

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 Vital Planet, LLC
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Serial No. 87455242
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Zachary D. Messa of Johnson, Pope, Bokor, Ruppel & Burns, LLP,
for Vital Planet, LLC.

Collier L. Johnson II, Trademark Examining Attorney, Law Office 123,
Susan Hayash, Managing Attorney.

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Before Ritchie, Kuczma, and Coggins,
Administrative Trademark Judges.

Opinion by Coggins, Administrative Trademark Judge:

Vital Planet, LLC (“Applicant”) seeks registration on the Principal Register of the mark VITAL FLORA (in standard characters) for “dietary supplements for pets for supporting intestinal flora for digestive health,” in International Class 5.¹

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 applied

¹ Application Serial No. 87455242 filed on May 18, 2017, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as November 10, 2016.

to the goods identified in the application, so resembles the mark FLORAVITAL (in typed form) for “dietetic food supplements,” in International Class 5,² on the Principal Register as to be likely to cause confusion, to cause mistake, or to deceive. When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal was resumed. We affirm the refusal to register.

I. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the 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.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *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. Identity of the Goods, Channels of Trade, and Classes of Customers

We first consider the second and third *du Pont* factors, the similarity of the goods, channels of trade, and classes of customers. We must make our determinations under these factors based on the goods as they are identified in the application and cited

² Registration No. 2295973, issued November 30, 1999; renewed.

registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990).

Registrant's goods are "dietetic food supplements." Applicant's goods are "dietary supplements for pets for supporting intestinal flora for digestive health." Where the cited registration describes the goods broadly, and there is no limitation as to their nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all goods of the type described, that they move in all normal channels of trade, and that they are available to all classes of purchasers. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981). Because Registrant's broadly identified food supplements are not restricted to humans, Registrant's identification must be read to encompass Applicant's narrower goods.³

³ Although the Examining Attorney presumed that Registrant's goods were for human use, *see* April 13, 2018 Office Action at TSDR 5 ("Where the identification does not specify otherwise, the Office construes an identification in International Class 5 to identify goods for human use."), and Brief, unnumbered p. 9 (12 TTABVUE 10) ("the registrant is offering supplements for humans"), there is no such limitation in Registrant's identification, and we are not bound by the Examining Attorney's statement. *See, e.g., In re D.B. Kaplan Delicatessen*, 225 USPQ 342, 343 n.2 (TTAB 1985) (Board need not "limit its determination of the question of registrability to the reasons set forth by the Examining Attorney during the prosecution of this application"); *see also*, TBMP § 1217 (2019) and authorities cited therein. The Board may find goods related or legally identical even if our specific reasoning was not previously argued by Applicant or the Examining Attorney during the application's prosecution and on appeal. Moreover, there appears to be no legal basis for the presumption, which runs against TMEP §§ 1402.07(a) (Oct. 2018) (The Ordinary-Meaning Test) and 1207.01(a)(iii) (Reliance on Identification of Goods/Services in Registration and Application).

See In re Hughes Furniture Indus., Inc., 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”).

To the extent Applicant argues that Registrant’s specimen shows the cited “goods are for human not pet consumption, a different market than [Applicant’s] dietary supplements for pets,” Brief, p. 10 (10 TTABVUE 14), our determination is bounded by the four corners of the application and cited registration; we may not read into them limitations based on actual use. *See, e.g., In re La Peregrina Ltd.*, 86 USPQ2d 1645, 1647 (TTAB 2008) (“An applicant may not restrict the scope of the goods covered in the cited registration by argument or extrinsic evidence.”) (citing *In re Bercut-Vanderboort & Co.*, 229 USPQ 763, 764-65 (TTAB 1986)). Therefore, the goods in the cited registration overlap with the goods in the application; they are legally identical in part.

Given the legal identity of the goods in part, and the lack of restrictions or limitations in the cited registration as to their nature, channels of trade, or classes of purchasers, we must presume that the channels of trade and classes of purchasers are also the same. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1518-19 (TTAB 2016); *see also In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion).

Based on the in-part legal identity of the goods set forth in the application and the cited registration, and the overlapping trade channels and classes of purchasers, the

du Pont factors of the similarity of the goods, channels of trade, and classes of customers weigh heavily in favor of likelihood of confusion.

B. Strength of the Mark

Because the strength of the cited FLORAVITAL mark will inform our comparison of the marks, we address Applicant's claim that the term FLORAVITAL deserves a narrow scope of protection for dietetic food supplements because, due to "dozens of registered marks" containing either the term FLORA or the term VITAL, Brief, p. 3 (10 TTABVUE 7), "consumers are bombarded with each of the terms contained in . . . Registrant's mark for the same type of goods." Reply Br., p. 3 (13 TTABVUE 7).

The Examining Attorney made of record dictionary definitions showing VITAL means "necessary to the continuation of life; life-sustaining: a vital organ; vital nutrients" and FLORA means "the bacteria and other microorganisms that normally inhabit a bodily organ or part: intestinal flora."⁴ Based on these definitions alone we find each constituent term (i.e., FLORA and VITAL) to be suggestive of dietetic food supplements. However, there is no evidence to indicate that when combined as FLORAVITAL the mark has any conceptual weakness.

In support of its position that FLORA and VITAL are individually weak terms and entitled only to a limited scope of protection, Applicant invokes the sixth *du Pont* factor by pointing to third-party registrations and uses of those registered marks (i.e., specimens in the respective registration files) that include either the term VITAL or

⁴ From THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE; April 13, 2018 Office Action, TSDR 7, 9.

the term FLORA for dietary or nutritional supplements. *See* October 15, 2018 Request for Reconsideration at TSDR 36-128 (VITAL marks) and 129-356 (FLORA marks).

The Federal Circuit has held that evidence of extensive registration and use of a term by others for similar goods can be “powerful” evidence of the term’s weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). If the evidence establishes that the consuming public is exposed to widespread third-party use of similar marks for similar goods, it “is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005).

The record contains extensive evidence of third-party use and registration of marks that include either the term VITAL or the term FLORA for dietary or nutritional supplements. *See* October 15, 2018 Request for Reconsideration at TSDR 36-128 (VITAL marks) and 129-356 (FLORA marks).⁵ These individual terms appear to be weak for dietary and nutritional supplements. *See Juice Generation*, 115 USPQ2d at 1675 (Third-party registrations “are relevant to prove that some segment of the composite marks which both contesting parties use has a normally understood

⁵ Not all of this evidence is probative, as a handful of marks identify goods other than dietary or nutritional supplements or are owned by the same third-parties; however, the majority of the evidence is probative.

and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.” (quoting *Textronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694 (CCPA 1976))). However, Applicant produced no evidence of third-party use or registration of the combined term FLORAVITAL. It is well-established that the weakness of the individual components of a mark is not, of itself, sufficient to prove that their combination creates a weak mark. *See China Healthways Inst., Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (“It is incorrect to compare marks by eliminating portions thereof and then simply comparing the residue.” (citing *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1283 (Fed. Cir. 1984))); *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.”). We give little weight to Applicant’s evidence of third-party trademark registrations and specimens which separately include variants of either VITAL or FLORA. Applicant has not shown that the combination of the terms FLORA and VITAL into the term FLORAVITAL is a weak mark not entitled to a normal scope of protection.

Even if we assume that the combined term FLORAVITAL is weak, “likelihood of confusion is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong’ mark.” *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974). Given the identity of the two terms (i.e., FLORA and VITAL) in Applicant’s and Registrant’s marks and the

absence of any evidence showing that the combined term FLORAVITAL is weak or diluted, we accord the cited mark an ordinary scope of protection in our likelihood of confusion analysis. Moreover, while third-party registrations may be used to demonstrate that a portion of a mark is suggestive or descriptive, they “cannot justify the registration of another confusingly similar mark.” *In re J.M. Originals Inc.*, 6 USPQ2d 1393, 1394 (TTAB 1987), quoting *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).

The *du Pont* factors assessing the degree of weakness or strength of the registered mark are neutral.

C. Similarity of the Marks

We next consider the first *du Pont* likelihood of confusion factor, which focuses on “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay v. Veuve Clicquot*, 73 USPQ2d at 1691 (quoting *du Pont*, 177 USPQ at 567). “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) (quotation omitted). Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time. *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1468 (TTAB 1988). Moreover, where the goods of the applicant and registrant are legally identical, as they are in-part in this case, the

degree of similarity between the marks required to support a finding of likelihood of confusion is not as great as would be required with diverse goods. *See Bridgestone Ams. Tire Operations, LLC v. Fed. Corp.*, 673 F.3d 1330, 102 USPQ2d 1061, 1064 (Fed. Cir. 2012); *Viterra*, 101 USPQ2d at 1908; *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010). The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014); *In re Binion*, 93 USPQ2d 1531, 1534 (TTAB 2009). Here, the average purchaser of Applicant's goods includes ordinary consumers who purchase dietary supplements for pets for supporting intestinal flora for digestive health.

Applicant's mark is VITAL FLORA. Registrant's mark is FLORAVITAL. Each mark contains the terms VITAL and FLORA, and only those terms. Applicant's mark transposes the terms as they are presented in the cited mark.

Applicant argues that its mark is comprised of two words while Registrant's mark consists of a single word. We acknowledge there is no space between FLORA and VITAL in the cited mark; however, the lack of a space does not mean that consumers would not recognize and understand that the cited mark is comprised of two terms FLORA and VITAL. Applicant has not demonstrated that FLORAVITAL is a recognized word, and, as noted above, the Examining Attorney made of record dictionary definitions for the words VITAL and FLORA. Because "flora" and "vital" are standard words, consumers will readily recognize that the cited mark is comprised of two individual terms, both of which are words – the same words which

appear in Applicant's mark. The marks sound similar to the extent they contain the identical constituent words.

Applicant also argues that "the difference in connotation between Applicant's use of the term 'flora' and Registrant's use [of that same term] is apparent." Brief, p. 7 (10 TTABUE 11). Specifically, Applicant posits that FLORA in its mark connotes bacteria or intestinal flora, while FLORA in the cited mark connotes a plant or a flower. *Id.* In its argument about the connotation of the term FLORA, Applicant attempts to limit Registrant's goods to products "comprised of non-probiotic ingredients." Brief, p. 8 (10 TTABVUE 12). However, there is no such limitation in Registrant's identification of goods. We must focus on the identification of goods stated in the Application and Registration, not on extrinsic evidence of the nature of the actual goods. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)). Similarly, we reject the implication that the commercial impression conveyed by Registrant's mark differs, or is limited, due to Registrant's specimen of record.⁶ We must consider Registrant's mark, as registered, and not as it may otherwise be used, in our likelihood of confusion analysis. *See, e.g., Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470-71 (TTAB 2016) (citing, inter alia, *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000) ("registrations with typed drawings are not limited to any particular

⁶ The specimen was made of record by Applicant as Exhibit 5 to the October 15, 2018 Request for Reconsideration, TSDR 4, 476.

rendition of the mark and, in particular, are not limited to the mark as it is used in commerce”); *In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214 (TTAB 2001) (“in Board proceedings, likelihood of confusion is determined independent of the context of actual usage”). There is simply nothing to indicate that consumers will have different commercial impressions for the two identical terms as used on overlapping goods. *Cf. Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721 (meaning and commercial impression of “coach” differed due to use on different services).

The Examining Attorney argues that “[A]pplicant’s mark simply transposes the two word elements of [R]egistrant’s mark,” and that when the terms VITAL and FLORA are used together in either Applicant’s or Registrant’s mark, they “convey that the dietary supplements sold under the respective marks contain or provide vital flora (i.e., necessary intestinal bacteria). Transposing the wording in these marks does not change this commercial impression, and thus, the marks are confusingly similar.” Examiner’s Brief, unnumbered pp. 4-5 (12 TTABVUE 5-6). We find the marks FLORAVITAL and VITAL FLORA to have a similar commercial impression, especially when used on in-part legally identical goods. As discussed above, FLORA means “the bacteria and other microorganisms that normally inhabit a bodily organ or part: intestinal flora,” while VITAL means “necessary to the continuation of life; life-sustaining: a vital organ; vital nutrients.”⁷ Although Applicant’s mark places the

⁷ From THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE; April 13, 2018 Office Action, TSDR 7, 9.

adjective VITAL before the noun FLORA, but Registrant's mark places the noun before the adjective, there is nothing to suggest that the transposition of the terms gives a new or different meaning to either of the constituent terms or to the marks as a whole.

Relying on *In re Akzona Inc.*, 219 USPQ 94, 96 (TTAB 1983) ("Applicant's mark 'SILKY TOUCH,' conveys the impression that applicant's synthetic yarns are silky to the touch. On the other hand, registrant's mark 'TOUCH O' SILK,' suggests that registrant's clothing products contain a small amount of silk."), and *Murphy, Brill and Sagner, Inc. v. N.J. Rubber Co.*, 102 USPQ 420 (Comm'r. Pat. 1954) (finding that TOPFLITE for shoe soles conveys a different meaning than FLITE TOP for hosiery), Applicant argues that its transposition of the component terms from the cited mark create a difference sufficient to quell any likelihood of confusion. Brief, p. 8 (10 TTABVUE 12). However, unlike *Akzona* and *N.J. Rubber*, Applicant's mark does not create an appreciable different commercial impression from Registrant's mark.

Above, we found the constituent terms FLORA and VITAL weak for or dietary and nutritional supplements, but we found that Applicant had not demonstrated that a mark comprised of a combination of these terms was weak. Indeed, none of the third-party marks cited by Applicant combined FLORA and VITAL; the record indicates that Applicant and Registrant have the only two such marks. As such, Applicant's VITAL FLORA mark is closer to Registrant's FLORAVITAL mark than any of the other marks.

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1353 (TTAB 2015). We focus on the recollection of the average consumer who retains a general rather than a specific impression of trademarks. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). And we bear in mind that where, as here, goods are legally identical in part, “the degree of similarity necessary to support a conclusion of likely confusion declines.” *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Applicant also argues that its “use of the term VITAL is akin to the use of a house mark” Brief, p. 7, n.3 (10 TTABVUE 11). In general the use of a house mark does not obviate confusion. *In re Mighty Leaf Tea*, 94 USPQ2d at 1260. “The exceptions to this general rule are where 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.” *Gen. Mills Inc. v. Fage Dairy Processing Indus. SA*, 100 USPQ2d 1584, 1602 (TTAB 2011). Neither of these exceptions apply here since the marks convey the same or similar commercial impression, and, although the constituent terms have been shown to be weak, the unique combination of VITAL and FLORA in a single mark has not been shown to be merely descriptive or diluted.

Similarity in any one of the elements of sound, appearance, meaning, or commercial impression is sufficient to support a determination of likelihood of

confusion. *See, e.g., Krim-Ko Corp. v. Coca-Cola Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968); *In re Mr. Recipe*, 118 USPQ2d at 1089; *Eveready Battery Co. v. Green Planet Inc.*, 91 USPQ2d 1511, 1519 (TTAB 2009). Because we find the marks are similar in sound and appearance to the extent they contain identical constituent words, and that they convey the same or similar commercial impressions, the first *du Pont* factor weighs in favor of a likelihood of confusion.

D. Conditions of Purchase of the Goods

Applicant argues that “[p]et owners often view their pets as members of their family and are inclined to exhibit a high degree of care in making decisions regarding their pet’s health.” Brief, p. 11 (10 TTABVUE 15).

It is “well-settled that even careful purchasers who are knowledgeable as to the goods are not necessarily knowledgeable in the field of trademarks or immune to source confusion arising from the use of confusingly similar . . . marks on or in connection with the goods.” *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009). Marks for all types of goods, including dietary supplements for pets, “must be considered . . . in light of the fallibility of memory’ and ‘not on the basis of side-by-side comparison,” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014), and “[h]uman memories even of discriminating purchasers . . . are not infallible.” *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 168 USPQ 110, 112 (CCPA 1970). *See also In re Research & Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“That the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of

distinguishing between similar trademarks for similar goods.”). Even though the goods might be purchased with a heightened degree of care, the fourth *du Pont* factor only slightly supports a finding that confusion is not likely.

E. Summary and Balancing the Factors

We have found that the goods, which might be purchased with a heightened degree of care, are in-part legally identical and are presumably sold through the same channels of trade and to the same classes of purchasers. Although the constituent terms FLORA and VITAL have been shown to be weak for dietary and nutritional supplements, the cited mark FLORAVITAL which combines those terms has not been shown to be weak. When compared in their entirety, Registrant’s mark FLORAVITAL and Applicant’s mark VITAL FLORA are similar in sound and appearance to the extent they contain identical constituent words, and they convey the same or similar commercial impressions. On balance, we find confusion is likely.

II. Decision

The refusal to register Applicant’s mark VITAL FLORA is affirmed.