

ESTTA Tracking number: **ESTTA686001**

Filing date: **07/27/2015**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	86187537
Applicant	Active Life Global Solutions Ltd.
Applied for Mark	SECOND WIND
Correspondence Address	MATTHEW H. SWYERS THE TRADEMARK COMPANY 344 MAPLE AVE W STE 151 VIENNA, VA 22180-5612 UNITED STATES mswyers@thetrademarkcompany.com
Submission	Appeal Brief
Attachments	Brief of the Applicant.pdf(375955 bytes)
Filer's Name	Matthew H. Swyers
Filer's e-mail	mswyers@TheTrademarkCompany.com
Signature	/Matthew H. Swyers/
Date	07/27/2015

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of Active Life Global Solutions Ltd.

Serial No. 86187537

Trademark: SECOND WIND

Filing Date: Feb. 07, 2014

BRIEF OF THE APPLICANT

TABLE OF CONTENTS

	Page No.s
Table of Authorities.....	3
I. Introduction.....	4
II. Statement of the Case.....	4
III. Argument.....	5
IV. Conclusion.....	16

TABLE OF AUTHORITIES

CASES:

<i>Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank</i> , 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987).....	7, 13
<i>First Savings Bank F.S.B. v. First Bank System Inc.</i> , 101 F.3d at 645, 40 USPQ2d 1865, 1870 (10 th Cir. 1996).....	6
<i>General Mills, Inc. v. Kellogg Co.</i> , 824 F.2d 622, 3 USPQ2d 1442 (8th Cir. 1987).....	6
<i>Hewlett-Packard Co. v. Packard Press Inc.</i> , 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002).....	7, 13
<i>In re Decombe</i> , 9 USPQ2d 1812 (TTAB 1988).....	8
<i>In re Dixie Restaurants Inc.</i> , 41 USPQ2d 1531, 1533 (Fed. Cir. 1997).....	5
<i>In re E.I. du Pont DeNemours & Co.</i> , 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).....	5
<i>In re Pellerin Milnor Corp.</i> , 221 USPQ 558 (TTAB 1983).....	8
<i>In re Shell Oil Co.</i> , 992 F.2d 1204, 26 USPQ2d 1687 (Fed. Cir. 1993).....	7
<i>J & J Snack Foods Corp. v. McDonald’s Corp.</i> , 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991).....	7, 13
<i>Local Trademarks, Inc. v. Handy Boys Inc.</i> , 16 USPQ2d 1156 (TTAB 1990).....	7, 13
<i>Luigino’s Inc. v. Stouffer Corp.</i> , 50 USPQ2d 1047.....	7
<i>Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.</i> , 875 F.2d 1026, 10 USPQ2d 1961 (2d Cir. 1989).....	6
<i>Octocom Systems Inc. v. Houston Computer Services Inc.</i> , 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990).....	7
<i>Paula Payne Products Co. v. Johnson Publishing Co.</i> , 473 F.2d 901, 177 USPQ 76 (C.C.P.A. 1973).....	7, 13
<i>Quartz Radiation Corp. v. Comm/Scope Co.</i> , 1 USPQ2d 1668 (TTAB 1986).....	7, 14

Shen Manufacturing Co. v. Ritz Hotel Ltd., 393 F.3d 1238,
73 USPQ2d 1350 (Fed. Cir. 2004)..... 7

Universal Money Centers, Inc. v. American Tel. & Tel. Co., 22 F.3d 1527,
30 USPQ2d 1930 (10th Cir. 1994)..... 6

OTHER AUTHORITIES:

TMEP § 1207.01(a)(i)..... 8

TMEP § 1207.01(a)(iii)..... 7

TMEP § 1207.01(d)(vii)..... 8

I. INTRODUCTION

COMES NOW the Applicant Active Life Global Solutions Ltd. (hereinafter “Applicant”) and through counsel The Trademark Company, PLLC, and provides this Brief of the Applicant in support of its appeal of the examining attorney’s refusal to register the instant mark.

II. STATEMENT OF THE CASE

On or about Feb. 07, 2014 Applicant filed the instant trademark with the U.S. Patent and Trademark Office seeking to register the same on in connection with the following goods: "Dietary and nutritional supplements; Dietary supplements; Nutritional supplements".

On or about May 16, 2014 the Examining Attorney refused registration of the Applicant’s trademark on the grounds that, if registered, it would create a likelihood of confusion with the registered trademarks, both for 2ND WIND, as more fully set forth in U.S. Registration Nos. 2200619 and 4512946, respectively.

On or about February 26, 2015 Applicant filed a response to the Office Action dated May 16, 2014 arguing in support of registration. However, ultimately Applicant’s argument was not deemed persuasive by the Examining Attorney and, accordingly, on or about March 2, 2015 the Examining Attorney made the refusal final.

The instant appeal now timely follows.

III. ARGUMENT

The Standard for a Determination of a Likelihood of Confusion

A determination of likelihood of confusion between marks is made on a case- specific basis. *In re Dixie Restaurants Inc.*, 41 USPQ2d 1531, 1533 (Fed . Cir. 1997). The Examining Attorney is to apply each of the applicable factors set out in *In re E.I. du Pont DeNemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973). The relevant *du Pont* factors are:

- (1) The similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression;
- (2) The similarity or dissimilarity and nature of the goods as described in an application or registration or in connection with which a prior mark is in use;
- (3) The similarity or dissimilarity of established, likely-to-continue trade channels;
- (4) The conditions under which and buyers to whom sales are made, i.e., ‘impulse’ vs. careful, sophisticated purchasing;
- (5) The number and nature of similar marks in use on similar services; and
- (6) The absence of actual confusion as between the marks and the length of time in which the marks have co-existed without actual confusion occurring.

Id.

The Examining Attorney is tasked with evaluating the overall impression created by the marks, rather than merely comparing individual features. *Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 875 F.2d 1026, 1029, 10 USPQ2d 1961 (2d Cir. 1989). In this respect, the Examining Attorney must determine whether the total effect conveyed by the marks is confusingly similar, not simply whether the marks sound alike or look alike. *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1870 (10th Cir. 1996) (recognizing that while the dominant portion of a mark is given greater weight, each mark still must be considered as a whole)(citing *Universal Money Centers, Inc. v. American Tel. & Tel. Co.*, 22 F.3d 1527, 1531, 30 USPQ2d 1930 (10th Cir. 1994)). Even the use of identical dominant words or terms does not automatically mean that two marks are confusingly similar. In *General Mills, Inc. v. Kellogg Co.*, 824 F.2d 622, 627, 3 USPQ2d 1442 (8th Cir. 1987), the court held that “Oatmeal Raisin Crisp” and “Apple Raisin Crisp” are not confusingly similar as trademarks. Also, in *First Savings Bank F.S.B. v. First Bank System Inc.*, 101 F.3d at 645, 653, 40 USPQ2d 1865, 1874 (10th Cir. 1996), marks for “FirstBank” and for “First Bank Kansas” were found not

to be confusingly similar. Further, in *Luigino's Inc. v. Stouffer Corp.*, 50 USPQ2d 1047, the mark "Lean Cuisine" was not confusingly similar to "Michelina's Lean 'N Tasty" even though both marks use the word "Lean" and are in the same class of services, namely, low-fat frozen food.

Concerning the respective goods with which the marks are used, the nature and scope of a party's goods must be determined on the basis of the goods recited in the application or registration. *See, e.g., Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 n.4 (Fed. Cir. 1993); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 18 USPQ2d 1889 (Fed. Cir. 1991); *Octocom Systems Inc. v. Houston Computergoods Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987); *Paula Payne Products Co. v. Johnson Publishing Co.*, 473 F.2d 901, 177 USPQ 76 (CCPA 1973). *See generally* TMEP § 1207.01(a)(iii).

Even if the marks are similar, confusion is not likely to occur if the goods in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create an incorrect assumption that they originate from the same source. *See, e.g., Shen Manufacturing Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 73 USPQ2d 1350 (Fed. Cir. 2004) (cooking classes and kitchen textiles not related); *Local Trademarks, Inc. v. Handy Boys Inc.*, 16 USPQ2d 1156 (TTAB 1990) (LITTLE PLUMBER for liquid drain opener held not confusingly similar to LITTLE PLUMBER and design for advertising services, namely the formulation and preparation of advertising copy and literature in the plumbing field); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668 (TTAB 1986) (QR for coaxial cable held

not confusingly similar to QR for various products (*e.g.*, lamps, tubes) related to the photocopying field). *See generally* TMEP § 1207.01(a)(i).

Purchasers who are sophisticated or knowledgeable in a particular field are not necessarily immune from source confusion. *See In re Decombe*, 9 USPQ2d 1812 (TTAB 1988); *In re Pellerin Milnor Corp.*, 221 USPQ 558 (TTAB 1983). However, circumstances suggesting care in purchasing may tend to minimize likelihood of confusion. *See generally* TMEP § 1207.01(d)(vii).

Applying the legal standards as enumerated above, it is clear that confusion is not likely as between Applicant's trademark and the trademark cited and, accordingly, the refusal to register SECOND WIND should be withdrawn.

Cited Registrations Owned by Diverse Owners

Initially, it is noted that the cited registrations are owned by diverse registrants. During the examination of an application, the examining attorney should consider separately each registration found in a search of the marks registered in the USPTO that may bar registration of the applicant's mark under §2(d). If the examining attorney finds registrations that appear to be owned by more than one registrant, he or she should consider the extent to which dilution may indicate that there is no likelihood of confusion. TMEP §1207.01(d)(x).

Generally, registration of more than one trademark by diverse entities indicates dilution of the cited terms as it applies to the applied-for trademark. §1207.01(d)(x) As such, it is respectfully submitted that dilution of the terms involved in the instant refusal are sufficient enough that fact favors a finding of an absence of a likelihood of confusion under the relevant *du Pont* factors.

The Trademarks Are Dissimilar

The points of comparison for a word mark are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973)). Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related. Rather, taking into account all of the relevant facts of a particular case, similarity as to one factor alone *may* be sufficient to support a holding that the marks are confusingly similar, but a similarity of one factor is not dispositive of the entire analysis. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988). Additions or deletions to marks are often sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.

The Trademarks Create Distinct Connotations

Similarity in meaning or connotation is another factor in determining whether the marks are confusingly similar. *See In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (CCPA 1973); *In re Cynosure, Inc.*, 90 USPQ2d 1644, 1645-46 (TTAB 2009). The focus is on the recollection of the average purchaser who normally retains a general, rather than specific, impression of trademarks.

Moreover, the meaning or connotation of a mark must be determined in relation to the named goods or services. Even marks that are identical in sound and/or appearance may create

sufficiently different commercial impressions when applied to the respective parties' goods or services so that there is no likelihood of confusion. *See, e.g., In re Sears, Roebuck & Co.*, 2 USPQ2d 1312, 1314 (TTAB 1987) (holding CROSS-OVER for bras and CROSSOVER for ladies' sportswear not likely to cause confusion, noting that the term "CROSS-OVER" was suggestive of the construction of applicant's bras, whereas "CROSSOVER," as applied to registrant's goods, was "likely to be perceived by purchasers either as an entirely arbitrary designation, or as being suggestive of sportswear which "crosses over" the line between informal and more formal wear . . . or the line between two seasons"); *In re British Bulldog, Ltd.*, 224 USPQ 854, 856 (TTAB 1984) (holding PLAYERS for men's underwear and PLAYERS for shoes not likely to cause confusion, agreeing with applicant's argument that the term "PLAYERS" implies a fit, style, color, and durability suitable for outdoor activities when applied to shoes, but "implies something else, primarily indoors in nature" when applied to men's underwear); *In re Sydel Lingerie Co.*, 197 USPQ 629, 630 (TTAB 1977) (holding BOTTOMS UP for ladies' and children's underwear and BOTTOMS UP for men's clothing not likely to cause confusion, noting that the wording connotes the drinking phrase "Drink Up" when applied to men's clothing, but does not have this connotation when applied to ladies' and children's underwear); *In re Farm Fresh Catfish Co.*, 231 USPQ 495, 495-96 (TTAB 1986) (holding CATFISH BOBBERS (with "CATFISH" disclaimed) for fish, and BOBBER for restaurant services, not likely to cause confusion, because the word "BOBBER" has different connotation when used in connection with the respective goods and services); *Citigroup Inc. v. Capital City Bank Group, Inc.*, 637 F.3d 1344, 1356, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (affirming TTAB's holding that contemporaneous use of applicant's CAPITAL CITY BANK marks for banking and financial services, and opposer's CITIBANK marks for banking and financial

services, is not likely cause confusion, based, in part, on findings that the phrase “City Bank” is frequently used in the banking industry and that ”CAPITAL” is the dominant element of applicant’s marks, which gives the marks a geographic connotation as well as a look and sound distinct from opposer’s marks).

The Applicant’s mark is SECOND WIND. The cited marks are 2nd WIND Reg. No. 22000619 and 2nd WIND Reg. No. 4512946. The Examining Attorney opined that a likelihood of confusion could result from the Applicant’s use of the term “SECOND” which is the word form of “2nd”. The Examining Attorney is correct in this regard, and we agree that the Applicant’s SECOND WIND and the cited marks 2nd WIND are similar in sound.

There is also a resemblance in appearance as both marks use the term “WIND”. However, we here point out that the Applicant’s mark spells out the word “SECOND” whereas both cited marks use its numerical form. Therefore, the over-all appearances of the subject marks are dissimilar.

As for connotation and commercial impression, the Examining Attorney concludes that the marks are “identical in meaning” and “highly similar in commercial impression”. We disagree. Determination of a mark’s commercial impression is not in the abstract but based on the goods claimed by the Applicant. Applying this principle, the relevant buyer could interpret SECOND WIND to mean rejuvenation, recovery and to revive health and the commercial impression would be to maintain all around general well-being post recovery.

As for the cited mark 2nd WIND Reg. No. 2200619 for dietary supplements made with herbs in a powdered form and encapsulated per the Specimen of Use submitted by Registrant. 2nd WIND here connotes a boost of energy needed to complete physically strenuous exercise. The commercial impression therefore is that 2nd WIND is a natural performance enhancer for sports and exercise.

The other cited mark, 2nd WIND Reg. No. 4512946 for energy drinks shares the same connotation and commercial impression as with the 2nd WIND mark referenced above and relays restored energy or strength needed to complete physically strenuous exercise.

The marks are therefore dissimilar in respect of connotation and commercial impression. Although there is an admittedly close resemblance in appearance and the identical phonetics we believe that the dissimilarities in connotation and commercial impression outweigh the aspects where the marks are similar and identical.

We therefore submit that consideration of this *du Pont* factor should favor registration of the Applicant's mark.

Cited Trademark on the Supplemental Register

Additionally, the Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that merely descriptive and weak designations are entitled to a narrower scope of protection than an entirely arbitrary or coined word. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1373, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005); *Giersch v. Scripps Networks, Inc.*, 90 USPQ2d 1020, 1026 (TTAB 2009); *In re Box Solutions Corp.*, 79 USPQ2d 1953, 1957-58 (TTAB 2006); *In re Cent. Soya Co.*, 220 USPQ 914, 916 (TTAB 1984).

In the instant case, the cited trademark 2ND WIND (U.S. Reg. No. 4512946) is registered on the Supplemental Register. As such, it should be afforded a far narrower scope of protection and, accordingly, this should also weigh in favor of a finding of an absence of a likelihood of confusion under the instant *du Pont* factor.

Distinctions as Between Applicant's and Registrant's Goods and Services

The nature and scope the goods or services offered in connection with the Applicant's and the registrant's trademarks must be determined on the basis of the goods or services identified in the application or registration. *See, e.g., Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1370, 101 USPQ2d 1713, 1722 (Fed. Cir.

2012); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *J & J Snack Foods Corp. v. McDonald's Corp.*, 932 F.2d 1460, 1463, 18 USPQ2d 1889, 1892 (Fed. Cir. 1991); *Octocom Sys., Inc. v. Houston Computer Servs., Inc.*, 918 F.2d 937, 942, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Canadian Imperial Bank of Commerce, N.A. v. Wells Fargo Bank*, 811 sF.2d 1490, 1493, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987); *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 902, 177 USPQ 76, 77 (CCPA 1973); *In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011); *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1500 (TTAB 2010).

The issue is not whether the goods and/or services will be confused with each other, but rather whether the public will be confused as to their source. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 1329, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000).

If the goods or services in question are not related or marketed in such a way that they would be encountered by the same persons in situations that would create the incorrect assumption that they originate from the same source, then, even if the marks are identical, confusion is not likely. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371, 101 USPQ2d 1713, 1723 (Fed. Cir. 2012) (affirming the Board's dismissal of opposer's likelihood-of-confusion claim, noting "there is nothing in the record to suggest that a purchaser of test preparation materials who also purchases a luxury handbag would consider the goods to emanate from the same source" though both were offered under the COACH mark); *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1244-45, 73 USPQ2d 1350, 1356 (Fed. Cir. 2004) (reversing TTAB's holding that contemporaneous use of RITZ for cooking and wine selection classes and RITZ for kitchen textiles is likely to cause confusion, because the relatedness of the respective goods and services was not supported by substantial evidence); *Local Trademarks*,

Inc. v. Handy Boys Inc., 16 USPQ2d 1156, 1158 (TTAB 1990) (finding liquid drain opener and advertising services in the plumbing field to be such different goods and services that confusion as to their source is unlikely even if they are offered under the same marks); *Quartz Radiation Corp. v. Comm/Scope Co.*, 1 USPQ2d 1668, 1669 (TTAB 1986) (holding QR for coaxial cable and QR for various apparatus used in connection with photocopying, drafting, and blueprint machines not likely to cause confusion because of the differences between the parties' respective goods in terms of their nature and purpose, how they are promoted, and who they are purchased by).

The facts in each case vary and the weight to be given each relevant *du Pont* factor may be different in light of the varying circumstances; therefore, there can be no rule that certain goods or services are *per se* related, such that there must be a likelihood of confusion from the use of similar marks in relation thereto. *See, e.g., In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009) (regarding alcoholic beverages); *Info. Res. Inc. v. X*Press Info. Servs.*, 6 USPQ2d 1034, 1038 (TTAB 1988) (regarding computer hardware and software); *Hi-Country Foods Corp. v. Hi Country Beef Jerky*, 4 USPQ2d 1169, 1171–72 (TTAB 1987) (regarding food products); *In re Quadram Corp.*, 228 USPQ 863, 865 (TTAB 1985) (regarding computer hardware and software); *In re British Bulldog, Ltd.*, 224 USPQ 854, 855-56 (TTAB 1984) (regarding clothing); *see also M2 Software, Inc. v. M2 Commc'ns, Inc.*, 450 F.3d 1378, 1383, 78 USPQ2d 1944, 1947–48 (Fed. Cir. 2006) (noting that relatedness between software-related goods may not be presumed merely because the goods are delivered in the same media format and that, instead, a subject-matter-based mode of analysis is appropriate).

The Applicant claims use for “dietary and nutritional supplements”, which presumably can include vitamins, herbal medicine, amino acid and protein supplements, omega 3 fish oil fatty acid supplements and antioxidants.

The cited mark 2nd Wind is for use on “dietary supplements made with herbs in powdered form and encapsulated”. As stated, the herbal capsules are used for performance enhancement, as the label on Registrant’s Specimen of Use states “increases clearance of lactic acid”. Lactic acid build is believed to cause stress and fatigue particularly during exercise.

The other cited mark 2nd WIND is used for “energy drinks” which are commonly consumed during strenuous physical exercise and activities. Energy drinks contain ingredients that rehydrate the body, replace electrolytes and boost energy, e.g., sodium, sugar, caffeine. The Specimen of Use submitted by the Registrant indicates that the drink is an “all-natural” drink for “nutritious energy”.

In a very general sense, dietary and nutritional supplements are related goods because supplements are perceived to augment nutritional deficiencies in order to achieve general well-being. However some supplements are specifically indicated e.g., calcium for bone loss, Kelp for thyroid support. Also, certain physical conditions limit the use of supplements where the combined use of supplements are contraindicated, e.g., glucosamine is typically recommended for arthritic joints but cannot be taken together with green barely or protein supplements because the high uric acid will aggravate joint pains. Therefore, in order to accurately determine relatedness in the goods here, and avoid hasty generalizations, the goods here must be examined as to their specific nature, purpose, use and function.

We submit that the goods are dissimilar because the Applicant’s goods are intended to achieve and maintain good health and well-being. On the other hand, both the cited marks seem

to be used for performance enhancement and increasing energy in sports, exercise and athletic activities.

As such, and in consideration of these distinctions, it is respectfully submitted that the instant *du Pont* factor favors registration of the applied-for trademark.

Sophistication of Purchasers

The purchasers of the Applicant dietary and nutritional supplements are people who seek to achieve and maintain good health and general well-being.

The purchasers of the both the 2nd WIND cited marks supplements and energy drinks are likely to include athletic, sporty people, or those who engage in strenuous physical exercise, e.g., core, weight lifting, red-cord, hiking, cycling. Energy drinks and supplements are used to fuel the body because eating food is discouraged before any exercise.

Supplement products are not impulse buys. Careful thought and consideration is given before any supplement is purchased given that these products are ingested. Inappropriate use could lead to serious physical side effects and even death. However, when a consumer finds a supplement brand that is effective and responsive to their needs, the buyer tends to be loyal to that brand.

Finally, supplements are generally pricey and hence, the relevant buyer can be relied upon to make discerning choices. As such, it is submitted that the buyers for the respective services are sophisticated enough to distinguish among the marks and thus this *du Pont* factor also favors a finding of an absence of a likelihood of confusion.

CONCLUSION

Based upon the foregoing it is submitted that the *du Pont* factors addressed herein favor registration of the Applicant's Trademark.

WHEREFORE it is respectfully requested that the Trademark Trial and Appeal Board reverse the decision of the Examining Attorney, remove as an impediment the cited trademark, and approve the instant Application for publication.

Respectfully submitted this 27th day of July, 2015,

THE TRADEMARK COMPANY, PLLC

/Matthew H. Swyers/

344 Maple Avenue West, PMB 151

Vienna, VA 22180

Tel. (800) 906-8626 x100

Facsimile (270) 477-4574

mswers@thetrademarkcompany.com