

This Opinion is not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Laboratoires Quinton International, S.L.
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Serial No. 79251083
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Leo M. Loughlin and Davide F. Schiavetti of Rothwell,
Figg, Ernst, & Manbeck, P.C.
for Laboratoires Quinton International, S.L.

Tina L. Snapp, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

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Before Mermelstein, Goodman and Lynch,
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Laboratoires Quinton International, S.L. (“Applicant”) seeks registration on the
Principal Register of the mark TOTUM SPORT (in standard characters, SPORT
disclaimed) for

Dietary supplements, specifically sea-water-based
beverages in International Class 5.¹

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¹ Application Serial No. 79251083 was filed on December 27, 2018, based upon Applicant’s
assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the
Trademark Act, 15 U.S.C. § 1051(b).

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground of

likelihood of confusion with the registered mark **TOTUM** (stylized)² for the following International Class 5 goods:

Pharmaceutical products, namely, analgesics; dietetic products, namely, dietetic food supplements and nutritional supplements containing vitamins, minerals, herbs and amino-acids sold in the form of pills, capsules, tablets, powder, bars, liquids, patches and vials, intended for skin improvement, stimulating weight loss, improving blood circulation, improving digestion, alleviating joint pain, alleviating sleep and mood disorders, alleviating physical and mental fatigue, alleviating the effects of menopause and hormone disorders in general; disinfectants for sanitary purposes, namely, hand gels.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. 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 goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

² Registration No. 4762457 issued June 30, 2015 as an extension of protection under Section 66(a) of the Trademark Act, 15 U.S.C. § 1141f(a).

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, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument.³ See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (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.”).

A. Similarity of the Marks

We first turn to the first *DuPont* factor which requires us to determine the similarity or dissimilarity of the marks when viewed in their entirety in terms of appearance, sound, connotation and overall commercial impression. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

Registrant’s mark is **TOTUM**, a minimally stylized mark using block letters. Applicant’s mark is TOTUM SPORT (standard characters, SPORT disclaimed).

³ Applicant indicates in a footnote in its brief, 4 TTABVue 6, that the parties entered into a consent agreement in Europe; however no consent agreement that covered the United States was submitted during examination.

Applicant argues that the marks differ significantly in sound and appearance as well as the overall commercial impression. Applicant's brief, 4 TTABVUE 6. Applicant submits that the addition of the word SPORT results in a difference in sound and appearance that is sufficient to distinguish the marks. *Id.*

In considering the marks, we note that although the marks at issue 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 a dominant feature in determining the overall commercial impression created by the mark. *See In re Chatam Int'l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1946-47 (Fed. Cir. 2004); *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

In this case, the dominant portion of Applicant's applied-for mark is the lead element TOTUM inasmuch as it is the first part of the mark, and the descriptive and disclaimed last word SPORT is subordinate in nature.⁴ *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) ("descriptive component of a mark may be given little weight in reaching a conclusion on likelihood of confusion") (quoting *In re Nat'l Data Corp.*, 224 USPQ at 752); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 1407, 41 USPQ2d 1531, 1533-34

⁴ By disclaiming the word SPORT, Applicant has conceded the wording is, at a minimum, descriptive of its goods, dietary supplements. *In re Pollio Dairy Prods. Corp.*, 8 USPQ2d 2012, 2014 n.4 (TTAB 1988). *See* March 26, 2019 Office Action at TSDR 9. ("Sports supplements (also called ergogenic aids) are products used to enhance athletic performance...").

(Fed. Cir. 1997) (dominant portion of THE DELTA CAFÉ and design mark is DELTA as the generic term CAFÉ has been disclaimed); *Presto Prods. Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”).

Comparing the marks in their entirety in terms of appearance, we note first that Applicant’s mark is a standard-character mark and may be displayed in any font style, size or color. *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1186 (TTAB 2018) (literal elements of standard character mark may be presented in any font style, size or color). Therefore, we must consider that Applicant may display its mark in the same or similar font style, size or color as Registrant, which means that Applicant’s and Registrant’s marks are similar in appearance to that extent because they both include the identical term TOTUM. The marks are also somewhat dissimilar in appearance because Applicant’s mark includes the additional term SPORT. However, we find that this dissimilarity is greatly outweighed by the dominant element TOTUM in Applicant’s mark and the fact that SPORT is descriptive of Applicant’s goods. Therefore, when viewed in their entirety, we find that the two marks are more similar than dissimilar in appearance.

In terms of sound, we find that the marks are highly similar to the extent that the identical term TOTUM sounds the same in both marks, and to the extent that TOTUM is pronounced first in Applicant’s mark. The marks sound dissimilar to the extent that Applicant’s mark also includes the descriptive term SPORT. On balance,

we find that when the two marks are considered in their entirety, they are somewhat similar in sound.

In terms of connotation and commercial impression, TOTUM would appear to most purchasers as a coined term and conceptually strong. Although most purchasers are likely to view TOTUM as a coined term with no meaning, to the extent purchasers view TOTUM as having a meaning, we find the connotation of TOTUM in Applicant's and Registrant's marks would likely be the same for prospective purchasers.⁵ While the additional term SPORT in Applicant's mark does create a point of difference, it merely describes Applicant's goods, so that its contribution to the connotation and commercial impression is minimal. Thus, we find that this point of difference in meaning is greatly outweighed by the presence in both marks of the coined term TOTUM, and purchasers would look to TOTUM as a source indicator. We therefore find that the marks have similar connotations and commercial impressions when compared in their entirety.

In considering the marks in their entirety, we find them to be more similar than dissimilar. Consumers are more likely to look to the coined term TOTUM as identifying the source of the goods, and perhaps view the additional term SPORT as reflecting a line extension of the goods emanating from the source known as TOTUM.⁶ *See In re Karben4 Brewing, LLC*, 125 USPQ2d 1403, 1407 (TTAB 2017) (customers

⁵ Even if TOTUM is considered by consumers a misspelling of the word "totem," it still would be arbitrary in relation to the goods.

⁶ The Examining Attorney submitted third-party registrations to show that numerous entities are using a single mark and the same single mark plus the word "sport" on their nutritional and dietary supplements. November 5, 2019 Office Action at TSDR 1-125.

likely to perceive applicant's SILK SCORPION mark as an extension of Registrant's SCORPION beer product).

In addition, the fact that the cited registered mark is subsumed by Applicant's mark increases the similarity between the two. *See, e.g., In re Mighty Tea Leaf*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010) (ML and ML MARK LEES confusingly similar when used on identical personal and skincare products); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant's mark MACHO COMBOS for food items confusingly similar to MACHO for restaurant entrees).

We find the first *DuPont* factor favors a finding of likelihood of confusion.

B. Relatedness of the Goods and Channels of Trade

We next consider the second and third *DuPont* factors. The second *DuPont* factor “considers [t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Detroit Athletic Co.*, 128 USPQ2d at 1051 (quoting *DuPont*, 177 USPQ at 567). 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, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

Applicant's goods are

“Dietary supplements, specifically sea-water-based beverages.”

Registrant’s goods are

Pharmaceutical products, namely, analgesics; dietetic products, namely, dietetic food supplements and nutritional supplements containing vitamins, minerals, herbs and amino-acids sold in the form of pills, capsules, tablets, powder, bars, liquids, patches and vials, intended for skin improvement, stimulating weight loss, improving blood circulation, improving digestion, alleviating joint pain, alleviating sleep and mood disorders, alleviating physical and mental fatigue, alleviating the effects of menopause and hormone disorders in general; disinfectants for sanitary purposes, namely, hand gels.”

Applicant argues that Applicant’s and Registrant’s goods are significantly different, would not be encountered in the same manner, and that Applicant’s goods are narrowly defined as “sea-water-based beverages.” Applicant’s brief, 4 TTABVUE 7. Applicant argues that Registrant’s goods are pharmaceutical and dietetic food supplements while Applicant’s goods are dietary food supplements that “[b]y virtue of the different purpose, consumers would not be confused.” *Id.* at 7-8. Applicant also contends that there is no evidence that “sea-water-based beverages and ‘pharmaceutical or dietetic products’ are related” and that its goods are neither pharmaceutical nor medicinal but “integrate one’s diet by boosting hydration.” *Id.* at 7; Applicant’s Reply Brief, 7 TTABVUE 4.

However, we find the goods are related. The nutritional supplements offered by Registrant are separate from Registrant’s pharmaceutical products. Both Registrant’s dietetic products in the form of nutritional supplements and Applicant’s dietary supplements in the form of sea-water-based beverages supplement a person’s

diet.⁷ In addition, Registrant’s dietetic products include vitamins, minerals, amino acids, and herbs, and the record shows that dietary supplements may also contain vitamins, minerals, amino acids, herbs and botanicals. March 26, 2019 Office Action at TSDR 9 (kidshealth.org “sports supplements”). Registrant’s identified goods come in a variety of forms, including liquids, and the wording in Registrant’s identification is broad enough to include sea-water-based beverages such as Applicant’s. Although Registrant’s goods are limited to particular purposes, Applicant’s goods could be used for a similar purposes as the identification of goods does not restrict their purpose. We find the goods overlap and are legally identical in part.

In addition, the third-party registration evidence provided by the Examining Attorney shows that dietary and nutritional supplements may emanate from the same sources under the same marks. November 5, 2019 Office Action at TSDR 4, 7, 11-12, 19-28, 32-34, 40-41, 45-47, 48-52, 60-64, 68-74, 77-79, 83-85, 89-97, 100-101, 105-113, 116-118, 122-124. *See In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (although third-party registrations “are not evidence that the marks

⁷ We take judicial notice of the definitions of “dietary,” which is “of or relating to a diet or to the rules of a diet” and “dietetic,” which is “of or relating to diet.” Merriam-Webster dictionary <https://www.merriam-webster.com/dictionary/dietary>; <https://www.merriam-webster.com/dictionary/dietetic> Merriam-Webster dictionary (accessed November 19, 2020). We also take judicial notice of the encyclopedia entry for “nutritional supplements,” which states: “Nutritional supplements include vitamins, minerals, herbs, meal supplements, sports nutrition products, natural food supplements and other related products used to boost the nutritional content of the diet.” Gale Encyclopedia of Medicine (2008) <https://medical-dictionary.thefreedictionary.com/Nutritional+Supplements> (accessed December 1, 2020). *In re Brohill Furniture Indus. Inc.*, 60 USPQ 2d 1511, 1514 n. 5 (judicial notice taken of standard reference works).

shown therein are in use on a commercial scale or that the public is familiar with them, [they] may have some probative value to the extent that they may serve to suggest that such goods or services are the type which may emanate from a single source”); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993). In this case, to the extent that the goods are not overlapping, the registrations suggest that a common entity may be the source of both dietary and nutritional food supplements.

The second *DuPont* factor favors a finding of likelihood of confusion.

As to trade channels, neither the present application nor the cited registration place any limitations on trade channels in which the goods move or the customers who purchase the goods. Because the goods identified in the application and in the cited registration are legally identical in part, we must presume that the channels of trade and classes of purchasers are also the same for these goods. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (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).

The third *DuPont* factor also favors a finding of likelihood of confusion.

C. Sophisticated Purchasers

Applicant argues that the Board has “repeatedly indicated that consumers exercise a higher level of care when purchasing mineral supplements and vitamins” and argues, without support, that consumers of Applicant’s and Registrant’s supplements exercise a high degree of care. Applicant’s reply brief, 7 TTABVUE 5.

Neither Applicant's nor Registrant's goods are restricted to any particular price point or consumer. When the goods are unrestricted, it is assumed that they are sold to all purchasers, including those purchasers exercising only ordinary care, and at all price points. *Bongrain Int'l (Am.) Corp. v. Moquet Ltd.*, 230 USPQ 626, 628 (TTAB 1986). In our analysis, we must consider the degree of care that would be exercised by the least sophisticated consumer. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163 (precedent requires consumer care for likelihood-of-confusion decision to be based "on the least sophisticated potential purchasers"). As stated, there is no evidence that the least sophisticated potential purchasers of dietary supplements or dietetic products exercise particular care in purchasing Applicant's and Registrant's goods. Accordingly, we find this *DuPont* factor is neutral.

D. Conclusion

We conclude that confusion is likely because the marks are similar, the goods are related in part, and the channels of trade and classes of consumer overlap for the legally identical goods.

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