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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Evlution Nutrition, LLC


Serial No. 98502228

Darren Heitner, of Heitner Legal, P.L.L.C.,
for Evlution Nutrition, LLC

Ryan Cianci, Trademark Examining Attorney, Law Office 116,
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Before Heasley, Casagrande, and O'Connor, Administrative Trademark Judges.

Opinion by Casagrande, Administrative Trademark Judge:

Evlution Nutrition, LLC (Applicant) seeks registration on the Principal Register of the mark  for goods in International Class 5 ultimately identified as follows: “Dietary and nutritional supplements; Dietary and nutritional supplements for muscle growth, increasing endurance, muscle repair, and acceleration of recovery; Dietary and nutritional supplements for endurance sports;

Powdered nutritional supplement drink mix containing whey protein concentrate; all of the aforementioned principally comprised of whey protein.”¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), citing likelihood of confusion with the mark VITAWAYS (in standard characters), which is registered on the Principal Register for “Dietary and nutritional supplements; Vitamin and mineral supplements; Vitamin preparations; Vitamin supplements; Mineral nutritional supplements,” in International Class 5.²

After the Examining Attorney made the refusal final,³ Applicant appealed.⁴ Both Applicant and the Examining Attorney filed appeal briefs.⁵ Applicant also filed a reply brief.⁶ For the reasons explained below, we affirm the refusal to register.

Analysis

Section 2(d) of the Trademark Act prohibits registration of a mark that “so resembles a mark registered in the Patent and Trademark Office ... as to be likely,

¹ Application Ser. No. 98502228 was filed on April 16, 2024, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), asserting a date of first use anywhere and in commerce of April 1, 2024. The application states: “The mark consists of the literal element VITAWHEY with VITA in white with a brown outlining and WHEY in brown with grey outlining;” and “The color(s) white, brown and grey is/are claimed as a feature of the mark.”

² Reg. No. 7472458 issued on August 13, 2024. *See* Aug. 15, 2024, Nonfinal Office Action, at TSDR 7. Citations in this opinion to the application record refer to the version of the record downloaded in .pdf format from the Trademark Status and Document Retrieval (TSDR) database of the United States Patent and Trademark Office (USPTO).

³ *See* Dec. 18, 2024, Final Office Action.

⁴ *See* 1 TTABVUE. References to the briefs and appeal record cite to the Board’s TTABVUE electronic docket system. The number preceding “TTABVUE” represents the docket number assigned to the cited filing in TTABVUE and any number immediately following “TTABVUE” identifies the specifically-cited page(s), if any.

⁵ *See* 4 TTABVUE (Applicant); 6 TTABVUE (Examining Attorney).

⁶ *See* 7 TTABVUE.

when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 15 U.S.C. § 1052(d). We determine whether confusion is likely by analyzing all probative facts in evidence 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). *See, e.g., In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023). The Board considers each factor “for which there is evidence and argument.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023) (quoting Board Decision). We then weigh together our findings on the relevant factors to determine if, on balance, they indicate that confusion is likely. *See, e.g., Charger Ventures*, 64 F.4th at 1381; *In re Majestic Distilling Co.*, 315 F.3d 1311, 1319 (Fed. Cir. 2003).

A. Comparison of the marks

The first likelihood-of-confusion factor assesses “[t]he similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *du Pont*, 476 F.2d at 1361. “Similarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (citation omitted). “The proper test is ... 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.” *In re i.am.symbolic, llc*, 866 F.3d 1315, 1323 (Fed. Cir. 2017) (citation omitted); *see also Phillips Petroleum Co. v. Knox Indus. Corp.*, 277 F.2d 945, 947 (CCPA 1960) (“This issue is whether the marks are confusingly similar, not whether they are identical.”) (citation omitted).

In assessing the marks, we compare their “appearance, sound, connotation and commercial impression.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1340 (Fed. Cir. 2015) (citation omitted); *accord i.am.symbolic*, 866 F.3d at 1324. Refusal is appropriate “if the similarity in either form, spelling or sound alone is likely to cause confusion.” *Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 732 (CCPA 1968) (citation omitted); *see also Hancock v. Am. Steel & Wire Co.*, 203 F.2d 737, 740 (CCPA 1953) (“[i]t is proper to consider [the marks’] appearance, sound and meaning ... [b]ut a combination of all three factors need not necessarily exist”) (citations omitted). We do not compare the marks side-by-side, however, as though in a laboratory. Rather, we keep in mind that consumers must depend on their recollection of marks to which they’ve previously been exposed and that their memories are fallible. *See, e.g., St. Helena Hosp.*, 774 F.3d at 751; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981).

We compare marks in their entireties. *See, e.g., Oakville Hills Cellar, Inc. v. Georgallis Holdings, LLC*, 826 F.3d 1376, 1380 (Fed. Cir. 2016). Sometimes, however, “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 commercial impression created by the mark.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368 (Fed. Cir. 2012) (citations omitted).

Applicant’s mark is  and the registered mark is VITAWAYS in standard characters. Applicant concedes that both have the prefix VITA.⁷

⁷ See 4 TTABVue 8.

Applicant further concedes that “the marks are phonetically similar.”⁸ We agree. The conceded phonetic similarity is important. Several decisions have noted that phonetic similarity alone can lead to likely confusion. In *Krim-Ko*, 390 F.2d at 731-32, our primary reviewing Court compared BEEP and VEEP, observing:

Despite specific differences in spelling and in probable meaning, the dominant factor for consideration is the likelihood of confusion arising from the similarity in sound of the two words when spoken. The consonants ‘V’ and ‘B’ provide the initial aural impact on the listener and initiate the psychological processes leading to recall and assignment of a meaning to the words. The consonant sounds ‘B’ and ‘V’ are likely to be misunderstood by the listener, depending as they do on such variables as the diction of the speaker and the hearing acuity of the listener. Thus there may well be a doubt as to whether the entire words when spoken are likely to confuse a listener-purchaser. Unless both the one speaking and the one hearing the two words are particularly careful, the sound similarities of ‘V’ and ‘B’ may lead to a confusion in the recall process, so as to negate the effect of the differences in meaning of the words.

Id. at 731-32; *see also* *TBC Corp. v. Holsa, Inc.*, 126 F.3d 1470, 1472 (Fed. Cir. 1997) (“in this age of business over the telephone and advertising on TV and radio the close similarity in sound between GRAND SLAM and GRAND AM would be likely to result in mistake if not confusion”). The Board has also found that similarities in pronunciation can lead to confusion notwithstanding distinctions in spelling. *See, e.g., Edwards Lifesciences Corp. v. VigiLanz Corp.*, No. 91154210, 2010 WL 1514315, at *10 (TTAB 2010) (VIGILANZ and VIGILANCE); *Interstate Brands Corp. v. McKee Foods Corp.*, No. 91105415, 2000 WL 187204, at *4 (TTAB 2000) (YO-YO’S and

⁸ *See id.* at 7.

HOHOs); *Pfizer Inc. v. Cody John Cosmetics, Inc.*, No. 91062162, 1981 WL 40481, at *4-5 (TTAB 1981) (confusion likely where U.S. consumers might pronounce COTY and CODY (in CODY JOHN) identically); *Aileen, Inc. v. Eileen Togs Corp.*, No. 91049718, 1975 WL 20886, at *2 (TTAB 1975) (AILEEN and EILEEN).⁹

The literal aspect of Applicant's mark also looks similar to the registered mark, both beginning with VITA- and adding a four-letter suffix that starts with "W" and contains a "Y."¹⁰

Applicant and the Examining Attorney argue about the meaning of VITA- in the marks. Applicant notes that VITA- refers to vitamins in both marks.¹¹ The Examining Attorney resists the assertion that VITA- refers to vitamins, noting that there's no actual evidence to that effect.¹² We do not believe that the lack of evidence indicating whether VITA- refers to vitamins or to something else plays a big role in this case. If, as Applicant urges, it means vitamins, then that might show some conceptual weakness in the identical portion of the marks (giving Applicant some leverage to focus on the importance of the differences in the suffixes of the marks), but would

⁹ While none of these prior decisions is "controlling" (because we must decide each case on the unique facts and record before us), they collectively provide us with a rough sense of how the Federal Circuit and the Board have historically applied this principle.

¹⁰ Applicant does not argue that the colors or the stylized format of its mark makes any material difference, acknowledging in its reply that this is "not central" to its argument. 7 TTABVUE 4. The standard character format of the registered mark means that the registrant is not limited to displaying its VITAWAYS mark in any particular typeface or color, covering even display in a typeface and color format identical to Applicant's. *See, e.g., Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373 (Fed. Cir. 2018); *SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 1041 (Fed. Cir. 1983); *Weider Publ'ns, LLC v. D&D Beauty Care Co.*, No. 91199352, 2014 WL 343269, at *9 (TTAB 2014).

¹¹ *See* 4 TTABVUE 8.

¹² *See* 6 TTABVUE 12.

also would show that this portion of the marks has the same meaning, which cuts against Applicant.

We agree that the similar-sounding and similar-looking endings WHEY and WAYS have different meanings, a point that Applicant highlights by noting that its products all principally contain whey.¹³ We note, however, that this argument depends on assigning a descriptive meaning to the term WHEY in Applicant's mark, *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874 (Fed. Cir. 2015) (a term that describes an ingredient of a product is descriptive), and descriptive terms tend not to play as great a role in forming the source-identifying aspect of a mark in which they appear. *See, e.g., Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 947 (Fed. Cir. 2000); *In re Nat'l Data Corp.*, 753 F.2d 1056, 1058 (Fed. Cir.1985). We find that the nonidentical WHEY/WAYS endings do not offset the cumulative effect of the marks' other similarities.

Overall, the marks are very similar, regardless of what meaning, if any, might be assigned to the identical VITA- prefixes. The overall similarity supports a conclusion that confusion is likely.

B. Comparison of the goods

The second likelihood-of-confusion factor looks at “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *du Pont*, 476 F.2d at 1361. We compare the goods as they are set forth in the application and registration. *See, e.g., In re Detroit Athl. Co.*, 903 F.3d 1297, 1307 (Fed. Cir. 2018);

¹³ *See* 4 TTABVUE 8-9; 7 TTABVUE 3.

i.am.symbolic, 866 F.3d at 1325. Both the application and registration list identical “dietary and nutritional supplements.” Applicant concedes that both marks “relate to nutritional supplements,”¹⁴ but emphasizes the qualifier on the end of its identification of goods that states “all of the aforementioned [goods] principally comprised of whey protein.”

This is not a material basis differentiating the respective dietary and nutritional supplements, however, because the registration has no qualifiers. That means it covers all dietary and nutritional supplements, including those, like Applicant’s, principally containing whey protein. *See, e.g., San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 684 (CCPA 1977) (registration for “capacitors” without limitation encompassed and was therefore legally identical to “electrical capacitors” in application regardless of what kind of capacitors registrant was actually selling); *Int’l Paper Co. v. Valley Paper Co.*, 468 F.2d 937, 938 (CCPA 1972) (where “registration description is broad enough to cover the goods [of the applicant], ... the legal effect of this fact is that the goods and channels of trade are to be considered the same for the purposes of this opposition”); *In re Hughes Furniture Indus., Inc.*, No. 85627379, 2015 WL 1734918, at *3 (TTAB 2015) (goods held to be “legally identical” where “Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture’”).

¹⁴ See 4 TTABVUE 9.

Applicant lists various types of supplements it says the owner of the cited registered mark currently sells, implying that Registrant, unlike Applicant, does not sell a whey-protein supplement.¹⁵ What the owner of the cited registration might or might not currently sell is irrelevant. *See, e.g., Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1323 (Fed. Cir. 2014); *Bose Corp. v. QSC Audio Prods., Inc.*, 293 F.3d 1367, 1377 (Fed. Cir. 2002); *Cunningham*, 222 F.3d at 948. Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), presumes the registered mark to validly cover all goods encompassed by the identification of goods.

The goods are identical at least in part, and this supports a conclusion that confusion is likely.

C. Comparison of the channels of trade and the classes of relevant customers

We also consider “[t]he similarity or dissimilarity of established, likely-to-continue trade channels” as well as “[t]he conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 476 F.2d at 1361. As with the comparison of the goods, we base our comparison of the trade channels and customers to whom sales are made on what is set forth in the involved application and cited registration. *See, e.g., i.am.symbolic*, 866 F.3d at 1325; *see also Glamorene Prod. Corp. v. Procter & Gamble Co.*, 538 F.2d 894, 896 (CCPA 1976) (“Glamorene’s application for registration does not specify sales through particular channels of trade or to a particular class of purchasers, and the fact that the channels

¹⁵ See 4 TTABVUE 9-10.

or purchasers are actually different is not controlling. The issue of likelihood of confusion must be resolved on the basis of the goods as broadly stated in Glamorene's application for registration.") (citation omitted).

When an application's or registration's identification of goods or services does not limit how the goods or services are sold or to whom, we presume that the goods or services are sold "in all normal trade channels to all the normal classes of purchasers." *Detroit Athl.*, 903 F.3d at 1308 (citation omitted). More specifically, where, as here, the goods are identical at least in part, we presume that the channels of trade and classes of customers are correspondingly identical in part. *See, e.g., Stone Lion*, 746 F.3d at 1323 (where "[t]he parties' recited services were in part legally identical," the Board properly "concluded the 'channels of trade and classes of purchasers are the same.'"); *In re Hitachi High-Techs. Corp.*, No. 79110412, 2014 WL 879500, at *4 (TTAB 2014) ("Because the goods described in the application and the cited registration are legally identical, in that they overlap in part, we must presume that the channels of trade and classes of purchasers are the same" and that fact "weigh[s] heavily in favor of finding a likelihood of confusion.").

Applicant does not argue that the trade channels differ. Nor does Applicant expressly argue that the classes of customers differ. In arguing about the differences in the marks, Applicant asserts that its customers are "bodybuilders/athletes/other protein powder consumers who are interested in a whey-based powder" and that the customers who purchase goods offered by the owner of the registered mark are

general consumers of vitamins.¹⁶ To the extent Applicant implies that consumers of dietary and nutritional supplements bearing the registered mark are different from its own customers, we reject the implication. The lack of restrictions in the registered mark means that all consumers of dietary and nutritional supplements—even that subset who are bodybuilders, athletes, and other protein powder consumers—are included.

The trade channels and classes of customers thus appear, on this record, to overlap, and so those two factors support a conclusion that confusion is likely.

As we noted in the beginning of this section, the fourth likelihood-of-confusion factor not only looks at “buyers to whom sales are made,” which we just discussed, but also whether they engage in “‘impulse’ vs. careful, sophisticated purchasing.” *du Pont*, 476 F.2d at 1361.

In its argument that the goods differ, Applicant refers several times to buyers of its products as sophisticated.¹⁷ It also similarly characterizes customers who purchase supplements under the registered mark as sophisticated.¹⁸ Applicant points to no evidence that consumers of dietary and nutritional supplements, even those containing whey protein, are any more sophisticated or discerning than consumers of any other general consumer product. On the other hand, there is nothing in the record that shows that consumers of these supplements are “impulse” purchasers who

¹⁶ See 4 TTABVUE 7-8.

¹⁷ See 4 TTABVUE 9-10, 11.

¹⁸ See *id.* at 10.

exercise less than an ordinary amount of care. The customer sophistication factor is neutral.

In sum, the overlapping trade channels and classes of customers favor a conclusion that confusion is likely. Customer sophistication is neutral.

D. The number and nature of similar marks in use in connection with similar goods

The sixth likelihood-of-confusion factor assesses “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 476 F.2d at 1361. Under the sixth factor, an applicant may submit evidence of third parties’ registration and/or use of similar marks to show the weakness of the registered mark in two ways: conceptually and commercially. “Evidence of third-party use may reflect commercial weakness, while third-party registration evidence ... may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *In re FCA US LLC*, No. 85650654, 2018 WL 1756431, at *13 (TTAB 2018) (citation omitted), *aff’d mem.*, 778 F. App’x 962 (Fed. Cir. 2019).

Applicant argues that we should not focus on the identical VITA- prefix in the two marks, but instead focus on the non-identical suffixes -WHEY and -WAYS, and thereby find the marks so dissimilar that confusion is unlikely.¹⁹ It bases this argument on the assertion that the prefix VITA- is “weak due to third-party use.”²⁰ The Examining Attorney responds that there is no evidence in the record reflecting

¹⁹ See 4 TTABVUE 10-11; 7 TTABVUE 5-6.

²⁰ See 7 TTABVUE 6.

any such third-party use.²¹ We agree with the Examining Attorney. We see no evidence in the record of third-party use of VITA- prefixes for supplements nor any third-party registrations containing the VITA- prefix for supplements. Applicant asserts this is a “matter of common knowledge, not requiring extrinsic evidence.”²² We disagree. Our decisions must be based on evidence in the record, not supposition. *See, e.g., In re Fiesta Palms, LLC*, No. 76595049, 2007 WL 950952, at *7 (TTAB 2007) (“we must decide the case based on the evidence of record and not on what either the examining attorney or applicant argues the facts are”); *Acomb v. Polywood Plastics Corp.*, No. 91054738, 1975 WL 21253, at *3 (TTAB 1975) (“Speculation and surmise is no substitute for evidence.”). Applicant suggests that the USPTO’s “own database could confirm” its assertion,²³ but we do not take judicial notice of registrations. *See, e.g., In re Weiss*, No. 88621608, 2024 WL 3617597, at *1 (TTAB 2024).²⁴

Lacking any relevant evidence, this factor is neutral.

E. Weighing the findings on the relevant factors together

Having made findings on each of the relevant likelihood-of-confusion factors, our final step is to assess together the findings we have made on the relevant factors to

²¹ *See* 6 TTABVUE 11-13.

²² *See* 7 TTABVUE 6.

²³ *See id.*

²⁴ And even if Applicant had identified or listed any third-party registrations in support, such a list would not have sufficed, either. *See, e.g., Fallon v. Brown Innovation, LLC*, No. 9125248, 2021 WL 5196463, at *5 (TTAB 2021) (“Submitting lists of third-party registrations is not an acceptable way to make such registrations of record.”) (cleaned up; citation omitted).

determine if, on balance, they indicate that confusion is likely as to the marks before us. *See, e.g., Charger Ventures*, 64 F.4th at 1384.

Here, four factors weigh in favor of a conclusion that confusion is likely: the close similarity of the marks; the fact that the goods are identical in part; and the overlap in the trade channels and classes of customers. Those are all significant factors, especially the first two. *See 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.”); *In re Max Cap. Grp. Ltd.*, Ser. No. 77186166, 2010 WL 22358, at *1 (TTAB 2010) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.”) (citations omitted). No factors weigh against a conclusion that confusion is likely. The only other two factors mentioned by Applicant are neutral. On this record, we have no difficulty concluding that confusion is likely.

Decision: We affirm the refusal.