

This Opinion is not a
Precedent of the TTAB

Mailed: September 30, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re New Roots Herbal Inc.

Serial No. 97205991

Bradley M. Stohry of Reichel Stohry Dean LLP,
for New Roots Herbal Inc.

Kelly Neal, Trademark Examining Attorney, Law Office 105,
Jennifer Williston, Managing Attorney.

Before Goodman, English and Thurmon,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

New Roots Herbal Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark PROBIOTIC INTENSITY (PROBIOTIC disclaimed) for

Dietary and nutritional supplements containing probiotics for humans; Probiotic supplements for humans in International Class 5.¹

¹ Application Serial No. 97205991 was filed on January 6, 2022, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere at least as early as March 2014, and first use in commerce since at least as early as February 2021.

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of likelihood of confusion with the following registered mark: INN TENSITY (in standard characters) for "dietary supplements" in International Class 5.²

When the refusal was made final, Applicant requested reconsideration which the Examining Attorney denied.³

Applicant then appealed and made a second request for reconsideration, providing additional evidence. After the Examining Attorney denied the second request for reconsideration, the appeal was resumed and fully briefed.

We affirm the refusal to register.

I. Likelihood of Confusion

Section 2(d) of 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

Page references to the application record are to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. Citations to the briefs refer to TTABVUE, the Board's online docketing system. *See Turdin v. Trilobite, Ltd.*, Conc. Use. No. 94002505, 2014 TTAB LEXIS 17, at *6 n.6 (TTAB 2014). Applicant's brief is at 6 TTABVUE and reply brief is at 9 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

This opinion cites to the Federal Reporter (e.g., F.2d, F.3d or F.4th) for decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals and cites to the LEXIS database for decisions of the Board. When available, the serial or proceeding number is provided. The TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 (2024) provides information about recommended citation forms.

² Registration No. 5054514, issued October 4, 2016.

³ The Examining Attorney had also refused registration under Section 2(d) based on three registrations owned by a different Registrant (Registration Nos. 6019998, 6108705, and 6148337) for vitamin and mineral and feed supplements for wildlife. November 24, 2022 Office action at TSDR 2. On reconsideration, the Examining Attorney withdrew the refusal based on these registrations. December 5, 2023 Denial of reconsideration at TSDR 1-2.

goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under § 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, 1361 (CCPA 1973) (“*DuPont*”). See also *In re Majestic Distilling Co.*, 315 F.3d 1311, 1315 (Fed. Cir. 2003). 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 re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, at *2 (TTAB 2019).

In every § 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. See *In re i.am.symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1165 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”). These factors, and others, are discussed below.

A. Similarity or Dissimilarity of the Goods, Channels of Trade and Classes of Consumers

We first consider the second and third *DuPont* factors, “[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.”⁴ *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018) (quoting *DuPont*, 476 F.2d at 1361). Our analysis under these factors is based on the identifications of goods in the application and the cited registration. *Id.*; *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014). “It 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.” *In re Aquamar, Inc.*, Ser. No. 85861533, 2015 TTAB LEXIS 178, at *9 n.5 (TTAB 2015) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981)).

Applicant’s goods are “Dietary and nutritional supplements containing probiotics for humans; Probiotic supplements for humans.” The goods in Registration No. 5054514 are “Dietary supplements.”

Applicant’s dietary supplements containing probiotics for humans are encompassed by Registrant’s more broadly stated “dietary supplements.” *In re Hughes Furniture Indus.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at *10 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Therefore, the goods are legally identical in part.

As to trade channels, because of the in part legal identity of the goods, we must presume that those legally identical goods would be offered in the same trade channels and to the same classes of purchasers. *In re Viterra Inc.*, 671 F.3d 1358,

⁴ Applicant did not address either factor in its brief.

1362 (Fed. Cir. 2012) (even though there was no evidence regarding channels of trade and classes of consumers, the Board was entitled to rely on this legal presumption in determining likelihood of confusion); *Am. Lebanese Syrian Assoc. Charities Inc. v. Child Health Rsch Inst.*, Opp. No. 91190361, 2011 TTAB LEXIS 260, at *14 (TTAB 2011) (channels of trade and classes of consumers the same for legally identical services) (citations omitted).

B. Strength or Weakness of the Cited Mark

We next consider Applicant's contention that the cited mark is weak under the sixth *DuPont* factor because the cited mark "coexists both on the Principal Register and [in] the market with numerous similar marks that contain the terms INTESITY [sic], INTENSE, INTENSIVE and INTENSIFY."⁵ See *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) ("There are two prongs of analysis for a mark's strength under the sixth factor: conceptual strength and commercial strength."); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength"); *In re FCA US LLC*, Ser. No. 85650654, 2018 TTAB LEXIS 116, at *37-41 (TTAB 2018)

⁵ 6 TTABVUE 4. In an ex parte appeal, the owner of the cited registration is not a party, and the examining attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. See *In re Integrated Embedded*, Ser. No. 86140341, 2016 TTAB LEXIS 470, at *26 (TTAB 2016); *In re Thomas*, Ser. No. 78334625, 2006 TTAB LEXIS 135, at *18 n.11 (TTAB 2006) (fame is not normally a factor in ex parte proceedings). For that reason, in an ex parte appeal the fame of the mark under the fifth *DuPont* factor is treated as neutral when no evidence as to fame has been provided. TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(d)(ix) (May 2024). Because there is no evidence of fame in the record, the fifth factor is neutral in the analysis.

(considering applicant's evidence and arguments in ex parte proceeding that cited mark was conceptually and commercially weak).

To determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. *See generally Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210-11 (2000) (word marks registered without a claim of acquired distinctiveness that are arbitrary, fanciful or suggestive are “held to be inherently distinctive.”); *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 1332 (Fed. Cir. 2003) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992)).

The cited mark is registered on the Principal Register without a claim of acquired distinctiveness and thus is inherently distinctive. *Tea Bd. of India v. Republic of Tea, Inc.*, Opp. No. 91118587, 2006 TTAB LEXIS 330, at *62 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods”).⁶ Nonetheless, we may consider whether the cited mark is “weak as a

⁶ To the extent that Applicant argues INN TENSITY is descriptive, we construe Applicant's arguments in this regard not as an impermissible collateral attack on the cited registration, which contains no Section 2(f) claim and is inherently distinctive, but rather as support for its position that the cited mark INN TENSITY is weak and entitled only to a narrow scope of protection. *See Sage Therapeutics, Inc. v. SageForth Psychological Servs., LLC*, Opp. No. 91270181, 2024 TTAB LEXIS 139, at *27-28 (TTAB 2024) (“Applicant's third-party evidence may be relevant to show where, within the range of inherently distinctive marks, the SAGE CENTRAL mark belongs, but we cannot find the mark merely descriptive given its [a Principal Register] registration [without a claim of acquired distinctiveness].”); *see also In re Fiesta Palms, LLC*, Ser. No. 76595049, 2007 TTAB LEXIS 51, at *9 (TTAB 2007) (“inasmuch as the cited mark is registered on the Principal Register, we must assume that it is at least suggestive”).

source indicator” in the course of the *DuPont* analysis. *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, at *23 (TTAB 2016).

In connection with evaluating the cited mark’s conceptual strength, active third-party registrations may be used in the manner of dictionary definitions to show that a term has some significance in a particular field. *See Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”). *See also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015) (“Third-party registrations are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.”); *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1374 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’”) (quoting *Juice Generation*); *In re Guild Mortg.*, Ser. No. 86709944, 2020 TTAB LEXIS 17 at *10 (TTAB 2020) (same).

Applicant challenges the conceptual strength of the cited mark INN TENSITY by arguing that its phonetic equivalent, INTENSITY, or variants, is conceptually weak because it is a commonly registered term.⁷ Although there is no correct pronunciation of a trademark that is not a known word, *In re Belgrade Shoe Co.*, 411 F.2d 1352,

⁷ Applicant asserts that INN TENSITY is a misspelling. 6 TTABVUE 6.

1353 (CCPA 1969), and it is not possible for a trademark owner to control how purchasers will vocalize its mark, *Centraz Indus., Inc. v. Spartan Chem. Co.*, Opp. No. 91159335, 2006 TTAB LEXIS 20, at *10 (TTAB 2006), here we find that INN TENSITY is the phonetic equivalent of the term INTENSITY. *See In re Strathmore Prods.*, 1962 TTAB LEXIS 161, at *3 (TTAB 1962) (GLISTEN is phonetically identical to the registered mark GLISS'N, which is a contraction of the word glisten, and the marks have the same meaning); *see also W. Chem. Prods., Inc. v. W. Chem. Co.*, 1964 TTAB LEXIS 155, at *3-4 (TTAB 1964) (BRIGHT, or the phonetic equivalents BRITE and BRYTE, are relevant to the question of suggestiveness of the term BRIGHT in connection with cleaning and polishing preparations).

Applicant argues that the word INTENSITY (and formatives thereof) is “highly suggestive, if not outright descriptive” of Registrant’s goods and “describes or suggests supplements that are used to help with or fuel ‘intense’ workouts.”⁸ In support, Applicant made of record copies of nine third-party use-based registrations, owned by seven entities, containing INTENSITY, or variants, as a component of marks, covering dietary, and/or nutritional supplements, or vitamin supplements.⁹

⁸ 6 TTABVUE 4-5.

⁹ January 8, 2024 Request for Reconsideration, at TSDR 9-60 (copies of eight of the nine registrations); December 12, 2022 Response to Office Action, at TSDR 20-24 (copy of Reg. No. 5544392). *See also* chart at 6 TTABVUE 4. Applicant also submitted into the record the now cancelled Registration No. 5184483 INTENSE ENERGY SHOTS and design but does not rely on this registration in its brief.

Mark/Reg. No.	Goods	Owner
WHEN LIFE DEMANDS INTENSITY Reg. No. 5680315	Dietary and nutritional supplements	Vitargo, Inc.
PEANUT BUTTER INTENSITY Reg. No. 6019998	Vitamin and mineral supplements for wildlife; feed supplements for wildlife	Kalmbach Feeds, Inc.
SWEET APPLE INTENSITY Reg. No. 6108705	Vitamin and mineral supplements for wildlife; feed supplements for wildlife	Kalmbach Feeds, Inc.
PERSIMMON INTENSITY Reg. No. 6148337	Vitamin and mineral supplements for wildlife; feed supplements for wildlife	Kalmbach Feeds, Inc.
POWERED BY IN10SITY FITNESS UNITED and Design Reg. No. 5773932	Dietary supplements	Reginald Brown
INTENSE DEFENSE Reg. No. 5360151	Probiotic supplements; Nutritional supplements, namely, probiotic compositions	Lovebug Nutrition, Inc.
INTENSE SEED NUTRITION Reg. No. 5446644	Nutritional supplements	Innovative Food Prospects, LLC
INTENSIVE NUTRITION Reg. No. 5544392	Health food supplements; Vitamin supplements; Vitamins	Intensive Nutrition Incorporated
INTENSIVE BOWEL SUPPORT Reg. No. 4130573	Dietary supplement	RB Health (US) LLC

Three of these registrations (Reg. Nos. 6019998, 6108705, and 6148337) identify supplements “for wildlife.” While the cited mark broadly identifies “dietary supplements,” which could include supplements both “for humans” and “for wildlife,” Applicant’s supplements are specifically “for humans.” There is no evidence in the record that supplements for wildlife are offered to the same consumers as supplements for humans. Because the goods in the application and cited registration are legally identical, we consider those third-party registrations that include dietary

supplements for humans most relevant. *See Omaha Steaks Int'l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1325 (Fed. Cir. 2018), quoting *Nat'l. Cable Tel. Ass'n v. Am. Cinema Editors, Inc.*, 937 F.2d 1572, 1579-80 (Fed. Cir. 1991) (“[T]he present analysis [under the sixth factor] only involves goods like those being offered by the parties to the ‘relevant public,’ while third-party use outside of that relevant market is meaningless.”); *Sage Therapeutics*, 2024 TTAB LEXIS 139, at *30 (“we must narrow the field of relevant third-party uses and registrations to services that are similar to those offered under the marks at issue in this case”). Accordingly, these three registrations owned by the same entity are not probative of the strength of the cited mark in the relevant market.

With respect to the remaining six registrations, we take judicial notice of the dictionary definitions for INTENSITY, INTENSE and INTENSIVE.¹⁰ *See In re Guild Mortg.*, 2020 TTAB LEXIS 17, at *6 (taking judicial notice of the dictionary definition of the word GUILD in connection with analyzing conceptual weakness); *see also Bell's Brewery, Inc. v. Innovation Brewing*, Opp. No. 91215896, 2017 TTAB LEXIS 452, at *17-19 (TTAB 2017) (in connection with opposer's marks INSPIRED BREWING and BOTTLING INNOVATION SINCE 1985 and the sixth *DuPont* factor, the Board considered third-party marks containing component terms INSPIRED, INSPIRE and

¹⁰ The Board may take judicial notice of dictionary definitions, including definitions or entries from references that are the electronic equivalent of a print reference work. *See Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, Opp. No. 91061847, 1982 TTAB LEXIS 146, at *7 (TTAB 1982), *aff'd*, 703 F.2d 1372 (Fed. Cir. 1983); *In re Red Bull GmbH*, Ser. No. 75788830, 2006 TTAB LEXIS 136, at *8-9 (TTAB 2006) (online dictionaries that exist in printed format or regular fixed editions).

INSPIRATION or INNOVATION, INNOVATIONS and INNOVATIVE); *Ferro Corp. v. Martin-Marietta Corp.*, 1969 TTAB LEXIS 190, at *12-13 (TTAB 1969) (in connection with opposer’s ELECTRO mark and the sixth *DuPont* factor, the Board considered evidence of variants LECT, LECTRO, ELECTRO, ELECTRA (third-party registration evidence), ELECTRO, ELECTRA, ELECTRIC, ELECTRICAL (trade name evidence), and dictionary definition for ELECTRO). INTENSITY is defined as “the quality or state of being intense especially: extreme degree of strength, force, energy, or feeling.”¹¹ INTENSE is defined as “existing in an extreme degree.”¹² INTENSIVE is defined as “of, relating to, or marked by intensity or intensification: such as highly concentrated.”¹³ The cited mark, INN TENSITY, as the phonetic equivalent of INTENSITY, has the connotation of extreme degree of strength, force or energy.

The submitted third-party registrations include additional terms. But the component terms INTENSITY, INTENSE and INTENSIVE in these third-party registrations still suggest an “extreme degree of strength, force or energy” in connection with the properties of the dietary or nutritional supplements or their effects on the user. In that respect, the third-party registrations are similar in connotation to INN TENSITY. We find the six registrations covering dietary, nutritional or vitamin supplements probative. Also probative of the conceptual

¹¹ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed September 19, 2024).

¹² *Id.*

¹³ *Id.*

strength of the cited mark is Applicant's evidence of third-party use of the marks: INTENSITY, INTENSITY LABS and INTENSITY LIFE (all by the same user); MULTI INTENSE; and INTENSIFY, all for dietary supplements.¹⁴ *See e.g., Land-O-Nod Co. v. Paulison*, Opp. No. 91064130, 1983 TTAB LEXIS 77, *15-16 (TTAB 1983) (common use and/or registration by third-parties of the term CHIRO, a shortened form of chiropractic or chiropractor, suggests a "highly desirable association between a bedding product and chiropractic or the chiropractic profession").

The third-party registration and use evidence and dictionary definitions demonstrate that INTENSITY and variants are somewhat suggestive of the nature or purpose of Registrant's "dietary supplements," evidencing some conceptual weakness of the cited mark.¹⁵

The only evidence of commercial weakness is the three third-party uses noted above: INTENSITY, INTENSITY LABS and INTENSITY LIFE (all by the same user); MULTI INTENSE; and INTENSIFY, all for dietary supplements.¹⁶ Applicant argues, based on this evidence, that the cited mark is commercially weak.¹⁷ While this third-party use evidence has some probative value, it is a more modest showing than found probative in other cases. *Compare In re Charger Ventures LLC*, 64 F.4th 1375, 1383 (Fed. Cir. 2023) (twenty-four third-party uses of SPARK-formative marks

¹⁴ January 8, 2024 Request for Reconsideration, at TSDR 62-68.

¹⁵ Our finding on this factor would remain the same even if we included Registration Nos. 6019998, 6108705, and 6148337 in our consideration of relevant registrations.

¹⁶ January 8, 2024 Request for Reconsideration, at TSDR 62-68.

¹⁷ 6 TTABVUE 6.

probative of weakness); *Juice Generation*, 794 F.3d at 1338-39 (approximately 26 third-party registrations and uses in connection with restaurant services or food products incorporating the phrase “peace, love” followed by a product-identifying term found probative of weakness) *with In re FabFitFun, Inc.*, 2018 TTAB LEXIS 297, at *13-14 (finding 10 uses of SMOKIN’ HOT “reflects a more modest amount of [third-party use] evidence than that found convincing in *Jack Wolfskin* and *Juice Generation* wherein ‘a considerable number of third parties’ use [of] similar marks was shown.”) (citations omitted). *See also Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, Opp. No. 91217095, 2016 TTAB LEXIS 604, at *12-20 (TTAB 2016) (at least 85 uses of rose-formative marks for senior living communities and related services and eight registrations were in the record evidencing weakness); *In re Broadway Chicken Inc.*, Ser. No. 74326626, 1996 TTAB LEXIS 2, at *5-9, 19 (TTAB 1996) (“Broadway” is weak for restaurant services based on evidence that hundreds of restaurants and eating establishments use Broadway as a trademark or trade name).

Given the quantitative limitations of the third-party use evidence, and the absence of evidence regarding the extent of use of these marks, there is little indication of commercial weakness of the cited mark in connection with dietary supplements. *See In re FCA US LLC*, 2018 TTAB LEXIS 116, at *39-41 (two automotive conversion marks using the term MOAB from district court case and three examples of use of the term MOAB provided by applicant were “little indication of commercial weakness”).

We find the cited mark INN TENSITY (the phonetic equivalent of INTENSITY) has some conceptual weakness and is suggestive. We further find Applicant has failed to demonstrate that the cited mark is commercially weak due to third-party marketplace use.

Considering the evidence as a whole, pertaining to both conceptual and commercial strength, we thus accord the cited mark the normal scope of protection of a suggestive mark. *Sage Therapeutics*, 2024 TTAB LEXIS 139, at *35 (“The mark is less conceptually strong than an arbitrary mark, but suggestive marks are inherently distinctive and entitled to protection.”); *Husky Oil Co. of Del. v. Huskie Freightways, Inc.*, Opp. No. 91051577, 1972 TTAB LEXIS 270, at *3 (TTAB 1972) (“While ‘HUSKY’ might be somewhat suggestive of strength, this factor does not necessarily make it a ‘weak’ mark entitled to a limited scope of protection.”).

C. Similarity or Dissimilarity of the Marks

In analyzing the similarity of the marks, we compare the marks “in their entireties as to appearance, sound, connotation and commercial impression” to determine the similarity or dissimilarity between them. *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1371 (Fed. Cir. 2005) (quoting *DuPont*, 476 F.2d at 1361). The test, under the first *DuPont* factor, is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods or services offered under the respective marks is likely to result. *Coach Servs. Inc. v. Triumph Learning, LLC*, 668

F.3d 1356, 1368 (Fed. Cir. 2012) (quoting *Leading Jewelers Guild, Inc. v. LJOW Holdings, LLC*, Opp. No. 91160856, 2007 TTAB LEXIS 35, at *14 (TTAB 2007)). Although the marks at issue must be considered in their entirety, it is well-settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the overall commercial impression created by the mark. See *In re Chatam Int'l Inc.*, 380 F.3d 1340, 1343-44 (Fed. Cir. 2004); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058-59 (Fed. Cir. 1985).

Descriptive or generic terms in a mark are often less significant in creating the mark's commercial impression and generally given less weight. See *In re Nat'l Data Corp.*, 753 F.2d at 1060 (“a descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion”); *In re Code Consultants Inc.*, Ser. No. 7564560, 2001 TTAB LEXIS 685, at *12 (TTAB 2001). We also keep in mind that “[w]hen marks would appear on virtually identical goods . . . , as is the case here, the degree of similarity necessary to support a conclusion of likely confusion declines.” *In re Max Capital Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, at *17 (citing *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 877 (Fed. Cir. 1992)). See also *In re Mighty Leaf Tea*, 601 F.3d 1342, 1348 (Fed. Cir. 2010) (same).

Applicant's mark is PROBIOTIC INTENSITY. The registered mark is INN TENSITY. Applicant's mark and the cited mark are in standard characters, which means that either mark can be depicted in any font style, size, or color. Trademark

Rule 2.52(a), 37 C.F.R. § 2.52(a). Applicant's mark could therefore be displayed in a font style, size or color similar to Registrant's mark.

Applicant argues that its mark and the cited mark create different commercial impressions because “[w]hile the INN TENSITY mark suggests a supplement that can be used to fuel an intense workout, the PROBIOTIC INTENSITY mark suggests a supplement product that is loaded with probiotics.”¹⁸ Applicant also argues that the marks differ in sound and appearance, referencing the “unique spelling” of INN TENSITY as “two separate words;” and that its own mark is “led by the term ‘PROBIOTIC.’”¹⁹ We are not persuaded by these arguments.

As previously discussed, INN TENSITY is the phonetic equivalent of INTENSITY. Applicant's mark incorporates the phonetic equivalent of the cited mark in its entirety. Likelihood of confusion is often found where the entirety of one mark, or its phonetic equivalent, is incorporated within another. *See, e.g. In re South Bend Toy Mfg. Co.*, 1983 TTAB LEXIS 215, at *3-4 (TTAB 1983) (LIL' LADY BUGGY for toy doll carriages and LITTLE LADY for doll clothing); *see also In re Denisi*, Ser. No. 73324883, 1985 TTAB LEXIS 107, at *2 (TTAB 1985) (PERRY'S PIZZA for restaurant services specializing in pizza and PERRY'S for restaurant and bar services); *Johnson Publ'g Co. v. Int'l Dev. Ltd.*, Opp. No. 91063170, 1982 TTAB LEXIS 25, at *5 (TTAB 1982) (EBONY for cosmetics and EBONY DRUM for hairdressing and conditioner). *see also Stone Lion Capital Partners*, 746 F.3d at 1321-22 (affirming Board's finding

¹⁸ 6 TTABVUE 9.

¹⁹ 6 TTABVUE 9; 9 TTABVUE 6.

that the mark STONE LION CAPITAL incorporated the entirety of the registered marks LION CAPITAL and LION, that the noun LION was the dominant part of both parties' marks, and that confusion was likely)

Applicant's mark leads with PROBIOTIC. While the first literal term in a mark is typically the one which creates the strongest impression, "this is not always the case, and disclaimed or descriptive terms may be considered less significant features of the mark, even when they appear first." *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, at *45 (TTAB 2023) (citation omitted). PROBIOTIC is a generic or descriptive term used in the identification itself to describe Applicant's supplements, and is disclaimed, and thus is less significant in creating the mark's commercial impression. *See id.* at *47 ("the term ICE in Applicant's mark appears in the recitation of services, and is descriptive and disclaimed") (citing *In re Taylor & Francis (Publ'rs), Inc.*, Ser. No. 75229157, 2000 TTAB LEXIS 380, at *5 (TTAB 2000) (use of the word "psychology" in the identification demonstrated that the word was merely descriptive)). *See also In re Dixie Rests., Inc.*, 105 F.3d 1405, 1407 (Fed. Cir. 1997) (disclaimed matter that is descriptive of or generic for a party's goods or services is typically less significant or less dominant when comparing marks); *In re Allegiance Staffing*, Ser. No. 85663950, 2015 TTAB LEXIS 180, at *11 (TTAB 2015) ("Because descriptive words have little source-indicating significance, it is appropriate that we give less weight"). The second term in Applicant's mark—INTENSITY—is the dominant feature of Applicant's mark and entitled to more weight in the analysis.

As to the cited mark, INN TENSITY, “inn” is a known word that means “an establishment for the lodging and entertaining of travelers.”²⁰ Nonetheless, consumers are unlikely to perceive this meaning inasmuch as it makes little sense in the overall mark INN TENSITY. Rather, the use of the double “N” and the space before “TENSITY” appears to be intended to amplify the pronunciation of the overall mark, underscoring the product’s intensity and thus the meaning and commercial impression of the cited mark as the phonetic equivalent of “intensity.”

Further, the space between INN and TENSITY and the extra letter “N” does not meaningfully distinguish it in appearance from INTENSITY in Applicant’s mark. Slight differences in spelling or spacing are not significant distinctions. *See In re Peace Love World Live, LLC*, Ser. No. 86705287, 2018 TTAB LEXIS 220, at *23 (TTAB 2018) (I LOVE YOU and I LUV U “share the same structure, sound alike, mean the same thing and engender the same commercial impression”); *Mag Instr. Inc. v. Brinkmann Corp.*, Opp. No. 91163534, 2010 TTAB LEXIS 322, at *36-37 (TTAB 2010) (slight differences in marks do not normally distinguish them; difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *Giersch v. Scripps Networks, Inc.*, Can. No. 92045576, 2009 TTAB LEXIS 72, at *18 (TTAB 2009) (“DESIGNED2SELL is phonetically identical to respondent’s mark DESIGNED TO SELL . . . the spaces that respondent places between the words do not create a distinct commercial impression”); *In re Great Lakes Canning, Inc.*, Ser. No. 73365360, 1985 TTAB LEXIS 75, at *6 (TTAB 1985) (CAYNA is similar to CANA); *In re Best W.*

²⁰ MERRIAM-WEBSTER DICTIONARY (merriam-webster.com, accessed September 23, 2024).

Family Steak House, Inc., Ser. No. 73315241, 1984 TTAB LEXIS 173, at *1 (TTAB 1984) (“There can be little doubt that the marks [BEEFMASTER and BEEF MASTER] are practically identical”); *In re Energy Telecomms. & Elec. Ass’n*, Ser. No. 73286178, 1983 TTAB LEXIS 233, at *4 (TTAB 1983) (ENTELEC is similar to INTELECT); *RE/MAX of America, Inc. v. Realty Mart, Inc.*, 1980 TTAB LEXIS 34, at *12 (REMACS and RE/MAX “indistinguishable in sound” and confusingly similar). Despite the presence of the first word PROBIOTIC in Applicant’s mark, the marks overall are quite similar in appearance, with consumers likely to focus on the suggestive word INTENSITY in Applicant’s mark.

The marks in their entirety also share some similarity in sound as the second word INTENSITY in Applicant’s mark and INN TENSITY, the entirety of Registrant’s mark, are phonetic equivalents. See *In re Viterra*, 671 F.3d at 1367 (XCEED and X-SEED similar); *Shenzhen IVPS Tech. Co. v. Fancy Pants Prods., LLC*, Opp. No. 91263919, 2022 TTAB LEXIS 383, at *57-58 (TTAB 2022) (SMOK, the phonetic equivalent of “smoke,” is similar in pronunciation and conveys a similar or identical meaning to SMOKES, the literal portion of applicant’s composite mark).

With respect to connotation and commercial impression, both Applicant’s mark and the cited mark connote a product with “intensity,” whether that be probiotic “intensity” or workout “intensity.” Further, when we take into account the fallibility of memory, consumers are left with the same general commercial impression of “intensity.” *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014).

When we compare the marks INN TENSITY and PROBIOTIC INTENSITY in their entireties, we find that the strong similarities between the marks in overall appearance, sound, connotation and commercial impression outweigh the differences.

II. Conclusion

The first *DuPont* factor weighs in favor of likelihood of confusion. The second and third *DuPont* factors weigh heavily in favor of likelihood of confusion. *See In re Bay State Brewing Co.* Ser. No. 85826258, 2016 TTAB LEXIS 46, at *4-5 (TTAB 2016) (“The identity in the goods and trade channels therefor, and the overlap in purchasers, are factors that weigh heavily in favor of a finding of likelihood of confusion”). INN TENSITY, the phonetic equivalent of INTENSITY, is conceptually suggestive of dietary supplements, and there is little indication of commercial weakness. The sixth *DuPont* factor weighs slightly against likelihood of confusion but does not outweigh the other factors. We find confusion is likely.

Decision: The refusal to register Applicant’s mark PROBIOTIC INTENSITY is affirmed.