

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 Liquivita, LLC
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Serial No. 86265014
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Joseph C. Wasch of Wasch Raines LLP,
for Liquivita, LLC.

Steven W. Ferrell, Jr., Trademark Examining Attorney, Law Office 121,
Michael W. Baird, Managing Attorney.

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Before Taylor, Bergsman and Greenbaum,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Liquivita, LLC (“Applicant”) seeks registration on the Principal Register of the
mark LIQUIVITA LOUNGE and design, shown below, for

Medical services; Medical testing for diagnostic or
treatment purposes; Providing medical information in the
field of health and wellness; Medical hydration clinic
services, namely, providing intravenous hydration,
intravenous free radical reduction therapy, intravenous
fluid cleansing therapy, supplemental oxygen therapy, and
massage therapy; Providing medical information,
consultancy and advisory services; Mobile medical
hydration clinic services, namely, providing intravenous
hydration, intravenous free radical reduction therapy,

intravenous fluid cleansing therapy, supplemental oxygen therapy, and massage therapy, in Class 44.¹



Applicant disclaimed the exclusive right to use the word “Lounge.”

The Trademark Examining Attorney has refused registration of Applicant’s mark under Section 2(d) of the Trademark Act of 1946, 15 U.S.C. § 1052, on the ground that Applicant’s mark so resembles the registered mark LIQUI-VITE (typed drawing form) for a “multivitamin dietary food supplement,” in Class 5, as to be likely to cause confusion.²

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We affirm the refusal to register.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of

¹ Application Serial No. 86265014 was filed on April 29, 2014, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as February 2014.

² Registration No. 1526499, issued February 28, 1989; renewed.

likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). *See also In re Majestic Distilling Co., Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the services. *See 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. The similarity or dissimilarity of the marks.

We turn first to the *du Pont* likelihood of confusion factor focusing on the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *In re E. I. du Pont De Nemours & Co.*, 177 USPQ at 567. In a particular case, “two marks may be found to be confusingly similar if there are sufficient similarities in terms of sound *or* visual appearance *or* connotation.” *Kabushiki Kaisha Hattori Seiko v. Satellite Int’l, Ltd.*, 29 USPQ2d 1317, 1318 (TTAB 1991), *aff’d mem.*, 979 F.2d 216 (Fed. Cir. 1992) (citation omitted). *See also Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009) (citing *Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”)).

In comparing the marks, we are mindful that “[t]he proper test is not a side-by-side comparison of the marks, but instead ‘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." *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012). See also *San Fernando Electric Mfg. Co. v. JFD Electronics Components Corp.*, 565 F.2d 683, 196 USPQ 1, 3 (CCPA 1977); *Spoons Restaurants Inc. v. Morrison Inc.*, 23 USPQ2d 1735, 1741 (TTAB 1991), *aff'd mem.*, 972 F.2d 1353 (Fed. Cir. 1992). The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Industries, Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975). Based on Applicant's identification of services, the average customer is a person seeking medical services specifically intravenous hydration, intravenous free radical reduction therapy, intravenous fluid cleansing therapy, supplemental oxygen therapy, and massage therapy.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entirety, the analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. See *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985). See also *Franklin Mint Corp. V. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) ("It is

axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion”). On the other hand, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re National Data Corp.*, 224 USPQ at 751.

The dominant element of Applicant’s mark is the word LIQUIVITA. In the case of marks consisting of words and a design, the words are normally given greater weight because they would be used by consumers to request the products and/or services. *In re Viterra Inc.*, 671 F.3d 1358, 1362, 101 USPQ2d 1905, 1908, 1911 (Fed. Cir. 2012) (citing *CBS Inc. v. Morrow*, 708 F. 2d 1579, 1581-82, 218 USPQ 198, 200 (Fed. Cir. 1983)); *Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 4 USPQ2d 1793, 1798 (Fed. Cir. 1987); *Giant Food, Inc. v. Nation’s Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Although the droplet design in Applicant’s mark is clearly visible, it merely emphasizes the liquid component of the identified services.

Applicant further emphasizes the word LIQUIVITA as the dominant part of its mark by displaying it in a much larger font thereby calling attention to that word as opposed to the word “Lounge” which is displayed in a much smaller font below the word LIQUIVITA.

Consumers are not apt to place much significance on the hyphen in the registered trademark LIQUI-VITE. *See Nahshin v. Prod. Source Int’l LLC*, 107 USPQ2d 1257, 1258 n.2 (TTAB 2013) (“the presence or absence of a hyphen is insignificant to our

. . . decision”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (hyphen did not distinguish MAGNUM from MAG-NUM); *Goodyear Tire & Rubber Company v. Dayco Corporation*, 201 USPQ 485, 489 n.4 (TTAB 1978) (“Fast-Finder” with hyphen is in legal contemplation substantially identical to “Fastfinder” without hyphen). Therefore, LIQUIVITA and LIQUI-VITE are similar in appearance and sound.

Both LIQUIVITA and LIQUI-VITE are coined terms engendering the commercial impression of liquid life.³ Consumers may interpret the addition of the word “Lounge” in Applicant’s LIQUIVITA LOUNGE mark as the division of LIQUI-VITE that provides hydration therapy to consumers.

We disagree with Applicant’s argument that any similarity in the marks is based on “an improper dissection of the marks and an improper disregard of Appellant’s ‘Lounge’, the non-common element of the refused mark.”⁴ As stated, there is nothing improper in giving more or less weight to a particular feature of a mark, so long as the decisive likelihood of confusion conclusion is based on a consideration of the entireties of the respective marks. *In re National Data Corp.*, 224 USPQ at 751. In

³ The word “vita” is an adverb defined as “during life.” Dictionary.com based on the *Random House Dictionary* (2016). The word “vite” is an adverb defined, inter alia, as “lively.” *Id.* The Board may take judicial notice of dictionary definitions, *Univ. of Notre Dame du Lac v. J.C. Gourmet Food Imp. Co.*, 213 USPQ 594 (TTAB 1982), *aff’d*, 703 F.2d 1372, 217 USPQ 505 (Fed. Cir. 1983), including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* ___ F.3d ___, ___ USPQ2d ___ (Fed. Cir. 2016); *Threshold.TV Inc. v. Metronome Enters. Inc.*, 96 USPQ2d 1031, 1038 n.14 (TTAB 2010); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁴ Applicant’s Brief, p. 3 (9 TTABVUE 4).

fact, Applicant argues that the marks are not similar by dissecting the marks and focusing on the slight differences between the LIQUIVITA and LIQUI-VITE. For example,

- LIQUI-VITE is two words separated by a hyphen;
- LIQUIVITA LOUNGE, comprising two distinct and separate words, invites pronunciation of each word with emphasis providing an impression of a commercial establishment; and
- Adding the word LOUNGE to the element common of both marks creates a very distinct and different commercial impression when applied to LIQUVITA as it suggests a physical location that is commercial in nature, not a product or group of products.⁵

In view of the foregoing, we find that the marks are similar in their entireties in terms of appearance sound, connotation and commercial impression.

B. The similarity or dissimilarity and nature of the goods and services and established, likely-to-continue channels of trade.

⁵ Applicant's Brief, pp. 3-4 (9 TTABVUE 4-5). We cannot consider Applicant's argument that its tagline is "replenish, rehydrate, revitalize," because the tagline is not part of the mark sought to be registered. We are concerned here with the mark shown in the drawing accompanying the application. See Trademark Rule 2.52 (A drawing depicts the mark sought to be registered."); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847-48 (Fed. Cir. 2000) (because applicant filed to register a typed drawing of its mark, "it is irrelevant that [applicant] has a particular display for his mark in commerce, and the Board was correct to ignore those features."); *In re Rexel Inc.*, 223 USPQ 830, 832 (TTAB 1984) ("The fact that applicant's stapler kits bear its house mark 'REXEL' as well as the product mark 'LITTLE GOLIATH' is not persuasive of a different result since applicant is seeking to register the mark 'LITTLE GOLIATH' alone.").

To show that Applicant’s services are related to Registrant’s “multivitamin dietary food supplements,” the Trademark Examining Attorney submitted use-based, third-party registrations comprising the relevant goods and services. Third-party registrations based on use in commerce that individually cover a number of different goods and services may have probative value to the extent that they serve to suggest that the listed goods and service are of a type that may emanate from the same source. *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-1786 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Representative registrations, with relevant portions of the identifications, are listed below.

Mark	Reg. No.	Goods/services
BRING THE HAPPINESS AND LONGEVITY TO YOUR HOME	4693429	Food-based botanical dietary supplements; massage therapy; medical services, namely, vitamin therapy, vitamin injections ⁶

⁶ Although vitamin therapy and vitamin injections are not expressly set forth in Applicant’s identification of services, they are very closely related to Applicant’s “intravenous free radical reduction therapy” and, therefore, probative of the relatedness of the goods and services. Free radicals are formed as part of the metabolic process and may cause cellular damage. “Free Radicals,” *Stedman’s Medical Dictionary* (stedmanonline.com). “[T]here is evidence that many nutrients, including vitamins C and E and beta-carotene, also exert an antioxidant effect.” *Id.*

Free radicals are normally scavenged from tissues by the antioxidant enzymes ... In addition, a number of nutrient substances, vitamins, and minerals have been shown to contribute to antioxidant functions, generally by serving as cofactors or coenzymes.

* * *

Claims that vitamins and other nutrients, when taken in massive doses, can prevent heart attack or cancer or retard

Mark	Reg. No.	Goods/services
GOLDEN CABINET	3346927	Nutritional and dietary supplements; vitamin therapy; health care services, namely, wellness programs for treatment of acute and chronic pain, gastrointestinal digestive disorders, metabolic disorders, chronic fatigue syndrome, emotional stress, sexual and hormonal health, cancer prevention, neurological degenerative disease, respiratory disorders and anti-aging
LIQUIFUSION	4743562	Vitamin and mineral supplements; intravenous vitamin infusion services; intravenous free radical reduction therapy
THE DIET DIRECTOR	3632717	Dietary and nutritional supplements; counseling services in the field of health, nutrition and lifestyle wellness; vitamin therapy; providing assistance, fitness evaluation and consultation to individuals to help them make health, wellness and nutritional changes in their daily living to improve health

aging are not based on scientific evidence. Although a high intake of antioxidants from food sources appears to offer some health advantages, there is at present no unequivocal evidence that any antioxidant nutrient, when taken in excess of normal dietary amounts, has value in the prevention or treatment of cardiovascular disease, cancer, or any other abnormal process except such as may be associated with frank nutritional or vitamin deficiency.

“Antioxidants,” *Stedman’s Medical Dictionary* (stedmansonline.com). Accordingly, many consumers sophisticated enough to utilize Applicant’s intravenous free radical reduction therapy will do so because they believe that such therapy includes an infusion of vitamins and minerals providing antioxidants to reduce the cellular damage caused by free radicals.

Mark	Reg. No.	Goods/services
MEDI-COLON HYDROTHERAPY	4319607	Liquid dietary supplements; medial services, including colon hydrotherapy services before colonoscopies, colon therapy for digestive disorders, and nutritional counseling
MIRAVITA	4363157	Dietary supplements; medical services
VIDA MD	4573715	Dietary and nutritional supplements; counselling services in the fields of health, nutrition and lifestyle wellness; vitamin therapy

The Trademark Examining Attorney also submitted excerpts from third-party websites showing that the same entity offered the relevant goods and services under the same mark. For example,

1. Eastside Primary Care & Wellness (eriksuhmd.com) advertises that its medical practice offers “Nutritional IVs,” providing “life giving nutrients and antioxidants in a way you can’t get with oral supplements,” as well as its private label EASTSIDE Primary Care & Wellness vitamins;⁷

⁷ September 2, 2015 Office Action. “Nutrients” are “constituent[s] of food necessary for normal physiologic function.” “Nutrient,” *Stedman’s Medical Dictionary* (stedmansonline.com). “Essential nutrients” “must be in the diet, because they are not formed metabolically within the body.” “Essential nutrients,” *Stedman’s Medical Dictionary* (stedmansonline.com). “Vitamins” are “[o]ne of a group of organic substances, present in minute amounts in natural foodstuffs that are essential to normal metabolism; insufficient amounts in the diet may cause deficiency diseases.” “Vitamin,” *Stedman’s Medical Dictionary* (stedmansonline.com). “Hydration therapy” may include vitamins and antioxidants. BuzzFeedNews website (buzzfeed.com) attached to the September 2, 2015 Office Action. Accordingly, these services are related to Applicant’s “medical hydration clinic services, namely, intravenous free radical reduction therapy.”

2. Motykie MedSpa (motykiemedspa.com) advertises intravenous infusion therapies to help patients absorb vital nutrients and its own line of vitamin supplements;⁸
3. Sonoran Naturopathic Center (sncaz.com) advertises intravenous therapy for nutrients, vitamins, amino acids, etc. and its own line of supplements;⁹
4. Medi Weightloss (mediweightlossclinics.com) advertises its medical services and own line of dietary supplements;¹⁰ and
5. The Riordan Clinic (riordanclinic.org) advertises its vitamin injection services and its own line of vitamins and nutrients;¹¹

See also Hangover Heaven (hangoverheaven.com),¹² Patients Medical (patientsmedical.com),¹³ Visions HealthCare (visionshealthcare.com),¹⁴ and AgeLess Integrative Medical Spa (agelessllc.com).¹⁵

Applicant argues that it operates a brick and mortar clinic providing intravenous hydration and cleansing therapies while Registrant sells its supplement online.¹⁶

Thus, the products sold by Registrant over the internet are expressly limited to the sale of vitamins to an expressly limited group of purchasing consumers who search

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ August 20, 2014 Office Action.

¹² *Id.*

¹³ *Id.*

¹⁴ January 20, 2015 Office Action.

¹⁵ *Id.*

¹⁶ Applicant's Brief, p. 4 (9 TTABVUE 5).

websites to obtain deliveries of vitamins by mail or overnight courier.¹⁷

Because we may not read limitations into descriptions of goods and services, we may not limit Registrant's "multivitamin dietary food supplement[s]" to a "group of purchasing consumers who search websites to obtain deliveries of vitamins by mail or overnight courier." *Squirto v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirto's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"). Therefore, we must presume that Registrant's supplements could be sold as part of a medical practice rendering hydration and cleansing therapies as demonstrated by the third-party websites submitted by the Trademark Examining Attorney.

In view of the foregoing, we find that the goods and services are related and move in the same channels of trade.

C. The conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing.

Applicant argues that its services are not subject to impulse purchases whereas Registrant's supplements "are more likely to be purchased on impulse."¹⁸ Without any supporting evidence, we simply cannot find that "multivitamin dietary food supplement[s]" are impulse buys. On the other hand, we acknowledge that consumers

¹⁷ Applicant's Brief, p. 4 (9 TTABVUE 5).

¹⁸ Applicant's Brief, p. 5 (9 TTABVUE 6).

for Applicant's services and Registrants "multivitamin dietary food supplement[s]" will exercise a high degree of consumer care in deciding whether to engage Applicant's services or purchase Registrant's dietary supplements. However, we find that the similarity of the marks and the relatedness of the goods and services sold thereunder outweigh any sophisticated purchasing decision, especially in the absence of specific evidence relating to the degree of care in making the decision. *See HRL Associates, Inc. v. Weiss Associates, Inc.*, 12 USPQ2d 1819 (TTAB 1989), *aff'd*, *Weiss Associates, Inc. v. HRL Associates, Inc.*, 902 F.2d 1546, 14 USPQ2d 1840 (Fed. Cir. 1990) (similarities of goods and marks outweigh sophisticated purchasers, careful purchasing decision, and expensive goods).

D. Balancing the factors.

Because the marks are similar, the goods and services are related, and the goods and services move in some of the same channels of trade, we find that Applicant's mark LIQUIVITA LOUNGE and design for the services set forth in the application are likely to cause confusion with the registered mark LIQUI-VITE for "multivitamin dietary food supplement[s]."

Decision: The refusal to register Applicant's mark LIQUIVITA LOUNGE and design is affirmed.