

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Oral Hearing: May 14, 2025

Mailed: June 3, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Natrol LLC

Serial Nos. 98027771, 98027798, 98027815, 98029191, and 98029200

John L. Cordani, of Robinson & Cole LLP,
for Natrol LLC.

Mary O'Neill, Trademark Examining Attorney, Law Office 120,
David Miller, Managing Attorney.

Before Lebow, Elgin, and Bradley,
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

I. Background

Natrol LLC (“Applicant”) seeks registration on the Principal Register of the following stylized marks for goods identified as “Vitamins; Dietary and nutritional supplements,” in International Class 5:¹

¹ Ser. Nos. 98027771, 98027798, and 98027815 were filed on June 5, 2023, and Ser. Nos. 98029191 and 98029200 were filed on June 6, 2023, all under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s bona fide intent to use the marks in commerce. The mark in Ser. No. 98027771 is described as “the stylized word SLEEP with a

Sleep+

— Ser. No. 98027771, SLEEP disclaimed;

**Sleep+
Recovery**

— Ser. No. 98029200, SLEEP and RECOVERY disclaimed;

**Sleep+
Beauty**

— Ser. No. 98027798, SLEEP and BEAUTY disclaimed;

**Sleep+
Calm**

— Ser. No. 98027815, SLEEP and CALM disclaimed; and

**Sleep+
Immune
Health**

— Ser. No. 98029191, SLEEP and IMMUNE HEALTH disclaimed.

The Examining Attorney has refused registration of Applicant's marks under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that, as applied to the goods identified in the applications, they so resemble the registered standard

plus design to the right." The mark in Ser. No. 98029200 is described as "the stylized words SLEEP RECOVERY with a plus design on the right of the word SLEEP." The mark in Ser. No. 98027798 is described as "the stylized words SLEEP BEAUTY with a plus design to the right of the word SLEEP." The mark in Ser. No. 98027815 is described as "the stylized words SLEEP CALM with a plus design on the right side of the word SLEEP." The mark in Ser. No. 98029191 is described as "the stylized words SLEEP IMMUNE HEALTH with a plus design to the right of the word SLEEP."

The cases were consolidated by Board order on February 11, 2025, and were briefed together after that point. 7 TTABVUE. Except for the differences in Ser. No. 98027798, as discussed *infra* in note 2, the briefs and records are almost identical in substance. Thus, except as noted, citations in this opinion to the prosecution record refer to the .pdf version in the TSDR system, and citations to the briefs in the appeal record refer to the Board's TTABVUE docket system, for Ser. No. 98027771. *See In re Integra Biosciences Corp.*, Ser. No. 87484450, 2022 TTAB LEXIS 17, *6 (TTAB 2022). Pursuant to an internal Board pilot citation program, case citations in this opinion are in the form recommended in TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a)(2). This opinion cites decisions of the Board in the LEXIS legal database.

character mark SLEEP PLUS (SLEEP disclaimed) for the following goods in International Class 3, as to make confusion likely:²

[P]erfumery; fragrances; room fragrances; household fragrances; aromatics for fragrances, namely, pillow sprays, body spray, linen sprays and room sprays; bath oils massage preparations, namely, massage oils, and lotions; essential oils; cosmetic preparations; non-medicated skin care preparations; cosmetic preparations for body care; skin lotions, skin creams, skin moisturisers.

When the refusals were made final,³ Applicant filed appeals in each case, which are now fully-briefed.⁴ Counsel for Applicant and the Examining Attorney appeared at an oral hearing before the panel on May 14, 2025. We have reviewed all of the evidence and arguments of record, although we do not necessarily address all of them in this opinion.

For the reasons set forth below, we affirm the refusals to register.

² Reg. No. 4917238, registered March 15, 2016; Declarations of Use and Incontestability under Trademark Act Sections 8 and 15, 15 U.S.C. § 1058 and 1065, accepted and acknowledged. The Examining Attorney did not list the goods depicted in double parenthesis in the USPTO's Trademark system, although they remain in the cited registration, but she acknowledged certain of these goods in her argument. 8 TTABVUE 3, 8-11. *See generally* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1402.12 (May 2025) ("The Post Registration Section ... uses double parentheses to indicate that certain goods or services are not claimed in an affidavit of incontestability under 15 U.S.C. §1065.").

Applicant argued against an additional cited registration, Reg. No. 6465434, in its appeal brief for the application for the mark SLEEP + BEAUTY. *See* Ser. No. 98027798, 4 TTABVUE 5, 13-15. The Examining Attorney did not address this argument in her consolidated brief, and at oral hearing confirmed that she was withdrawing the refusal based on that cited registration. Accordingly, we consider this ground for refusal to have been withdrawn.

³ December 6, 2024 Final Office Action.

⁴ *See supra* note 2. Applicant's Brief and Reply Brief are at 4 and 9 TTABVUE. The Examining Attorney's Brief is at 8 TTABVUE.

II. Likelihood of Confusion

“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, mistake, or to deceive.’” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (quoting Section 2(d)). Our determination 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*”); *see also Charger Ventures*, 64 F.4th at 1379. “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 988 (Fed. Cir. 2020) (citation omitted).

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].” *Monster Energy Co. v. Lo*, Opp. No. 91225050, 2023 TTAB LEXIS 14, *18 (TTAB 2023) (citing *Federated Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 1103 (CCPA 1976)). These factors, and others, are discussed below.

A. Strength of the Cited Mark

Because it may affect the scope of protection to which the cited mark SLEEP PLUS is entitled, and because it is central to Applicant’s arguments, we turn first to the

question of the strength or weakness of Registrant's mark. We may consider two types of strength: the inherent or conceptual strength of the mark based on the nature of the mark itself and its commercial strength based on marketplace recognition of the mark. *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength ... and its marketplace strength"). In this case, Applicant argues only that SLEEP PLUS is an inherently weak mark which should be afforded a narrow scope of protection.⁵

Conceptual or inherent strength is a measure of a mark's distinctiveness. *Chippendales*, 622 F.3d at 1353-54. "Marks are often classified in categories of generally increasing distinctiveness[:] (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). "[T]he strength of a mark is not a binary factor" and instead "varies along a spectrum from very strong to very weak." *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (internal citations omitted).

The cited registration issued on the Principal Register without a claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). We presume, therefore, that the cited mark as a whole is inherently distinctive for Registrant's goods. *Tea v. Republic of Tea*, Opp. No. 91118587, 2006 TTAB LEXIS 330, *62 (TTAB 2006) ("A mark that is registered on the Principal Register is entitled

⁵ See 4 TTABVue 10-11. Because this is an ex parte proceeding, we would not expect the Examining Attorney to submit evidence of fame of the cited mark under the fifth *DuPont* factor. *DuPont*, 476 F.2d at 1361. This factor, as is normally the case in ex parte proceedings, is treated as neutral. See *In re Thomas*, Ser. No. 78334625, 2006 TTAB LEXIS 135, *18 n.11 (TTAB 2006).

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.”).

Nonetheless, we may consider whether an inherently distinctive mark, or a portion thereof, is “weak as a source indicator” in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 TTAB LEXIS 150, *23 (TTAB 2016). “Marks that are descriptive or highly suggestive are entitled to a narrower scope of protection, i.e., are less likely to generate confusion over source identification, than their more fanciful counterparts.” *Spireon, Inc. v. Flex LTD*, 71 F.4th 1355, 1362-63 (Fed. Cir. 2023) (quoting *Juice Generation*, 794 F.3d at 1339); *see also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 1373 (Fed. Cir. 2015).

The cited registration includes a disclaimer of the term SLEEP, and thus this term is weak as a source indicator for Registrant’s goods. *See, e.g., Sock It To Me, Inc. v. Fan*, Opp. No. 91230554, 2020 TTAB LEXIS 201, *30 (TTAB 2020) (SOCK IT TO ME for socks “taken as a whole, is inherently distinctive, although its strength is somewhat limited by its first word, SOCK, which is generic for socks.”). Applicant argues that PLUS also is weak, resulting in a weak mark in total.⁶ But Applicant did not make the prosecution history of the application underlying the cited registration of record, so we are unable to determine the bases for the examining attorney’s

⁶ 4 TTABVUE 10-11.

decisions regarding the registrability thereof. Nor did Applicant make of record any evidence indicating the meaning or strength of PLUS.

Nonetheless, we find that the term “PLUS” in Registrant’s SLEEP PLUS mark is defined as “having, receiving, or being in addition to what is anticipated,” “greater than that specified,” or “possessing a specified quality to a high degree.”⁷ The Federal Circuit and the Board previously have recognized that the word PLUS is suggestive; for example, by indicating that it either connotes a higher quality product or that the product adds an extra characteristic or ingredient. *See, e.g., China Healthways Inst. Inc. v. Wang*, 491 F.3d 1337, 1341 (Fed. Cir. 2007) (“‘Plus’ ordinarily connotes a related superior product, not one from a different source”; addition of PLUS to a mark is unlikely to avoid confusion); *Plus Prods. v. Med. Modalities Assocs.*, Opp. No. 91057922, 1983 TTAB LEXIS 151, *5-6 (TTAB 1983) (“We would agree that the word ‘PLUS’ has suggestive significance with respect to both parties’ goods, namely, something additional or extra”);⁸ *Plus Prods. v. Natural Organics, Inc.*, 1979 TTAB LEXIS 85, *22-23 (TTAB 1979) (no number in original) (“Plus is both a laudatory word, implying a higher quality product — the sense in which opposer has used its trademark ‘PLUS’ — and a highly suggestive word indicating that the product adds

⁷ MERRIAM-WEBSTER DICTIONARY (www.merriam-webster.com/dictionary/plus, accessed June 3, 2025). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format. *In re Cordua Rests. LP*, Ser. No. 85214191, 2014 TTAB LEXIS 94, *6 n.4 (TTAB 2014); *see also B.V.D. Licensing Corp. v. Body Action Design Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988) (“dictionaries and encyclopedias may be consulted”). n.4 (TTAB 2014). We exercise our discretion to do so here.

⁸ This case vacated an earlier decision in *Plus Prods. v. Med. Modalities Assocs.*, 1981 TTAB LEXIS 6 (TTAB 1981), in which the Board held that the mark PLUS was highly suggestive and in a crowded field, thus confusion was unlikely.

an additional quality or value to something else or contains an additional ingredient”).

SLEEP PLUS as a whole suggests that Registrant’s products promote sleep, and that they also have something more: for example, they could be superior, or possess additional characteristics or ingredients. There is nothing in Registrant’s mark SLEEP PLUS or the evidence of record, however, to indicate with any degree of specificity just what this “something more” is, or restrict it in any way.

The issue is whether the designation SLEEP PLUS, considered as a whole, is so weak that consumers are able to distinguish the source of the goods from amongst highly similar marks based on minute differences. Applicant argues it is, relying on *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 1973 TTAB LEXIS 69, *11 (TTAB 1973) (no number in original), *aff’d*, 496 F.2d 1400 (CCPA 1974), in which the Board found no likelihood of confusion between MISS KING’S for cakes and KING’S for candy because KING’S was a “highly descriptive” mark used “on different, although related goods”; and *Juice Generation*, 794 F.3d at 1338 (“The weaker an opposer’s mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection”).⁹

Both of these cases are distinguishable. In *King Candy*, the Board was presented with over twenty relevant third-party registrations for marks containing “KING” or “KING’S” for candy and bakery products, demonstrating that the mark was “almost as weak a mark as can be found” and thus entitled to a very narrow or restricted

⁹ 4 TTABVUE 9.

scope of protection. *King Candy*, 1973 TTAB LEXIS 69, at *9, In *Juice Generation*, the Court of Appeals for the Federal Circuit found that the Board had incorrectly discounted evidence of twenty-six similar third-party marks for the opposer's restaurant services, which the Court deemed "powerful on its face" to show conceptual weakness. *Juice Generation*, 794 F.3d at 1339. *See also Med. Modalities*, 1983 TTAB LEXIS 151, at *4 (ninety registrations); *Natural Organics*, 1979 TTAB LEXIS 85, at *18-20 (sixteen registrations). Here, Applicant did not provide any third-party evidence whatsoever demonstrating that the term PLUS (or the compound mark SLEEP PLUS) has a commonly accepted suggestive or descriptive connotation for Registrant's goods.

Applicant also cites to *RiseandShine Corp. v. PepsiCo, Inc.*, 41 F.4th 112, 124 (2d Cir. 2022) and *Plus Prods. v. Plus Disc. Foods, Inc.*, 722 F.2d 999, 1006 (2d Cir. 1983).¹⁰ In both cases, like the cases discussed above, the Second Circuit Court of Appeals considered not only the suggestiveness of the marks, but also "extensive" third-party use of the marks on related products, to find the marks very weak. *See RiseandShine Corp.*, 41 F.4th at 123 (evidence of over 100 uses of the term RISE in connection with beverages and food in the same way as the plaintiff); *Plus Prods.*, 722 F.2d at 1005 (evidence of over 130 different uses of marks that include the word

¹⁰ 4 TTABVUE 9. Both cases present analyses under the factors set forth in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961), *cert. denied*, 368 U.S. 820 (1961), which are somewhat different from the analysis of likelihood of confusion as it concerns registrability. We are not bound by these authorities, as we apply the law set forth by the Federal Circuit and its predecessor. Nonetheless, we have addressed these authorities for completeness.

PLUS, suggesting a generic character, as well as tacit acknowledgement of weakness of mark by the plaintiff). Again, we have no equivalent evidence in this record.

In sum, we find that SLEEP PLUS is suggestive for Registrant's goods. However, there is no evidence of any third-party use further weakening the mark. *Cf. In re i.am.symbolic, llc*, 866 F.3d 1315, 1329 (Fed. Cir. 2017) (stating that evidence of third-party use "falls short of the 'ubiquitous' or 'considerable' use of the mark components present in [applicant's] cited cases"). As a result, we find that, although the cited mark is entitled to a somewhat reduced scope of protection, it is not so weak that consumers are able rely on minute differences to distinguish it from amongst highly similar marks.

Moreover, as the Examining Attorney has pointed out, even weak marks are entitled to protection against registration of very similar marks, especially when the goods are identical or closely related.¹¹ As the Court of Appeals stated in affirming the Board's decision in *King Candy*: "Confusion is confusion. The likelihood thereof is to be avoided, as much between 'weak' marks as between 'strong' marks, or as between a 'weak' and a 'strong' mark." *King Candy*, 496 F.2d at 1401.

Accordingly, we turn next to a comparison of the marks and goods.

B. Similarity or Dissimilarity of the Marks

Turning to the first *DuPont* factor, we compare Applicant's marks and the cited mark "in their entirety as to appearance, sound, connotation and commercial

¹¹ See 8 TTABVue 7-8.

impression.” *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). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, Ser. No. 87075988, 2018 TTAB LEXIS 170, at *13 (TTAB 2018) (quoting *In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, *4 (TTAB 2014)).

Although the marks must be considered in their entireties, 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). We do not assess whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are similar enough that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, Opp. No. 91193427, 2012 TTAB LEXIS 81, *15 (TTAB 2012).

Applicant’s five stylized marks are comprised of the literal terms SLEEP + with “sleep” disclaimed, and four of them add the terms RECOVERY, BEAUTY, CALM, and IMMUNE HEALTH, respectively, which are also disclaimed. Registrant’s cited mark is SLEEP PLUS in standard characters, with “sleep” disclaimed.

We agree with the Examining Attorney’s assessment that the mathematical symbol “+” in each of Applicant’s marks is likely to be perceived and pronounced as PLUS. Applicant described each of its marks in its applications as consisting of stylized words “with a plus sign.”¹² It described the symbol “design” in its briefs as a “plus-symbol.”¹³ The symbol “+” and the word PLUS are pronounced the same.¹⁴ The evidence also demonstrates that Applicant promotes this pronunciation and meaning to consumers by advertising that its products “PLUS UP YOUR SLEEP” and “[p]lus up your sleep with these premium sleep blends” (e.g., “fall asleep faster + stay asleep longer”).¹⁵

Moreover, under the doctrine of legal equivalents, a word and the symbol therefor are treated as legal equivalents and must be regarded as having the identical significance in determining likelihood of confusion. For example, the mathematical symbol Σ (used to denote summation) has been found legally equivalent to the word “sigma.” *See In re Endevco Corp.*, 1964 TTAB LEXIS 160, *4 (TTAB 1964) (no number in original); *Sigma Instruments, Inc. v. Sigma Sys. Corp.*, 1968 TTAB LEXIS 23, *4 (TTAB 1968) (no number in original). Applying this principal, Registrant’s cited mark SLEEP PLUS and the literal elements SLEEP + in each of Applicant’s marks are legally identical.

¹² *See supra* note 1.

¹³ *E.g.* 4 TTABVue 5, 11, 12.

¹⁴ We note that Applicant’s counsel conceded this point at oral argument.

¹⁵ January 3, 2024 Office Action at TSDR 55, 57, 58.

As to Applicant's compound marks, because SLEEP + constitutes the first words in each mark, they are dominant and purchasers are more inclined to focus on them. *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, Opp. No. 91074797, 1988 TTAB LEXIS 60, *8 (TTAB 1988) ("it is often the first part of a mark which is likely to be impressed upon the mind of a purchaser and remembered."). This is so even though the term SLEEP is disclaimed in all of the marks, as consumers are not aware of disclaimers in USPTO application files. The trailing terms RECOVERY, BEAUTY, CALM, and IMMUNE HEALTH in Applicant's compound marks are disclaimed as descriptive or generic, and we accord them less weight in creating the marks' commercial impressions. *See 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, *12 (TTAB 2001). Moreover, Applicant did not argue that these disclaimed terms distinguish the marks, instead focusing on a comparison of SLEEP PLUS and **Sleep+**.¹⁶

We conclude that **Sleep+** is the dominant portion of all of the applied-for marks, and that it is legally identical to Registrant's mark, resulting in highly similar marks overall. "It is not improper for the Board to determine that, for rational reasons, it should give more or less weight to a particular feature of the mark provided that its ultimate conclusion regarding the likelihood of confusion rests on a

¹⁶ *See* Ser. No. 98027798 (4 TTABVUE 12-13, 9 TTABVUE 7-8); Ser. Nos. 98027815, 98029191, and 98029200 (4 TTABVUE 11-12, 9 TTABVUE 7-8).

consideration of the marks in their entireties.” *QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F.3d 1031, 1035 (Fed. Cir. 2021) (internal citations omitted, cleaned up).

Nor does the minimal stylization of Applicant’s marks distinguish them from the cited mark. *See In re Sadoru Grp.*, Ser. No. 77941164, 2012 TTAB LEXIS 325, *13 (TTAB 2012) (common and ordinary lettering with minimal stylization is generally not sufficient to make an impression on purchasers separate from the wording). Moreover, the cited registration is in standard characters and may be used in “any particular font style, size, or color,” including the same or similar font, size and color as the literal portions of Applicant’s marks. *In re Aquitaine Wine USA, LLC*, Ser. No. 86928469, 2018 TTAB LEXIS 108, *13 (TTAB 2018). This might include, for example,

**Sleep Plus or Sleep
Plus**

In sum, we find Applicant’s applied-for marks to be highly similar to Registrant’s cited mark in appearance, sound, connotation, and commercial impression. In reaching this conclusion, we have also kept in mind: (1) “the fallibility of memory over a period of time”; (2) the “average” purchaser “normally retains a general rather than a specific impression of trademarks”; and (3) Applicant’s and Registrant’s marks include the identical words or their legal equivalent SLEEP PLUS. *See Sealed Air Corp. v. Scott Paper Co.*, 1975 TTAB LEXIS 236, *6 (TTAB 1975) (no number in original) (citations omitted); *see also In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (“marks must be considered in light of the fallibility of memory”) (cleaned up).

We disagree with Applicant's remaining arguments that the marks are distinguishable. First, Applicant argues that the symbol "+" in its marks possesses significant distinctiveness beyond the word "plus," particularly in the context of dietary and nutritional supplements where the health connotations of the symbol can be recognized.¹⁷ Applicant asserts that "it is a matter of common knowledge and parlance to recognize a broad plus-symbol's health connotations, as used ubiquitously for example on first-aid kits."¹⁸ We are not persuaded that this is common knowledge, and Applicant has not supplied us with any evidence supporting a different connotation of the symbol "+" as to its vitamins and dietary and nutritional supplements, and "[a]ttorney argument is no substitute for evidence." *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1371 (Fed. Cir. 2018) (citation omitted).

Second, Applicant contends that because the terms in the cited SLEEP PLUS mark are very weak, the "design elements" and "differences between a word [PLUS] and a symbol [+]" are sufficient to distinguish the marks. We have already found that SLEEP PLUS and SLEEP + are legally identical and the design elements minimal. Although we found that the cited mark is somewhat weak, even a weak mark is entitled to protection against confusion, especially when the dominant terms are legally identical and, as we discuss below, are used for complementary and closely related goods or services. *King Candy*, 496 F.2d at 1401; *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 TTAB LEXIS 1, *11-12 (TTAB 2010). As we stated above,

¹⁷ 4 TTABVUE 11.

¹⁸ 9 TTABVUE 7 n.1.

the issue 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 offered under the respective marks is likely to result. *Coach Servs.*, 668 F.3d at 1368.

Viewing the marks in their entirety, we find that the cited mark SLEEP PLUS and Applicant's applied-for marks are similar in appearance, sound, connotation, and commercial impression. Therefore, the first *DuPont* factor favors a finding of likelihood of confusion.

C. The Goods, Trade Channels and Classes of Consumers

The second and third *DuPont* factors address the relatedness of the goods and the trade channels in which they travel. In analyzing the relatedness of the goods, we look to the identifications in the applications and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 1306 (Fed. Cir. 2018).

The goods need not be identical or even competitive to find a likelihood of confusion. *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 1086 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 1329 (Fed. Cir. 2000). Under the second factor, it is sufficient if "the respective goods are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs.*, 668 F.3d at 1369 (citation omitted).

Evidence of relatedness may include news articles and/or evidence from computer databases showing that the relevant goods are used together or used by the same

Serial Nos. 98027771, 98027798, 98027815, 98029191, and 98029200

purchasers; advertisements showing that the relevant goods are advertised together or sold by the same manufacturer or dealer; and/or copies of prior use-based registrations of the same mark for both an applicant's goods and the goods listed in the cited registration. *In re Country Oven, Inc.*, Ser. No. 87354443, 2019 TTAB LEXIS 381, *5 (TTAB 2019); *see also Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis").

Registration may be refused if Applicant's marks for any of its identified goods is likely to cause confusion with Registrant's mark for any of the goods listed in the cited registration. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983) (a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 1336 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application). We keep in mind our finding above that the cited mark is entitled to a somewhat reduced scope of protection.

As a reminder, Applicant's goods are:

Vitamins; Dietary and nutritional supplements, in International Class 5.

Registrant's goods are:

Perfumery; fragrances; room fragrances; household fragrances; aromatics for fragrances, namely, pillow sprays, body spray, linen sprays and room sprays; bath oils massage preparations, namely, massage oils, and lotions; essential oils; cosmetic preparations; non-medicated skin care preparations; cosmetic preparations for body care;

skin lotions, skin creams, skin moisturisers, in
International Class 3.

Applicant's broadly-identified goods are not restricted by purpose or type, and thus they are presumed to encompass such goods for all purposes, including vitamins and supplements that promote healthier skin. *Cf. In re Hughes Furniture Indus., Inc.*, Ser. No. 85627379, 2015 TTAB LEXIS 65, at *10 (TTAB 2015) (broadly worded identification of "furniture" necessarily encompasses narrowly identified "residential and commercial furniture").

The Examining Attorney made of record evidence to demonstrate that the same entities commonly provide Applicant's and Registrant's goods under the same mark. First, the Examining Attorney made of record thirty use-based registrations for third-party marks she argues are for use in connection with the same or similar goods as those of Applicant and Registrant in this case.¹⁹ We have reviewed these registrations and find that twenty-seven of them, by twenty-six owners, cover (inter alia) non-medicated skin care preparations and lotions in International Class 3; and dietary supplements and vitamins in International Class 5.²⁰ In addition, the Examining Attorney made of record evidence from eight third-parties to establish that the same entity commonly provides vitamins and/or supplements and non-medicated skin care preparations, essential oils, and/or fragrances and markets the goods under the same

¹⁹ 8 TTABVUE 9.

²⁰ See December 6, 2024 Final Office Action at TSDR 9-68. We have excluded Registration Nos. 5088281 (SKINBETTER), because the goods remaining in International Class 5 have not been shown to be related to dietary supplements or vitamins. Many of these registrations, and one other not included in our list (Reg. No. 7227606 for STARWEST EST BOTANICALS 1975) also cover various oils, but we do not find it necessary to focus on these goods as well.

mark.”²¹ We have focused on six of these websites (SIBERIAN GREEN; COPPER JOHNS; EVINA HEALTH; PERRICONE MD; YOUNG LIVING; and JANE IREDALE), which offer non-medicated skincare preparations and lotions as well as vitamins or dietary supplements under the same mark.²² In total, the record contains evidence of thirty-one entities offering non-medicated skincare preparations and lotions as well as vitamins or dietary supplements under the same mark.

We agree with the Examining Attorney that this evidence shows that Applicant’s products are related to Registrant’s products in-part because consumers may encounter entities offering both non-medicated skincare preparations and lotions as well as vitamins or dietary supplements under the same mark in the marketplace. *Hewlett-Packard*, 281 F.3d at 1267. This same evidence also shows that these products are complementary in nature and closely related insofar as they are advertised and typically used together. *See, e.g., In re Davia*, Ser. No. 85497617, 2014 TTAB LEXIS 214, at *21-24 (TTAB 2014) (pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565 (Fed. Cir. 1984) (bread and cheese related because they are often used in combination); *In re Cook*

²¹ 8 TTABVue 8-9. *See* January 3, 2024 Office Action at TSDR 12-58; December 6, 2024 Final Office Action at TSDR 69-102.

²² We have excluded from consideration the evidence of websites for SERENERGY HEALTH because (like the STARWEST registration, discussed above in note 20), it shows oils but not skin care preparations, and AVON because the relevant products are not branded under the same mark. YOUNG LIVING also is included in the third-party registrations discussed above.

Med. Techs. LLC, Ser. No. 77882876, 2012 TTAB LEXIS 496, *11 (TTAB 2012) (catheters and guiding sheaths used therewith closely related); *In re Toshiba Med. Sys. Corp.*, Ser. No. 79046106, 2009 TTAB LEXIS 447, *17 (TTAB 2009) (medical MRI diagnostic apparatus and medical ultrasound devices are related, based in part on the fact that such goods have complementary purposes and may be used by same medical personnel on same patients to address same medical issue).

The evidence shows that customers may use Applicant’s dietary supplements such as collagen and vitamins and Registrant’s skin care preparations and lotions as part of a skin care or health regimen. For example, the PERRICONE MD website advertises that customers should “combine supplements with an anti-inflammatory diet and topical skincare to look and feel your best,” and depicts nutritional supplements and skincare as two of the “3 Tiers to a Healthy New You.”²³ The JANE IREDALE website depicts nutritional supplements “designed to improve the health and appearance of the skin by nourishing it where topical creams can’t reach.”²⁴ This evidence shows the goods are complementary and closely related in that they are used together for the same purpose.

Applicant focuses its argument on the lack of relatedness between “nutritional supplements” and “cosmetics,” urging us to follow the finding in *Vital Pharmaceuticals, Inc. v. Kronholm*, Opp. No. 91181806, 2011 TTAB LEXIS 207

²³ January 3, 2024 Office Action at TSDR 28-30.

²⁴ *Id.* at TSDR 49; *see also id.* at 52.

(TTAB 2011), where the Board found that these goods were not related.²⁵ Aside from the fact that each case must be decided on its own merits based on the evidence in the record, *see In re Nett Designs, Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001), *Vital Pharmaceuticals* is distinguishable because there was no evidence of relatedness in that case. As there the Board explained:

[T]he parties' respective goods and services, as identified in the respective registrations and application are, on their face, distinctly different. There is no evidence of record showing that applicant's goods and opposer's services are related in such a manner that they could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source Here, there is no evidence that nutritional supplements and cosmetics, perfumes and fragrances would be sold in the same department or be situated near each other; nor is there evidence that the goods are complementary or would otherwise be purchased together, such that consumers would encounter both types of products in the course of a single shopping trip. Moreover, there is no basis, such as evidence that the same companies make nutritional supplements and cosmetics, perfumes and fragrances, or that they sell such products under a single mark, upon which we could conclude that consumers would assume that these different products emanate from a single source.

It is clear that the Board in *Vital Pharmaceuticals* was not presented with sufficient evidence to show that the goods are closely related and complementary as we have here in the form of numerous third-party registrations and websites.

We also are not convinced by Applicant's argument that the website evidence shows the relevant goods are sold under "separate tabs or sections for selling ... like

²⁵ 4 TTABVue 7.

different aisles in a market.”²⁶ The evidence shows that they are separated only by a few mouse clicks. In any event, consumers seeking a skincare or health regimen would be in the market for both topical skin care products and vitamins or dietary supplements.

Nor are we convinced by Applicant’s argument that the website evidence is insufficient because it depicts “company-wide trade names like Perricone, Young Living, Jane Iredale, Siberian Greens, etc.”²⁷ Applicant appears to argue that these are “house marks,” which actually could support, not negate, a finding of relatedness. *See Wet Seal, Inc. v. FD Mgmt., Inc.*, Opp. No. 91157022, 2007 TTAB LEXIS 21, *35-36 (TTAB 2007) (use of the house marks CALVIN KLEIN, CHANEL and BCBG for both clothing and fragrances supported a finding of relatedness). Where the record reflects use of a house mark on an extremely broad range of goods, that may diminish the probative value of the evidence, but that is not the case here. *Cf. In re Donnay Int’l, S.A.*, Ser. No. 74160268, 1994 TTAB LEXIS 21, *2 n.3 (TTAB 1994) (acknowledging that registrations for house marks may not be particularly persuasive to show relatedness because house marks can be used to identify a broad range of products). Here, we find that the third-party websites do not depict such a wide-ranging scope of goods that the probative value of the evidence is minimized.

Applicant also argues that, to find relatedness, we must find the goods to be not just related but “competitive” because Registrant’s SLEEP PLUS mark is very

²⁶ *Id.* at 8 (emphasis omitted).

²⁷ 9 TTABVUE 4.

weak.²⁸ Applicant relies on the Second Circuit’s decision in *Plus Prods.*, 722 F.2d at 1006, where the court stated, in relevant part:

When a mark is as weak as that of Products’ PLUS — comprised of an undistinctive word and coexisting with extensive third-party usage — it is extremely unlikely that prudent consumers will confuse it with similar marks on non-competitive goods We do not suggest that a product with a weak mark will never be accorded protection against non-competing goods. We do conclude, however, that the scope of protection accorded a weak mark, like PLUS which is little more than self praise, will be confined to competing products unless a convincing combination of other *Polaroid* factors militates strongly in favor of likelihood of confusion. As later indicated, the other findings in this case do not represent such a combination.

That case concerned a mark that was found to be extremely weak, unlike the case here. In addition, it was decided under the *Polaroid* standard, which is different from the “related goods” test we apply under *DuPont*.²⁹ *In re Save Venice New York, Inc.*, 259 F.3d 1346, 1355 (Fed. Cir. 2001) (whether “a reasonably prudent consumer would believe that noncompetitive but related goods sold under similar marks derive from the same source, or are affiliated with, connected with, or sponsored by the same trademark owner.”); *see also On-line Careline*, 229 F.3d at 1086 (goods need not be identical or even competitive to find a likelihood of confusion); *Recot*, 214 F.3d at 1329 (same). The explanation in *Plus Products*, 722 F.2d at 1006, further makes sense because, although *Polaroid* originally was formulated to assess confusion between noncompeting products, it later was extended to competing products. *See Plus Prods.*,

²⁸ *Id.* at 9-10.

²⁹ *See supra* note 10.

722 F.2d at 1004 n.7 (citing *Am. Int'l Grp., Inc. v. London Am. Int'l Corp.*, 664 F.2d 348, 351 (2d Cir.1981)). The goods need not be “competitive” under the *DuPont* standard; it is enough that they are related or complementary.

As for the third *DuPont* factor, where, as here, the goods are not identical, we presume that they travel in whatever trade channels are normal for each type of good. *Packard Press, Inc. v. Hewlett-Packard Co.*, 227 F.3d 1352, 1361 (Fed. Cir. 2000) (“When the registration does not contain limitations describing a particular channel of trade or class of customer, the goods or services are assumed to travel in all normal channels of trade.”). The same third-party website evidence discussed above (as well as the AVON website discussed *supra* in note 22) shows that online providers sell the goods in the cited registration and the goods in the subject applications under the same mark, and they are bought by the same consumers — e.g., those seeking improved skin or health.

We find that the second and third *DuPont* factors weigh in favor of likely confusion. This is especially true due to the highly similar marks and the fallibility of consumer memory. *In re St. Helena Hosp.*, 774 F.3d at 751.

D. Weighing of the *DuPont* Factors

We have carefully considered and weighed all of the evidence made of record, and the arguments related thereto. *Charger Ventures*, 64 F.4th at 1384 (“[I]t is important ... that the Board itself weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”) (emphasis in original).

The strength of the cited mark SLEEP PLUS is somewhat weak. Nonetheless, Registrant's SLEEP PLUS and Applicant's applied-for marks

Sleep+

**Sleep+
Recovery**

**Sleep+
Beauty**

**Sleep+
Calm**

**Sleep+
Immune
Health**

are very similar in appearance, sound, connotation, and commercial impression. The goods are similar in part and are offered in overlapping channels of trade to the same classes of consumers. These factors outweigh the weakness of the cited mark. We treat as neutral any *DuPont* factors for which there is no argument or evidence of record.

We conclude that confusion between Applicant's applied-for marks and the cited mark in Reg. No. 4917238 is likely. Moreover, to the extent we have any doubt about this conclusion, it must be resolved in favor of Registrant and against Applicant, which is the clear newcomer. *Chatam Int'l*, 380 at 1345 (citation omitted); *Hewlett-Packard*, 281 F.3d at 1265.

Decision

The refusals to register Application Ser. Nos. 98027771, 98027798, 98027815, 98029191, and 98029200 are **affirmed**.