ and that in view of VINTAGE meaning “‘of old, recognized, and enduring interest, importance, or quality’ or ‘of the best and most characteristic,’”³⁸ the inclusion of MUSCLE gives the commercial impression of “something like ‘enduring **muscle**’, ‘quality **muscle**’, and/or ‘best **muscle**’” whereas the inclusion of BURN in the cited mark gives the commercial impression of “‘enduring **burn**’, ‘quality **burn**’, and/or ‘best **burn**.’”³⁹ Applicant’s arguments are unavailing.

The first thing seen and heard in the Cited Mark and in Applicant’s mark is the word VINTAGE, which sounds and appears identical in each mark. Applicant emphasizes the difference in syllables and additional terms, MUSCLE and BURN, but the Board has long recognized that consumers typically do not focus on such minutia in forming their general impressions of marks, or in comparing them. *See In*

³⁶ *Id.* at 10.

³⁷ *Id.* at 13.

³⁸ *Id.* at 14; see June 22, 2022 Office Action Response at TSDR 10, MERRIAM-WEBSTER.COM/DICTIONARY/VINTAGE.

³⁹ *Id.* at 10.

re John Scarne Games, Inc., 1959 WL 5901, at *1 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting—they are governed by general impressions made by appearance or sound, or both”). Moreover, likelihood of confusion is not necessarily avoided between otherwise confusingly similar marks merely by adding or deleting other matter. If a portion of both marks is the same, then the marks may be confusingly similar notwithstanding some differences. *See, e.g., Charger Ventures*, 64 F.4th at 1382 (“an additional word or component may technically differentiate a mark but do little to alleviate confusion”).

There is nothing in the record to suggest that VINTAGE will have a different meaning or connotation when applied to the identified goods in the Application and Cited Mark. Indeed, as argued by Applicant, VINTAGE would be perceived to mean enduring, quality or best in both marks.⁴⁰ The word VINTAGE will sound the same when the marks in the Application and Cited Mark are verbalized and will be the first word heard when the marks are verbalized. Because of the shared first term, the marks have similar sounds, appearances and connotations.

We have not ignored the differences between the terms MUSCLE and BURN, which obviously look and sound different and thus, differentiate the marks to some extent. However, particularly in view of the in-part identical goods, consumers familiar with the VINTAGE BURN mark who encounter Applicant’s VINTAGE MUSCLE mark may very well perceive Applicant’s mark as an extension of Registrant’s mark, with both emanating from a single source. *See Double Coin*

⁴⁰ *Id.*

Holdings Ltd. Tru Dev., Can. No. 92063808, 2019 WL 4877349, at *9 (TTAB 2019) (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR.”); *Gott Wines LLC v. Rehoboth Von Gott, Inc.*, Opp. No. 91197659, 2013 WL 5407313 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer.”).

Furthermore, while consumers viewing the marks side-by-side might very well notice that they contain different trailing terms, that is not how consumers typically encounter marks. “The 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.” *Coach Servs.*, 668 F.3d at 1368 (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, Can. No. 92041930, 2007 WL 749713, at *5 (TTAB 2007)). We must consider whether the differences between the marks’ non-dominant elements are “likely to be recalled by purchasers seeing the marks at spaced intervals,” i.e., consumers who encounter Registrant’s mark first, but do not encounter Applicant’s mark until later, or vice versa. *Grandpa Pidgeon’s of Mo., Inc. v. Borgsmiller*, 477 F.2d 586, 587 (CCPA 1973).

Here, because MUSCLE is second and disclaimed and thus, not distinctive, we find that consumers would likely disregard or forget that term, especially when we keep in mind: (1) “the fallibility of memory over a period of time;” and (2) that the “average” consumer “normally retains a general rather than a specific impression of

trademarks.” *Sealed Air Corp. v. Scott Paper Co.*, 1975 WL 20752, at *3 (TTAB 1975). *See also In re St. Helena Hosp.*, 774 F.3d at 751 (“marks must be considered in light of the fallibility of memory”) (citation, internal quotation marks, and ellipsis omitted). Moreover, consumers might shorten both marks to VINTAGE. *Hunter Indus., Inc. v. The Toro Co.*, Opp. No. 91203612, 2014 WL 1649332, at *11 (TTAB 2014); *In re Bay State Brewing Co., Inc.*, Ser. No. 85826258, 2016 WL 1045677, at *3 (TTAB 2016) (“we also keep in mind the penchant of consumers to shorten marks”); *Big M, Inc. v. U.S. Shoe Corp.*, Ser. No. 92012970, 1985 WL 71976, at *3 (TTAB 1985) (“we cannot ignore the propensity of consumers to often shorten trademarks”).

“[S]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d at 752 (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 1344 (Fed. Cir. 2003) (internal quotations omitted). There are some specific differences between the VINTAGE MUSCLE and VINTAGE BURN marks, but these differences are outweighed by the marks’ overall similarities. Considering the marks as a whole, we find them similar. Because of the overall similarities of the marks, consumers are likely to view Applicant’s VINTAGE MUSCLE mark as a variation of the Cited Mark, with both marks indicating a single source for the goods.

The first *DuPont* factor supports a conclusion that confusion is likely.

D. Purchasing Conditions

Applicant asserts that “[c]ustomers are likely to exercise additional care in purchase of supplements for personal health consumption (particularly so for

Applicant's amended goods: non-protein anabolic precursors and non-protein pro-hormone formulations)." ⁴¹ Applicant does not submit any evidence in support of this assertion but instead relies on *Miles Labs. Inc. v. Naturally Vitamin Supplements Inc.*, Opp. No. 91062820, 1986 WL 83319 (TTAB 1986). As noted above, "[a]ttorney argument is no substitute for evidence." *Cai*, 901 F.3d at 1371 (quotation omitted).

In *Miles Labs*, the Board found that "purchasers of vitamins are likely to exercise special care in making their product selections." *Miles Labs.*, 1986 WL 83319 at *5. However, the Board also explained that "we do not believe the fact that vitamin purchasers are careful determines whether source confusion is likely, i.e., whether a purchaser will believe, erroneously, that VIT-A-DAY and SUPER VIT-A-DAY vitamins have the same source of origin as ONE A DAY. Determination of the latter question is crucial in the instant case." *Id.*

Likewise, although consumers may exercise care in purchase nutritional supplements, the relevant question is whether confusion is likely if both Applicant and Registrant offer nutritional supplements under their VINTAGE-formative marks. While the degree of care exercised reduces the likelihood of confusion, it does not outweigh the similarity of the marks and the in-part identical nature of the goods. Moreover, even sophisticated buyers are not immune from confusion. *In re Decombe*, Ser. No. 73592586, 1988 WL 252337, at *3 (TTAB 1988).

We find this factor neutral in our analysis.

⁴¹ 6 TTABVUE 20.

E. Instances of Actual Confusion

Applicant contends that the marks have co-existed “for over three (almost four now) years”⁴² with no instances of confusion. However, in this *ex parte* proceeding, in which Registrant is not a participant and cannot respond to Applicant’s claims, Applicant’s uncorroborated statement⁴³ that there are no known instances of actual confusion is of little or no evidentiary value. *See In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003) (“uncorroborated statements of no known instances of actual confusion are of little evidentiary value”); *see also In re Bisset-Berman Corp.*, 476 F.2d 640, 642 (CCPA 1973) (stating that self-serving testimony of applicant’s corporate president’s unawareness of instances of actual confusion was not conclusive that actual confusion did not exist or that there was no likelihood of confusion). The lack of evidence of actual confusion carries little weight, *J.C. Hall Co. v. Hallmark Cards, Inc.*, 340 F.2d 960, 986 (CCPA 1965), especially in an *ex parte* context. Moreover, the record is devoid of probative evidence relating to the extent of use of Applicant’s and Registrant’s marks and, thus, whether there have been meaningful opportunities for actual confusion to have occurred in the marketplace. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 949 (Fed. Cir. 2000); *Gillette Canada Inc. v. Ranir Corp.*, Opp. No. 82769, 1992 WL 215312, at *6 (TTAB 1992).

⁴² 14 TTABVUE 10; *see* 6 TTABVUE 21.

⁴³ The only evidence submitted in support of this contention is the untimely submitted declaration of Applicant’s CEO, Jared Van Yperen. 6 TTABVUE 22-23. As noted, we have not considered this declaration.

Accordingly, the *DuPont* factor regarding the nature and extent of any actual confusion is neutral.

III. Summary

The in-part, legally identical nature of the goods identified in the Application and the Registration and their identical channels of trade and classes of purchasers, weigh heavily in favor of a finding of likelihood of confusion. The similarity of the marks weighs in favor of a likelihood of confusion; and the conceptual and commercial strength of the marks, the degree of consumer care and instances of actual confusion are neutral.

We conclude, based on the record as a whole and the applicable *DuPont* factors, that there is a likelihood of confusion.

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