

This Opinion is Not a
Precedent of the TTAB

Mailed: January 31, 2018

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Spin80, Inc.

Serial No. 87116915

Darren Heitner of Heitner Legal, PLLC
for Spin80, Inc.

Jillian Cantor, Trademark Examining Attorney, Law Office 117,
Hellen Bryan-Johnson, Managing Attorney.

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

Opinion by Lynch, Administrative Trademark Judge:

I. Background

Spin80, Inc. (“Applicant”) seeks registration on the Principal Register of the mark CODEGREEN in standard characters, for “Nutritional supplements in pill and/or

powder form” in International Class 5.¹ The Examining Attorney has finally refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the mark CODE GREEN in standard characters for “fruit beverages” in International Class 32 and “vegetable based food beverages” in International Class 29.² After the final Office Action, Applicant appealed. We affirm the refusal to register for the reasons set out below.

II. Likelihood of Confusion

The determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic Distilling Co.*, 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 relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *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.”). We discuss below these and other relevant factors. *See M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d

¹ Application Serial No. 87116915 was filed July 26, 2016, based on alleged use in commerce as of July 11, 2016 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Registration No. 3506013 issued September 23, 2008, §§ 8/15 combined declaration accepted and acknowledged.

1378, 78 USPQ2d 1944 (Fed. Cir. 2006) (only *du Pont* factors that are “relevant and of record” need be considered).

A. Similarity of the Marks

We first turn to the *du Pont* factor comparing the applied-for and cited marks, which we consider “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods and services offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs., Inc. v. Glenn Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Comparing CODEGREEN to the registered mark CODE GREEN, we find the marks to be nearly identical. The only difference between them stems from Applicant presenting its mark without a space between the component terms “code” and “green,” while the registered mark contains a space between the same two words. We find this difference insignificant. *See, e.g., Seaguard Corp. v. Seaward Int’l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD “are, in contemplation of law, identical”); *In re Best W. Family Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (BEEF MASTER and BEEFMASTER “practically identical”); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff’d*, 737 F.2d 1576, 222 USPQ

665 (Fed. Cir. 1984) (STOCKPOT and STOCK POT “are phonetically identical and visually almost identical”). Overall, the marks are almost indistinguishable in appearance, and are identical in sound, meaning, and commercial impression. Applicant has acknowledged the similarity of the marks.³

B. The Goods

As to the goods, we must determine whether their degree of relatedness rises to such a level that consumers would mistakenly believe the respective goods emanate from the same source. In making this analysis of the second *du Pont* factor, we look to the identifications in the application and cited registration. *See Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Computers Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990). Applicant identifies nutritional supplements in pill and/or powder form, while the cited registration identifies fruit beverages and vegetable-based food beverages. In comparing the goods, we bear in mind that “the greater the degree of similarity between the applicant’s mark and the registered mark, the lesser the degree of similarity between the applicant’s goods and registrant’s goods that is required to support a finding of likelihood of confusion.” *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1636 (TTAB 2009).

The record includes evidence that goods of this type emanate from the same source under the same mark. For example:

³ TSDR January 9, 2017 Response to Office Action at 3.

- The Amway website promotes a sparkling fruit beverage under the same mark, XS, as nutritional supplements in pill form;⁴
- The website for Medifast offers fruit beverages and nutritional supplements in pill form under the Medifast mark;⁵
- The Swanson Health Products website features a pomegranate juice beverage and nutritional supplements in pill form under the Swanson mark;⁶
- The Vitacost website shows that mark used both on juice beverages and nutritional supplements in pill form;⁷
- The Vitacost website also shows the mark GARDEN OF LIFE and design used on both nutritional supplement pills and fruit beverages.⁸

This marketplace evidence demonstrates that consumers encounter fruit beverages being sold by a single entity under the same mark as nutritional supplements in pill form.

The Examining Attorney also submitted additional evidence, in the form of 11 use-based third-party registrations that identify fruit beverages and nutritional supplements under the same mark.⁹ These registrations suggest that the relevant goods and services may emanate from the same source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to

⁴ TSDR November 9, 2016 Office Action at 7-10 (amway.com).

⁵ *Id.* at 11-14 (medifast1.com).

⁶ *Id.* at 15-23 (swansonvitamins.com).

⁷ *Id.* at 30-35 (vitacost.com).

⁸ TSDR January 30, 2017 Office Action at 21-28.

⁹ *Id.* at 29-64.

suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons*, 29 USPQ2d 1783, 1785-86 (TTAB 1993).

Applicant argues against relatedness because its goods are “nutritional powder and/or pill products that are geared and marketed towards the training, exercise, and fitness industry, whereas the Registration’s Goods and Services [sic] have no precise application other than providing a liquid alternative to juice, water, milkshakes, etc.”¹⁰ However, Applicant points to no supporting evidence that such goods are unrelated, and the Examining Attorney’s evidence demonstrates that the same entities tend to offer both nutritional supplements and fruit beverages under the same mark. Applicant’s assertion that its goods are “highly specialized” also lacks evidentiary support, and the evidence regarding nutritional supplement pills suggests otherwise. Overall, we find that the record amply supports the relatedness of the relevant goods. The evidence as to these goods shows that “the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs.*, 101 USPQ2d at 1722.

C. Trade Channels and Classes of Consumers

This *du Pont* factor must be assessed according to the identifications of the respective goods and services in the application and registration at issue, not on

¹⁰ 4 TTABVUE 8 (Applicant’s Brief).

extrinsic evidence of actual use. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722; *Octocom*, 16 USPQ2d at 1787. We must assume that the identified goods and services move through all normal and usual channels of trade and methods of distribution for such goods and services. *In re i.am.symbolic llc*, 866 USPQ2d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983). The marketplace evidence set out above reflects that fruit beverages and nutritional supplement pills are promoted and sold together through the same websites, reaching the same classes of consumers. Thus, we find that at a minimum, the trade channels and classes of consumers overlap.

D. Purchasing Conditions and Purchasers

Applicant argues, without supporting evidence, that its goods involve careful purchasing conditions because consumers of nutritional supplements necessarily are “overly dedicated to fitness and wellness,” and are “specifically pursuing the results and effects” of the supplements.¹¹ We cannot infer that the relevant consumers in this case are especially sophisticated, as Applicant argues. *See Enzo Biochem Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005) (“Attorney argument is no substitute for evidence.”). And while *some* consumers may exercise a certain degree of care in selecting supplements, they are not necessarily likely to exercise a high degree of care in terms of examining the trademarks. In view of this and the requirement that we consider the least sophisticated potential purchasers,

¹¹ *Id.* at 9 (Applicant’s Brief).

we reject Applicant's proposition that careful purchasing conditions exist for the relevant goods. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163 ("Accordingly, the Board properly considered all potential investors for the recited services.... Board precedent requires the decision to be based 'on the least sophisticated potential purchasers.'").

Also under this *du Pont* factor, Applicant contends that the goods would not be confused because of the difference in the actual price of its goods from the typically lower price of vegetable and fruit beverages.¹² However, in support of its assertion that its goods are expensive, Applicant only states in its Brief that its specimen of use "show[s] that *one* item of the Mark's Goods and Services [sic] is sold for \$34.99 on Amazon."¹³ We have no representation from Applicant that all its identified goods fall in this price range. In any event, we must base our decision on the type of goods identified in the application, not the particular goods on which Applicant may currently use its mark, *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981), and evidence in the record shows that generally, nutritional supplements can sell at a much lower price, including in the \$4-\$10 range.¹⁴ Regardless, even if we were to attribute to the relevant consumer a degree of care in purchasing these goods, it is well established that even sophisticated consumers are not immune from source confusion, especially

¹² *Id.* at 10.

¹³ *Id.* (emphasis added).

¹⁴ *See, e.g.*, TSDR November 9, 2016 Office Action at 32 (Vitacost supplements at \$4.50 and \$4.22); *id.* at 23 (Swanson supplements at \$7.99 and \$8.99).

where, as here, the marks are substantially identical. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000).

E. The Extent of Potential Confusion

Applicant restates its position that the goods are distinct and the relevant consumer is sophisticated, and argues under the twelfth *du Pont* factor that therefore potential confusion is *de minimus*. We addressed these arguments above under the relevant *du Pont* factors.

F. Conclusion

The near identical nature of the marks for related goods that move in overlapping channels of trade, reaching the same classes of customers, renders confusion likely, notwithstanding any care consumers may exercise.

Decision: The refusal to register Applicant's mark is affirmed.