

**This Opinion is Not a
Precedent of the TTAB**

Mailed: March 28, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

—
Trademark Trial and Appeal Board
—

In re The Medicеutical Association, Inc.
—

Serial No. 86779237
—

Brick G. Power of Durham Jones & Pinegar, P.C.,
for The Medicеutical Association, Inc.

Laura M. Wright, Trademark Examining Attorney, Law Office 125,
Mark Pilaro, Managing Attorney.

—
Before Kuhlke, Masiello, and Heasley,
Administrative Trademark Judges.

Opinion by Masiello, Administrative Trademark Judge:

The Medicеutical Association, Inc. (“Applicant”) filed an application¹ for registration on the Principal Register of the mark THE SCIENCE OF MEDICEUTICALS in standard characters for the following goods:

Amino acid preparations for medical purposes; Amino acids for nutritional purposes; Dietary and nutritional supplements; Dietary supplements; Multi-vitamin preparations; Nutritional supplements; Nutritional supplements for amino acid supplementation, bone care,

¹ Application Serial No. 86779237 was filed on October 6, 2015 on the basis of Applicant’s *bona fide* intention to use the mark in commerce under Trademark Act Section 1(b), 15 U.S.C. § 1051(b).

skeletal care, joint support, brain support, nerve support, prenatal care, postnatal care, preparation for surgery, recovery from surgery, recovery from trauma and recovery from bone fractures; Prenatal vitamins; Vitamin and mineral preparations for medical use; Vitamin and mineral supplements; Vitamin supplements, in International Class 5.

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with Applicant's goods, so resembles the mark MEDICEUTICALS, in standard characters, as to be likely to cause confusion, or to cause mistake, or to deceive. The cited mark is the subject of two registrations that appear to be owned by a single entity:

Mark	Goods
MEDICEUTICALS	<p>Skin care products, namely, face creams, lotions, and gels; skin masks; skin peels; skin cleansers; skin scrubs; non-medicated skin care treatment, namely, cleansers, anti-bacterial creams, gels, and lotions, lotions, toners, oils, and moisturizers; non-medicated skin care treatment preparations; anti-aging creams, lotions, and gels; anti-wrinkle creams, lotions, and gels; skin moisturizing creams, lotions, and gels; foot creams and lotions; skin toners; bubble baths, in International Class 3;</p> <p>Medicated skin care products, namely, face creams, lotions, and gels; medicated skin masks; medicated skin peels; medicated skin cleansers; medicated skin scrubs; medicated anti-aging creams, lotions, and gels; medicated anti-wrinkle creams, lotions, and gels; medicated skin moisturizing creams, lotions, and gels; medicated foot creams and lotions; medicated skin toners; medicated skin care preparations for use in the treatment of oily skin, dry skin, psoriasis, rosacea, in International Class 5.²</p>

² Reg. No. 4448041, issued December 10, 2013.

Mark	Goods
MEDICEUTICALS	Hair shampoo, in International Class 3. ³

When the refusal was made final, Applicant appealed to this Board. Applicant and the Examining Attorney have filed briefs. We affirm the refusal.

I. Evidentiary matter.

Applicant attached to its brief 23 pages of evidence,⁴ and the Examining Attorney has objected to their admission.⁵ The evidence is untimely and we have not considered it. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d); *see also* Trademark Trial and Appeal Board Manual of Procedure (TBMP) § 1207.01 (June 2017). While it appears that some of the newly submitted evidence might have already been in the record, we have not compared it to the record evidence, but have based our decision solely on the evidence that is properly of record. *See* TBMP § 1203.02(e) (evidence already of record should not, as a matter of course, be resubmitted as exhibits to the brief).

II. Refusal under Section 2(d).

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the issue of likelihood of confusion as set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the

³ Reg. No. 0932375, issued April 11, 1972; renewed.

⁴ Applicant's brief, 4 TTABVUE 14-36.

⁵ Examining Attorney's brief, 6 TTABVUE 4-5.

similarities between the marks and the similarities between the goods and services. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

A. The marks.

We first consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005). “The 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). Moreover, marks must be considered in light of the fallibility of memory. *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014).

The marks are similar in appearance, sound, and meaning to the extent that Applicant’s mark contains within itself the entirety of the cited registered mark MEDICEUTICALS. The additional wording in Applicant’s mark, THE SCIENCE OF, is a point of difference in appearance, sound, and meaning. Although it is obvious that the words THE SCIENCE OF have a literal meaning that is absent from the cited mark, we find that Applicant’s mark as a whole does not create a commercial impression that is meaningfully different from the mark MEDICEUTICALS alone.

Applicant's own marketing literature, which refers to Applicant's goods as "mediceuticals," emphasizes repeatedly the science-based nature of the goods:

Unlike nutritional supplements or nutraceuticals ..., mediceuticals ... undergo a scientific, transparent testing process. ...

Mediceutical products represent the focused application of nutritional science formulated to support a specific medical condition.⁶

In order to qualify as a mediceutical, a supplement must:

... Contain elements validated by clinical research for the specific health condition or situation, as published in medical or scientific publication.⁷

Applicant's literature describes its goods as "Science-based, Advanced Nutritional Support," "Science-based, Targeted Nutritional Support," and "Science-based Amino Acid Nutritional Support."⁸ Apart from the way Applicant promotes its goods, the term MEDICEUTICALS on its face contains suggestions of the words "medicine" and "pharmaceuticals," both of which terms are related to "science." Thus, the cited mark MEDICEUTICALS carries a strong suggestion of science, such that the wording THE SCIENCE OF in Applicant's mark has only weak capacity to distinguish the two marks. Just as Applicant's mark invites customers to think about the scientific aspects of Applicant's goods, the cited mark similarly suggests to customers that

⁶ Applicant's response of August 2, 2016 at 19. (All references to the record in TSDR are to the downloadable pdf version.)

⁷ *Id.* at 19-20.

⁸ *Id.* at 9-18.

Registrant's goods have medical and pharmaceutical characteristics and are therefore "scientific" in their own right. We find that the two marks create substantially similar commercial impressions, and the *du Pont* factor of the similarity or dissimilarity of the marks favors a finding of likelihood of confusion.

B. The goods.

We next consider the similarity or dissimilarity of the goods as identified in the application and the cited registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014); *Octocom Sys. Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant's goods are amino acid preparations; dietary and nutritional supplements; and vitamin and mineral preparations and supplements. Registrant's goods are various skin care products (medicated and non-medicated) and shampoo.

The goods are, to some degree, similar in nature, as the record shows that some skin and hair care products are promoted as providing vitamins or minerals or functioning as a nutritional supplement, such as PHYTO Phytologist shampoo ("The best supplement to absolute hair thinning prevention");⁹ SWANSON Vitamin C Cream for skin;¹⁰ SWANSON Vitamin K Cream with Menaquinone-7, Vitamin E

⁹ Office Action of March 19, 2017 at 39.

¹⁰ *Id.* at 48.

Cream, and Niacin Skin Cream;¹¹ and CALENDULA Vitamin E Cream and Zinc Chamomile Cream.¹²

To show that the goods of Applicant and Registrant are commercially related, the Examining Attorney has submitted evidence from the internet showing nutritional supplements and skin and hair care products offered by a single producer under the same trademarks. We note the following:

CVS brand moisturizers, foaming cleanser, shampoos, omega-3 krill oil, multi-vitamins, and glucosamine chondroitin tablets;¹³

RITE AID brand acne gel, day cream, regenerating serum, moisturizer, shampoo, magnesium capsules, vitamin D-3 softgels, and glucosamine/chondroitin capsules;¹⁴

ARBONNE brand shampoo, facial oil, rejuvenating cream, “calcium plus” tablets;¹⁵

CAUDALIE brand moisturizers, face lifting soft cream, night infusion cream, and dietary supplement capsules;¹⁶

DR. BAUMANN brand shampoos, facial care creams, mineral food supplements, and omega-3 food supplements;¹⁷

HERBALIFE NUTRITION brand shampoo, aloe skin cleanser, herbal toner, moisturizer, night cream, and “targeted nutrition products”;¹⁸

¹¹ *Id.* at 50-51.

¹² Office Action of February 2, 2016 at 12.

¹³ *Id.* at 13-15.

¹⁴ *Id.* at 16-18.

¹⁵ Office Action of March 19, 2017 at 12-17.

¹⁶ *Id.* at 19-20, 23.

¹⁷ *Id.* at 27-31.

¹⁸ *Id.* at 33-38.

PHYTO brand shampoo and dietary supplements;¹⁹

SWANSON brand shampoos, moisturizing creams, oils, and lotions, skin serum, vitamin and multivitamin tablets and softgels;²⁰

MURAD brand skin cleansers, spot lightening gel, toners, moisturizers, and dietary supplements and “Pure Skin Clarifying Dietary Supplement”;²¹

PERRICONE MD brand omega-3 supplements, “skin clear supplements,” metabolic support supplements, moisturizers, exfoliators, cleansers, serums;²²

XTENDLIFE brand dietary supplement and “age defying day cream”;²³ and

MITOQ brand blood sugar capsules and cream serum for skin.²⁴

We need not find similarity as to each and every product listed in the application and registrations. For purposes of our analysis, it is sufficient that relatedness be established for any item encompassed by the identification of goods in a particular class in the application. *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

Applicant argues that the offering of supplements and beauty products under mass-market house brands like CVS and RITE AID does not show that such goods are so related as to suggest that customers would mistakenly believe they originate

¹⁹ *Id.* at 39, 42.

²⁰ *Id.* at 45-57.

²¹ Office Action of August 24, 2016 at 11-12.

²² *Id.* at 13-14.

²³ *Id.* at 15-16.

²⁴ *Id.* at 17-18.

from the same source.²⁵ Such house brands present less compelling evidence; however, the record includes several examples beyond the two mass-market house brands, showing such goods offered under the same mark. Applicant also argues that “the vast majority of sources of shampoo and skin care products are not sources of specialized supplements.”²⁶ Even if not *all* producers of beauty products are also producers of supplements, that does not undercut the Examining Attorney’s position, for as the evidence demonstrates, an appreciable number of businesses offer both types of products under the same mark.

The Examining Attorney’s evidence is sufficient to persuade us that relevant customers are likely to believe that nutritional supplements and skin and hair care products are types of goods that may come from a single source. Therefore, the *du Pont* factor of the similarity or dissimilarity of the goods weighs in favor of a finding of likelihood of confusion.

C. Trade channels; Customers.

Because there are no restrictions as to trade channels and customers in the application and registrations at issue, we may presume that the goods will move through all channels of trade that are normal for such goods and be available to all types of customers for such goods. *See Octocom*, 16 USPQ2d at 1787; *Paula Payne Prod’s Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77-78 (CCPA 1973); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Normal trade channels for

²⁵ Applicant’s brief at 5, 4 TTABVUE 9.

²⁶ *Id.* at 6, 4 TTABVUE 10.

Applicant's and Registrant's goods include drug stores, both brick and mortar and online. Indeed, the RITE AID website excerpt presents an example of that common trade channel. The other third-party websites (discussed in detail above) show that beauty products for hair and skin are offered over the internet together with nutritional supplements through the online stores of their makers. Although this is not evidence that the goods of different makers would be found in the same online stores, it does show that customers using the internet find products of both types in the same online stores. Applicant's unsupported contention that the only other channels through which its goods are available (aside from its own website) are "websites that sell products that have been certified as 'medicetical' products" and "the offices of healthcare providers"²⁷ is not relevant because there is no such limitation of trade channels set forth in the application. In view of the foregoing, we find these *du Pont* factors weigh in favor of finding likely confusion.

III. Conclusion.

We have considered all of the arguments and evidence of record, including those not specifically discussed herein, and all relevant *du Pont* factors. The marks at issue are similar, in part, in appearance, sound, and meaning and they create substantially similar overall commercial impressions. The goods at issue are sufficiently related that customers would believe that they emanate from the same source and are the types of goods that travel through the same channels of trade and are purchased by

²⁷ Applicant's brief at 7, 4 TTABVUE 11.

the same classes of consumers. We find that Applicant's mark so resembles the cited registered mark as to be likely to cause confusion as to the source of Applicant's goods.

Decision: The refusal under Section 2(d) is AFFIRMED.