

This Opinion is not a
Precedent of the TTAB

Mailed: July 13, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Fulfill Food and Beverages, LLC
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Serial No. 76719598
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Paul M. Denk, Esq.,
for Fulfill Food and Beverages, LLC.

John E. Michos, Trademark Examining Attorney, Law Office 118,
Michael W. Baird, Managing Attorney.

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Before Taylor, Ritchie, and Lynch,
Administrative Trademark Judges.

Opinion by Ritchie, Administrative Trademark Judge:

Fulfill Food and Beverages, LLC (“Applicant”) seeks registration on the Principal Register of the mark KARUNA THE ROOT OF GOOD HEALTH and design, as shown below, for goods ultimately identified as “a fruit infused plant-based drink,

namely, filtered water infused with a fruit flavoring and plant-based ingredients,” in International Class 32¹:



The Examining Attorney refused registration of Applicant’s mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), as to be likely to cause confusion, mistake, or to deceive, based on a registration for the mark KARUNA, in standard characters, for “nutritional supplements,” in International Class 5.²

After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration. When the request for reconsideration was denied, Applicant filed this appeal, which is fully briefed. For the reasons discussed herein, we affirm the refusal.

¹ Serial No. 76719598, filed on August 5, 2016, pursuant to Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b) alleging a bona fide intent to use the mark in commerce. The application contains the following description of the mark: The mark consists of the wording "KARUNA" as part of a tree design with the wording "THE ROOT OF GOOD HEALTH". The shading represents background and is not part of the mark.

² Registration No. 2964252 issued June 28, 2005. Sections 8 and 15 affidavits accepted and acknowledged. Renewed.

I. Likelihood of Confusion

Our determination of the issue of likelihood of confusion is based on an analysis of all the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). *See also In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976). *See also In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997). We consider the *du Pont* factors for which arguments or evidence were presented. The other factors, we consider to be neutral.

A. The Marks

We consider and compare the appearance, sound, connotation and commercial impression of the marks in their entireties. *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005). The mark in the cited registration is KARUNA, in standard character format. Applicant's mark also incorporates the term KARUNA, and features it prominently



as the largest literal term in its mark, . The Examining Attorney submitted a definition of “karuna” as meaning “compassion that is a fundamental

quality in the bodhisattva ideal of Mahayana Buddhism.”³ Applicant also submitted an article that notes, similarly, “Karuna means ‘compassion’ in Buddhism.”⁴ We find that this arbitrary term, KARUNA, is the dominant term in Applicant’s mark and the sole term in the cited mark. *See In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985). This shared term makes the marks look and sound similar, and contributes to a similar meaning and commercial impression. In Applicant’s mark, not only is KARUNA in larger font, but as the first part of a mark it is “most likely to be impressed upon the mind of a purchaser and remembered.” *Presto Products Inc. v. Nice-Pak Products, Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988). Because the cited mark is in standard characters, its protection extends to the same stylization Applicant uses for KARUNA in its mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 (Fed. Cir. 2012) (holding that the specific font style of a mark cannot serve as the basis to distinguish it from a mark in standard character form); *see also* Trademark Rule 2.52(a), 37 C.F.R. § 2.52(a). The additional wording in Applicant’s mark, “THE ROOT OF GOOD HEALTH” is suggestive of a function of its goods, which is to improve health, and is therefore less significant. We find that consumers would perceive it as a slogan or motto modifying the dominant source-indicating element of the mark, KARUNA. Applicant argues that “The Trees design reminds consumers of a healthy environment and gives the impression that the

³ Attached to July 24, 2017 Denial of Request for Reconsideration, at 2-3.

⁴ Attached to October 17, 2017 Request for Reconsideration, at 8.

product is a tree grown and fruit oriented drink.”⁵ We agree that the tree design also reflects the concept of the plant-based ingredients and the health-related aspects of Applicant’s goods, and we do not find that this changes the commercial impression of Applicant’s mark. Furthermore, we generally give less weight to the style and design elements of a mark than to the wording, because it is the wording that would be used by purchasers to request the services. *See Viterra Inc.*, 101 USPQ2d at 1911.

Overall, we find that the marks, considered in their entirety, are substantially similar in sight and sound and substantially similar in commercial impression. Thus, the first *du Pont* factor favors finding a likelihood of confusion.

B. Goods, Trade Channels and Purchasers

When considering the similarity or dissimilarity of the goods, we note that goods need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that the goods are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used or intended to be used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of the parties’ goods or services. *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991).

⁵ 4 TTABVUE 16.

The cited registration is for “nutritional supplements.” Applicant seeks to register goods ultimately identified as “a fruit infused plant-based drink, namely, filtered water infused with a fruit flavoring and plant-based ingredients.” To show that these goods serve the same function, the Examining Attorney submitted third-party websites that advertise liquid fruit-flavored beverages that also include or that serve as nutritional supplements. Some examples include Ensure Enlive, offered at Phc-online.com; Country Life, offered at Countrylifevitamins.com; Genesis™ Drink, offered at Symmetrydirectbuy.com; and NingXia Red, offered at Youngliving.com.⁶

The Examining Attorney further supported this conclusion by submitting copies of third-party registrations with nutritional supplements, as identified in the cited registration, on the one hand, and fruit-flavored beverages, as identified in the application, on the other. Copies of use-based, third-party registrations may help establish that the goods are of a type which may emanate from a single source. *See In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785 (TTAB 1993). These include POM WONDERFUL (Registration No. 3687491); DESIGNED WITH YOUR BODY IN MIND (Registration No. 4429265); DESIGNER WHEY (Registration No. 4519972); and NECTAR OF THE GODS (Registration No. 4827430).⁷

It is therefore clear that the “fruit infused plant-based drink, namely, filtered water infused with a fruit flavoring and plant-based ingredients” identified by Applicant can include or perform the same function as the “nutritional supplements”

⁶Attached to July 24, 2017 Denial of Request for Reconsideration, at 10-64.

⁷ Attached to June 1, 2017 Final Office Action, at 41-51.

identified in the cited registration, and are related thereto. *See In re Iolo Technologies LLC*, 95 USPQ2d 1498 (TTAB 2010) (finding likelihood of confusion where goods are “complementary in function and purpose”); *citing Octocom Systems, Inc. v. Houston Computers Services Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”) (citations omitted).

We do not find persuasive Applicant’s arguments based on the actual nature and form of Registrant’s nutritional supplements, as we must focus on the goods as identified in the cited registration, not on extrinsic marketplace evidence. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Systems*, 16 USPQ2d at 1787. Because the nutritional supplements in the cited registration are broadly identified, they are presumed to encompass all types of nutritional supplements. *In re Jump Designs LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006).

We thus find that the goods in the application and the cited registration are related and are likely to travel through the same channels of trade to the same classes of consumers, which are members of the general public who are seeking to accomplish goals relating to fitness and health. The second and third *du Pont* factors favor finding a likelihood of confusion.

C. Conditions of Sale

Applicant urges us to consider the consumer sophistication and degree of purchaser care likely to be exercised for the goods at issue in this proceeding, arguing that consumers of these goods “will take their time” and “will take the advice of a practitioner and review the listing of ingredients rather than the mark used.”⁸ There is no evidence to support these claims. Both the application and the cited registration contain no limitations and may be sold to general consumers. Even if we were to assume that consumers exercise a certain degree of care in selecting nutritional supplements, it is nevertheless well-established that even sophisticated consumers are not immune from source confusion where both the goods and the marks are similar. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). Overall, we find this factor to be neutral. *See Stone Lion Capital* 110 USPQ2d at 1163 (affirming that TTAB properly considered all potential purchasers for recited services, including both sophisticated and unsophisticated investors, since precedent requires consumer care for likelihood-of-confusion decision be based “on the least sophisticated potential purchasers”).

D. Other Factors

Applicant also urges us to consider the sixth through thirteenth *du Pont* factors.

Regarding the sixth *du Pont* factor, Applicant referenced in its Response to Office Action, and again in its brief two third-party registrations. Although Applicant did

⁸ 4 TTABVUE 22.

not include copies of the registrations, the Examining Attorney did not object, and we thus consider the information provided for what probative value it may have. Nevertheless, Applicant has only provided the two registration numbers, with the mark, and a general description of the goods. We do not know if the registrations are live. Even if we accept the information on its face, Applicant notes that they are owned by a single registrant, and that the goods are for cosmetics, which are different, and of course cannot be substituted as an edible nutritional product. Meanwhile, the existence of one or two registrations belonging to a single registrant is not enough to narrow the scope of protection of the cited registration. *Cf. Promark v. GFA Brands, Inc.*, 114 USPQ2d 1232, 1244 (TTAB 2015) (“Such third-party registrations and uses are competent to show that the common term has an accepted meaning in a given field.”); *cf Primrose Ret. Cmty., LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033-36 (TTAB 2016) (weakness of term ROSE in opposer’s mark PRIMROSE found based on at least 85 actual uses of ROSE-formative marks for similar services, eight similar third-party registrations, expert testimony and other evidence regarding the common nature of ROSE-formative marks in the industry, and testimony by opposer that it did not vigorously enforce its mark).

Regarding the seventh and eighth *du Pont* factors, Applicant urges us to consider that there has not been any actual confusion. The lack of evidence of “actual confusion” carries little weight, especially in an *ex parte* context. *Majestic Distilling*, 65 USPQ2d at 1205. This is particularly so where, as here, applicant has an intent-to-use application and there has not yet been an opportunity for confusion to occur.

Regarding the ninth through thirteenth *du Pont* factors, Applicant merely presents conclusory argument without evidence.⁹ We deem all of these *du Pont* factors to be neutral.

E. Conclusion

After considering all of the arguments and evidence of record as they pertain to the relevant *du Pont* factors, we find that the marks are substantially similar in sight, sound, connotation, and commercial impression, and that the goods, which serve a similar function, are related and travel through overlapping channels of trade to general consumers. Overall, we find that there is a likelihood of confusion between Applicant's applied-for mark and the mark in the cited registration.

Decision: The Section 2(d) refusal to register Applicant's mark is affirmed.

⁹ In accordance with our case law, it is unnecessary to argue every *du Pont* factor, where no evidence is available.