

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

Mailed: August 15, 2019

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Healeo Juice Company, LLC
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Serial No. 87493772
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Mark W. Hendricksen of Wells St. John P.S.,
for Healeo Juice Company, LLC.

Barney L. Charlton, Trademark Examining Attorney, Law Office 104,
Zachary Cromer, Managing Attorney.

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Before Mermelstein, Greenbaum and Heasley,
Administrative Trademark Judges.

Opinion by Greenbaum, Administrative Trademark Judge:

Healeo Juice Company, LLC (“Applicant”) seeks registration on the Principal Register of the mark LIFE FORCE REPLENISHMENT (in standard characters) for

Juices, namely, vegetable based juices, fruit based juices, and herbal based juices, and combinations thereof; vegetable-fruit juices; vegetable juices; herbal juices; spice based juices in the nature of cleansing spice juices such as ginger combined with fruit based and/or vegetable based juices; fruit juices, in International Class 32.¹

¹ Application Serial No. 87493772 was filed on June 16, 2017, based upon Applicant’s claim of first use anywhere and use in commerce since at least as early as June 7, 2017.

The Trademark Examining Attorney has refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the mark LIFEFORCE V (in standard characters), registered on the Principal Register for

Energy drinks; fruit beverages, fruit drinks; fruit-flavored beverages; fruit-flavored drinks; fruit-flavoured beverages; non-alcoholic beverages containing fruit juices; non-alcoholic cocktail mixes; sports drinks, in International Class 32,²

as to be likely to cause confusion, mistake or deception.

After the Examining Attorney made the refusal final, Applicant appealed to this Board. We affirm the refusal to register.

I. Evidentiary Objection

Applicant incorporated in its brief details about Reg. No. 4489902, a third-party registration that was not previously made of record. App. Br., 4 TTABVUE 6-7. We sustain the Examining Attorney's objection, and have not considered this evidence. Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d) (record should be complete prior to appeal).

II. Applicable Law

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 issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

² Registration No. 3245565 issued on May 22, 2007 and has been renewed.

(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. Relatedness of the Goods and Channels of Trade

Under the second and third *du Pont* factors, we base our evaluation on the goods as they are identified in the application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997). Applicant does not address these factors in its brief.

Here, the “fruit beverages” and “fruit drinks” identified in the registration encompass, and therefore are legally identical to, the “fruit based juices” and “fruit juices” identified in the 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.’”). Because the goods in the application and cited registration include legally identical products, we need not further consider the relatedness of the goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of

likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Given the in-part legal identity of the identified goods, and the lack of restrictions or limitations in the application or registration as to their nature, channels of trade, or classes of customers, we must presume that the channels of trade and classes of purchasers for these goods are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (legally identical goods are presumed to travel in same channels of trade to same class of purchasers).

The second and third *du Pont* factors strongly support a likelihood of confusion determination.

B. The Similarity or Dissimilarity of the Marks

We next compare the marks LIFE FORCE REPLENISHMENT to LIFEFORCE V “in their entirety as to appearance, sound, connotation and commercial impression.” *Detroit Athletic*, 128 USPQ2d at 1048 (quoting *du Pont*, 177 USPQ at 567); *see also Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (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.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quotation omitted).

Because similarity is determined based on the marks in their entireties, our analysis is not predicated on dissecting the marks into their various components. *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *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 consideration of the marks in their entireties.” *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

The 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) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). We focus on the recollection of the average consumer – here, an ordinary shopper of fruit-based beverages – who normally retains a general rather than a specific impression of trademarks. *See St. Helena Hosp.*, 113 USPQ2d at 1085; *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971). 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.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quotation omitted).

Applicant's mark is LIFE FORCE REPLENISHMENT and the cited mark is LIFEFORCE V, both in standard characters. The marks look and sound similar because of the common wording LIFE FORCE/LIFEFORCE, important considerations in the analysis for consumers "calling for" the goods. *See Viterra*, 101 USPQ2d at 1911. Although there is no space between these two words in the cited mark, the pronunciation and visual effect of LIFE FORCE and LIFEFORCE remains the same. *See, e.g., Seaguard Corp. v. Seaward Int'l, Inc.*, 223 USPQ 48, 51 (TTAB 1984) (SEAGUARD and SEA GUARD "are, in contemplation of the law, identical"); *Stock Pot, Inc. v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983) (STOCKPOT and STOCK POT are similar), *aff'd*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984). The connotation and commercial impression of the marks also is very similar because the common element, LIFE FORCE/LIFEFORCE, applied to fruit-based beverages, suggests desirable attributes of energy and health.

As the first part of each mark, the shared wording LIFE FORCE/LIFEFORCE "is most likely to be impressed upon the mind of a purchaser and remembered," *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) and *Palm Bay Imps.*, 73 USPQ2d at 1692, and so to play a dominant role in each mark. *See, e.g., Detroit Athletic*, 128 USPQ2d at 1049 ("The identity of the marks' initial two words is particularly significant because consumers typically notice those words first."); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (stating that, "upon encountering each mark, consumers must first notice this identical lead word"). Thus, while each mark, considered in its

entirety, contains an additional term (REPLENISHMENT and V) that somewhat differs between the marks, the dominant term in each mark is essentially identical, rendering the marks similar overall in appearance, sound, meaning and commercial impression. *See Nat'l Data*, 224 USPQ at 751 (Fed. Cir. 1985); *see also Stone Lion*, 110 USPQ2d at 1161. Consumers who encounter LIFE FORCE REPLENISHMENT could mistakenly believe that it represents a variation on the registered mark LIFEFORCE V, used to identify fruit-based beverages from a single source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (“Purchasers of opposer’s GOTT and JOEL GOTT wines are likely to assume that applicant’s goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer.”).

Applicant submitted one third-party registration for the mark LIFE FORCE for “nutritional and dietary supplements” with no showing that such goods are related to the beverage products identified in the cited registration. This third-party registration therefore has no bearing on the weakness of the cited registered mark.³ *See Omaha Steaks Int’l v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017)

³ Applicant raises a consistency argument, contending that this registration coexists with Reg. No. 4489902, and therefore Applicant’s application should be allowed to register despite the existence of the cited registration. 4 TTABVUE 6-8. We do not address the merits of this argument because, as noted above, Reg. No. 4489902 is not of record in this proceeding.

(disregarding third-party registrations for goods in other classes where the proffering party “has neither introduced evidence, nor provided adequate explanation to support a determination that the existence of I AM marks for goods in other classes, ... support a finding that registrants’ marks are weak with respect to the goods identified in their registrations”).

Applicant argues that its mark “is a unitary mark and should be taken as a whole with all three words, namely ‘LIFE FORCE REPLENISHMENT,’ and when viewed as such is distinctive from the cited reference.” 4 TTABVUE 6. We do not agree with Applicant that the Examining Attorney dissected the marks into isolated elements, without considering them in their entirety. Rather, we find that the Examining Attorney properly weighed the individual components of each mark to determine their overall impression, and in so doing, properly gave more weight to the common element LIFE FORCE/LIFEFORCE. *See Nat’l Data Corp.*, 224 USPQ at 751.

Given their overall resemblance in sound, appearance, connotation and commercial impression, we find LIFE FORCE REPLENISHMENT and LIFEFORCE V very similar. This factor weighs in favor of a likelihood of confusion.

III. Conclusion

We have considered all the evidence of record and Applicant’s arguments as they pertain to the relevant *du Pont* likelihood of confusion factors. To the extent that any other factors for which no evidence is of record may nonetheless be applicable, we treat them as neutral. We conclude that the overall similarity of the marks for legally

identical goods that move in the same channels of trade to the same classes of customers renders confusion likely.

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