

This Opinion is Not a  
Precedent of the TTAB

Mailed: June 15, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Mary Louise Jones*  
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Serial No. 88723679  
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Dale R. Jensen of Dale Jensen, PLC, for Mary Louise Jones.

Thomas M. Manor, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Larkin, English, and Johnson,  
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

Mary Louise Jones (“Applicant”) seeks registration on the Principal Register of the standard character mark MARY’S EDIBLES<sup>1</sup>, for “Nutritional supplements in the form of gummies,” in International Class 5 (“Applicant’s Goods”).

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<sup>1</sup> Application Serial No. 88723679, filed on December 11, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce. The application includes the following “Name Portrait Consent”: “The name(s), portrait(s), and/or signature(s) shown in the mark identifies applicant, whose consent(s) to register is made of record.” Applicant disclaims the exclusive right to use the word “EDIBLES.”

Citations to the appeal record are from the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry

The Trademark Examining Attorney refused registration of Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that the mark is likely to cause confusion with the following standard character marks registered on the Principal Register by the same entity (collectively, "cited marks"):

- MARYS MEDICINALS for "transdermal patches featuring herbal supplements and nutraceuticals for nausea, insomnia, anxiety, inflammation, pain relief and an improved sense of well-being," in International Class 5;<sup>2</sup> and
- MARYS NUTRITIONALS THE REMEDY for "medicated oil for nausea, insomnia, anxiety, inflammation, pain relief, and an improved sense of well-being comprised of hemp extracts not containing THC or CBD," in International Class 5.<sup>3</sup>

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal proceeded. The appeal has been fully briefed. We affirm the refusal to register.

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number; the number(s) following "TTABVUE" refer to the page number(s) of that particular docket entry, if applicable.

Citations to the application record are to downloadable .pdf versions of the documents in the Trademark Status and Document Retrieval (TSDR) database of the United States Patent and Trademark Office (USPTO).

<sup>2</sup> Registration No. 5218744, issued June 6, 2017. Registrant disclaims the exclusive right to use the word "MEDICINALS."

<sup>3</sup> Registration No. 5688686, issued March 5, 2019. Registrant disclaims the exclusive right to use the words "NUTRITIONALS" and "THE REMEDY."

## I. Evidentiary Issue

Before turning to the merits of the appeal, we address an evidentiary issue. In her Request for Reconsideration, Applicant proffered two Trademark Examination Search System (“TESS”) search result lists, one with 90 subsisting or “live” registrations for Mary-formative marks, and one with 8 “live” registrations and 85 pending or “live” applications for Mary-formative marks.<sup>4</sup> Third-party applications, as opposed to registrations, have no probative value other than as evidence that the applications were filed. *In re Team Jesus LLC*, 2020 USPQ2d 11489, at \*3 n.29 (TTAB 2020) (“an application would be evidence only of the fact that it was filed, and therefore has no probative value”); *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016) (a pending application is evidence only that the application was filed on a certain date). As to the registrations, a mere listing is not sufficient to make the listed registrations of record. *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1264 n.6 (TTAB 2011). However, because the Examining Attorney did not advise Applicant that the listings of third-party registrations were insufficient to make the registrations of record, and instead addressed the listings during prosecution and in his appeal brief, we treat the TESS search results as of record and consider the lists

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<sup>4</sup> Oct. 1, 2021 Request for Reconsideration (“RFR”) at 16-18 (live registration TESS search result list), 20-22 (live application and registration TESS search result list). In her briefs, Applicant states “there are 870 registered marks that include the word ‘Mary’” and 107 registered Mary-formative marks in Class 5 and “related classes” 29 and 30. 6 TTABVUE 8- 9; 9 TTABVUE 4. However, Applicant only included the first 100 entries of the 870 TESS search results, and not all of the entries are for Mary-formative marks. In addition, the TESS search results do not show the class(es) in which the marks are registered. We can only consider the evidence that is appropriately in the record before us, not Applicant’s representations thereof.

of Mary-formative registrations for whatever very limited probative value they may have. See *In re Kysela Pere et Fils*, 98 USPQ2d at 1264 n.6 (Board considered TESS listings for whatever probative value they had); see also *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (examining attorney waived objection to list of third-party registrations but the list did “not include enough information to be probative”).

## II. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark must be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office ... as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive ... .” 15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. ... Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at \*3 (Fed. Cir. 2020). “In any likelihood of confusion analysis, two key considerations are the similarities between the marks

and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at \*29 (TTAB 2021) (citing *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004) and *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)).

We focus our likelihood of confusion analysis on the cited standard character mark MARY’S MEDICINALS for “transdermal patches featuring herbal supplements and neutraceuticals for nausea, insomnia, anxiety, inflammation, pain relief and an improved sense of well-being,” in International Class 5 because it is the most similar to Applicant’s mark. *See, e.g., Sock It To Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*6 (TTAB 2020) (likelihood of confusion analysis confined to most similar pleaded mark); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (likelihood of confusion analysis confined to most similar cited mark). If we find a likelihood of confusion as to the mark MARY’S MEDICINALS, we need not find it as to the other standard character mark cited by the Examining Attorney, MARY’S NUTRITIONALS THE REMEDY.

#### **A. The Similarity or Dissimilarity and Nature of the Goods**

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration ... .” *DuPont*, 177 USPQ at 567. When analyzing the second *DuPont* factor, we look to the identifications of goods in the application and cited registrations. *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162

(Fed. Cir. 2014); *see also Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”). The goods do not have to be identical or even competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010); *In re G.B.I. Tile & Stone, Inc.*, 92 USPQ2d 1366, 1368 (TTAB 2009).

The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.”). It is sufficient that the identified goods of the applicant and the registrant are related in some manner or that the conditions surrounding their marketing are such that they are likely to be encountered by the same persons under circumstances that, because of the marks used in connection therewith, would lead to the mistaken belief that they originate from the same source. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted);

*On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000).

For ease of reference, Applicant's Goods are "nutritional supplements in the form of gummies," and the goods identified in the registration for the mark MARY'S MEDICINALS are "transdermal patches featuring herbal supplements and nutraceuticals<sup>5</sup> for nausea, insomnia, anxiety, inflammation, pain relief and an improved sense of well-being."

The Examining Attorney argues that Applicant's Goods are related to the goods identified in the MARY'S MEDICINALS registration. In support of his argument, the Examining Attorney made of record third-party use-based registrations,<sup>6</sup> shown in the chart below, demonstrating that Applicant's Goods and the registrant's goods are offered under the same mark.

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<sup>5</sup> A "nutraceutical" (or "neutraceutical") is a noun defined as "a bioactive compound occurring as a food component, additive, or product, including vitamins, dietary fiber, herbal extracts, carotenoids, and probiotics: nutraceuticals are said to promote health and well-being, allegedly helping in the prevention and treatment of disease." DICTIONARY.COM (<https://www.dictionary.com/browse/nutraceutical>) (last accessed June 9, 2022). The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re tapio GmbH*, 2020 USPQ2d 11387, at \*3 n.10 (TTAB 2020).

<sup>6</sup> Sept. 10, 2020 Office Action at 11-97. The Examining Attorney also cited Registration No. 3798331, for 瑞芬氏廣嗣藥露, which is canceled. A canceled or expired registration has no probative value other than to show that it once issued; it is not entitled to any of the statutory presumptions of Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b), including the presumption of an exclusive right to use the mark. *Temp. Servs. Inc. v. Labor Force Inc.*, 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("a canceled registration does not provide constructive notice of anything"); *In re Kysela Pere et Fils*, 98 USPQ2d at 1264 ("dead or cancelled registrations have no probative previous value at all").

<u>Reg. No.</u>	<u>Registered Mark</u>	<u>Relevant Class 5 Goods</u>
5848088	JUICE BEAUTY PREBIOTIX  ("BEAUTY" and "PREBIOTICS" disclaimed)	Vitamin supplement patches in the nature of skin patches for the transdermal delivery of vitamins; Non-medical topical transdermal patch for vitamin and mineral delivery; Topical dermatological products in the nature of medicated creams, ointments, solutions for dermatological use for skin cleansing and skin protection, and to treat dry skin and skin blemishes, and transdermal patches applied on the skin containing supplements, vitamins, minerals, and natural and herbal supplements; mineral supplements; nutritional supplements.
5761028	DLPA HAPPY  ("DLPA" disclaimed)	Nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
5773139	L-TRYPTOPHAN POSITIVE SLEEP  ("L-TRYPTOPHAN" disclaimed)	Nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
5852920	NATRICA	Dietary and nutritional supplements; Nutritional supplements; Vitamin supplement patches.
5956844	SUPERMODEL WELLNESS  ("WELLNESS" disclaimed)	Nutritional supplements; Vitamin supplement patches.
5869866	CATCHFIRE ENERGY HEALTH  ("ENERGY HEALTH" disclaimed)	Nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
5796320	<b>Healthy Joints System</b> ("SYSTEM" disclaimed)	Vitamin supplement patches; Nutritional supplements.
5813520	BRIGHTKIDS	Gummy vitamins; Nutritional supplements; Vitamin supplement patches.



<u>Reg. No.</u>	<u>Registered Mark</u>	<u>Relevant Class 5 Goods</u>
5843450	LOVE THE PROCESS	Nutritional supplements; Vitamin supplement patches.
5921078	VENOIO	Nutritional supplements; Vitamin supplement patches.
6103529	TOPLUX SUPPLEMENT (“SUPPLEMENT” disclaimed)	Vitamin supplement patches; nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Nutritional supplements in the form of capsules, tablets, caplets, powder, syrups, gummies, and gels.
5955637	METABO-BURN	Nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
5995580	Z NATURAL	Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
6134562	CRIXEN	Dietary and nutritional supplements; Medicated oils containing vitamins, minerals, hemp oil; Nutritional supplements; Nutritional supplements in the nature of nutritionally fortified soft chews; Vitamin supplement patches.
6081847	NATURE TARGET	Dietary and nutritional supplements.
6120437	INSPIRE FOR WOMEN	Dietary and nutritional supplements.
6094108	 (“NATURAL PRODUCTS” disclaimed)	Dietary and nutritional supplements.
6126188	K80	Dietary and nutritional supplements.
6068969	RUBY OF THE SEA	Dietary and nutritional supplements containing calanus oil, fish oil and krill oil.
6094685	NEXT GENERATION OF OMEGA-3S	Dietary and nutritional supplements containing calanus oil, fish oil, krill or any species, all containing Omega 3 fatty acids.
6130209	8 DAYS A WEEK	Dietary and nutritional supplements.

As a general proposition, third-party registrations that cover goods identified in both a cited registration and an applicant's application are relevant to show that the goods are of a type that may emanate from a single source under one mark. *In re Detroit Athletic*, 128 USPQ2d at 1051; *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988). Although third-party registrations are not evidence that the registered marks are actually in use or that the public is familiar with them, particularly in the absence of any evidence showing the extent of their use, we consider them for their probative value. *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005) (citation omitted); *Smith Bros. Mfg. Co. v. Stone Mfg. Co.*, 476 F.2d 1004, 177 USPQ 462, 462-63 (CCPA 1973); *In re Midwest Gaming & Entm't*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMEP) § 1207.01(d)(iii) (July 2021).

The evidence in the chart shows third-party registrations covering both “nutritional supplements,” which can take the form of gummies, and supplement-related patches. These registrations confirm that Applicant and registrant offer goods that are commonly manufactured, produced, or provided by the same source. Applicant did not address the second *DuPont* factor in her brief. We find the Examining Attorney's third-party use-based registrations to be probative of the relatedness of Applicant's Goods and the goods identified in the MARY'S

MEDICINALS registration. This *DuPont* factor weighs in favor of a finding of likelihood of confusion.

**B. The Number and Nature of Similar Marks in Use on Similar Goods**

To rebut the Examining Attorney's relatedness evidence, Applicant argues that the cited marks are weak and entitled to a narrow scope of protection because of widespread use of the given name "Mary." (6 TTABVUE 8-9; 9 TTABVUE 2-5). Under the sixth *DuPont* factor, "[t]he purpose of introducing evidence of third-party use is 'to show that customers have become so conditioned by a plethora of such similar marks that customers have been educated to distinguish between different marks on the bases of minute distinctions.'" *Omaha Steaks Int'l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps.*, 73 USPQ2d at 1694 (internal quotation omitted)). Third-party uses in the actual marketplace may be "relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection." *Id.*

We analyze the strength of the marks in the cited registrations by determining "the number and nature of similar marks in use on similar goods." *DuPont*, 177 USPQ at 567. Evidence of third-party use of similar marks can be "powerful on its face" and can "show that customers ... have been educated to distinguish between different ... marks on the basis of minute distinctions," *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (citation omitted), particularly if such evidence is "extensive." *Jack Wolfskin Ausrustung Fur Draussen*

*GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (citing *Juice Generation*, 115 USPQ2d at 1674).

The third-party uses must be “relevant.” When determining relevance, we must consider: (1) the similarity of the goods for which the third-party marks are used vis- à-vis the involved goods, and (2) the similarity of the third-party marks themselves to the cited marks. *Omaha Steaks* at 1693-94; *see also Juice Generation*, 115 USPQ2d at 1674 (discussing evidence of “a considerable number of similar marks” in connection with restaurant services or food products).

In support of her argument, Applicant proffered a U.S. Social Security Administration report entitled “Top Names Over the Last 100 Years,” which shows that “Mary” was the most popular given name for female babies born in the United States from 1921-2020.<sup>7</sup> But the general popularity of given baby names in America is irrelevant to the question of the weakness of Mary- formative names or marks; specifically, it is irrelevant to commercial, or marketplace, weakness of such marks. Evidence of actual third-party use of Mary- formative names or marks for goods and services — which this record lacks — might be directly relevant to the commercial weakness of the cited marks.

In addition, Applicant proffered third-party registration records and a TESS list of third- party registrations, contending that this type of “evidence demonstrates the ubiquitous use of similar marks as source identifiers ... Just as in *Jack Wolfskin*,

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<sup>7</sup> Oct. 1, 2021 RFR at 8-11.

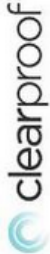



extensive evidence of third-party uses and registrations indicates consumers are not as likely confused by different, albeit similar looking, marks.” (6 TTABVUE 9).

First, without evidence of actual use, third-party registration evidence is not probative of commercial, or marketplace, weakness. This evidence tells us nothing about the extent to which the third-party marks may have been used, or the amount of exposure relevant customers may have had to those marks. *Primrose Ret. Cmtys., LLC v. Edward Rose Sr. Living, LLC*, 122 USPQ2d 1030, 1036 (TTAB 2016). Nevertheless, we will discuss the third-party registration evidence here since Applicant also proffered it to support her weakness argument.

Third-party registrations “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017); *see also In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). Applicant proffered twelve third-party registrations,<sup>8</sup> shown below, for Mary-formative marks:

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<sup>8</sup> Mar. 10, 2021 Response to Office Action at 9-34; Oct. 1, 2021 RFR at 12-15. We note that Applicant’s evidence includes the cited registrations MARY’S MEDICINALS and MARY’S NUTRITIONALS THE REMEDY. We have removed those two registrations from this evidence, since we must assess the weakness of the cited registrations under the sixth *DuPont* factor.

<u>Reg. No.</u>	<u>Registered Mark</u>	<u>Goods</u>
6252925	BLOODY MARY'S	"Antibacterial alcohol skin sanitizer gel," in International Class 5.
4506465	 	<p>"Cosmetics; Non-medicated skin care preparations; Non-medicated skin toners; Skin cleansers; Skin lotion; Skin moisturizer," in International Class 3.</p> <p>"Acne treatment preparations; Medicated facial cleansers; Medicated skin care preparations," in International Class 5.</p>
4055428	GLUTEN FREE SONNY MARIE'S  ("GLUTEN FREE" disclaimed)	"Gluten-free food to accommodate special medical and health conditions," in International Class 5.
4884242	  ("KALE MARY," "BLOODY MARY," and "MIX" disclaimed)	"Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes," in International Class 5.
0560896		"Jams, jellies," in International Class 29.
0796488	MARY JANE	"Bread, rolls," in International Class 30.
0817516		"Cleansing creams, night creams, facial creams, eye make-up, body lotions sold in individual sales to sales consultants, demonstrators and other individuals carrying on sales by means of personal home and private demonstrations to the individual consumer, sales 'parties,' and like group gatherings of individual consumers," in International Classes 3 and 5.

<u>Reg. No.</u>	<u>Registered Mark</u>	<u>Goods</u>
1513319	MARY KAY	“Acne medications, specifically acne treatment gels and blemish control toners,” in International Class 5.
6494662	 (“DEVELOPED BY” and “DERMATOLOGIST-VALIDATED” disclaimed)	“Acne treatment preparations; Medicated skin care preparations; Nutritional supplements; Dietary and nutritional supplements,” in International Class 5.
0872725	MARY QUANT	“Astringents, skin creams, skin lotions, lipsticks, rouge, rouge boxes containing rouge; nail polish, face powder, eyeshadow with and without applicators, mascara,” in International Classes 3 and 5.
5367407	MARYRUTH ORGANICS	“Multivitamins, multi-mineral vitamins, probiotic supplements, protein powder supplements, gummy vitamins; all of the foregoing made with organic ingredients,” in International Class 5.
5364062	MARYRUTH’S	“Multivitamin preparations; multi-mineral vitamins; gummy vitamins; and vitamins, all of the foregoing made with organic ingredients,” in International Class 5.

The goods identified in the registration for MARY’S MEDICINALS are “transdermal patches featuring herbal supplements and neutraceuticals for nausea, insomnia, anxiety, inflammation, pain relief and an improved sense of well-being.” We find that many of Applicant’s third-party “Mary-formative” registrations identify goods that are not sufficiently similar to the registrant’s goods to bear on the conceptual strength of MARY’S MEDICINALS. *Omaha Steaks*, 128 USPQ2d at 1693- 94 (the relevant consideration is similar marks for similar goods).

Regarding the actual marks in the chart, two are for the given name “Maryruth” and its possessive form, “Maryruth’s” — not “MARY.” One mark incorporates the possessive form of the given name “Marie” – again, not “MARY.” Six of the marks incorporate a given name with “MARY”: “Mary Jane,” “Mary Kay,” and “Mary Ellen.” Five of the marks are stylized or composite design marks incorporating “MARY.” While these marks contain the given name, “MARY,” they also contain additional elements that cause them to be easily distinguished from the mark MARY’S MEDICINALS.

Finally, Applicant’s TESS record search result list is not probative because it does not include the identified goods or services so we are unable to ascertain the relevance of the listed marks. *In re Peace Love World Live*, 127 USPQ2d at 1405 n.17.

Contrary to Applicant’s assertions, we find that Applicant’s third-party registration evidence falls far short of the quantity and nature of the third-party registration evidence found to be relevant in *Jack Wolfskin*. And since we do not have any evidence of the extent of their actual use, none of Applicant’s third-party registrations “show that customers ... have been educated to distinguish between different ... [Mary-formative] marks on the basis of minute distinctions.” *Juice Generation*, 115 USPQ2d at 1674; *In re Morinaga Nyugyo Kabushiki Kaisha*, 120 USPQ2d 1738, 1745 (TTAB 2016) (third-party registrations “standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”).



Based on all of the evidence of record, we find that the sixth *DuPont* factor is neutral in our analysis. Therefore, we accord the registration MARY'S MEDICINALS "the normal scope of protection to which inherently distinctive marks are entitled." *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017).

### C. The Similarity or Dissimilarity of the Marks

Next, we consider the *DuPont* factor relating to the similarity or dissimilarity of the marks. In comparing the marks, we must consider their appearance, sound, connotation and overall commercial impression in their entireties. *DuPont*, 177 USPQ at 567. Similarity as to any one of these factors may be sufficient to support a finding that the marks are confusingly similar. *See In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) ("Similarity in any one of these elements may be sufficient to find the marks confusingly similar."), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. Sept. 13, 2019) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)); *see also 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.").

"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." *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1748 (Fed. Cir. 2017) (quoting *Coach Servs.*, 101 USPQ2d at 1721); *see also In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) ("[M]arks must be

considered in light of the fallibility of memory and not on the basis of side-by-side comparison.”). Our analysis must focus on the recollection of the average purchaser — here, an ordinary consumer of nutritional supplements in chewable or transdermal patch form — who normally retains a general, rather than specific, impression of trademarks.

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant generally asserts that her mark, MARY’S EDIBLES, is distinct from the cited marks. Even though all three of the marks are Mary-formative marks, Applicant asserts that the element “EDIBLES” distinguishes her mark from the cited marks in appearance, sound, connotation, and overall commercial impression. (6 TTABVUE 11-13; 9 TTABVUE 5-8). Applicant further asserts that the Examining Attorney failed to give proper weight to the element “EDIBLES” in her mark, as well as the elements “MEDICINALS” and “NUTRITIONALS THE REMEDY” in the registered marks, citing *In re Hearst Corp.*, 982 F.2d 493, 25 USPQ2d 1238 (Fed. Cir. 1992). (6 TTABVUE 13; 9 TTABVUE 7-8).

We find, however, that the marks at issue here are indeed similar in sound, appearance, connotation, and overall commercial impression. As noted above, for rational reasons, we may give more or less weight to a particular feature of a mark,

provided the ultimate conclusion rests on a consideration of the marks in their entireties. *In re Viterra*, 101 USPQ2d at 1908. We find that the given name “MARY’S” is entitled to greater weight in the marks.

As to appearance, Applicant’s mark and MARY’S MEDICINALS are standard character marks that share the same identical lead element, “MARY’S,” which we weigh more heavily since it is the first, and dominant, element of both marks. Consumers are generally more inclined to focus on the first word, prefix, or syllable of a mark. *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers must first notice the identical lead word); *see also Palm Bay Imps.*, 73 USPQ2d at 1692 (“veuve” is most prominent part of the mark VEUVE CLICQUOT, because “veuve” is the first word in the mark and the first word to appear on the product label). Moreover, “EDIBLES” in Applicant’s mark, and “MEDICINALS” in the registered mark, are descriptive and have been disclaimed. As such, these elements are subordinate to the element “MARY’S.”

The dominant element of the marks, “MARY’S,” sounds the same when verbalized. We acknowledge that the remaining elements of both marks create some minor distinctions in sound, particularly when the marks are pronounced in their entireties. However, the propensity of consumers to shorten marks — here, shortened to “MARY’S” — makes the marks more similar than dissimilar in sound overall. *See, e.g., Giant Food, Inc. v. Nation’s Foodservice, Inc.*, 710 F.2d 1565, 218 USPQ 390, 395 (Fed. Cir. 1983) (“Although the record does not indicate that applicant’s business is

commonly referred to as ‘Giant,’ it does indicate that people have called it by that name, omitting the word ‘Hamburgers.’ Thus, in a conversation between two consumers in opposer’s area about a place of business called ‘Giant,’ there likely would be confusion about which ‘Giant’ they were talking about.”); *In re Abcor Dev. Corp.*, 588 F.2d 511, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring) (acknowledging that generally, “users of language have a universal habit of shortening full names from haste or laziness or just economy of words”); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (“In fact, the commercial impression engendered by Applicant’s mark is merely that it is the ‘Blonde’ brew of TIME TRAVELER brand beers. That is to say, when Applicant’s and Registrant’s marks are considered in their entireties, the term BLONDE does very little or nothing to distinguish them. In saying this, we also keep in mind the penchant of consumers to shorten marks.”); *Big M Inc. v. U. S. Shoe Co.*, 228 USPQ 614, 616 (TTAB 1985) (“[W]e cannot ignore the propensity of consumers to often shorten trademarks[.]”).

Turning to connotation and commercial impression, as previously mentioned, “EDIBLES” in Applicant’s mark, as well as “MEDICINALS” in the registered mark, have been disclaimed. Disclaimed matter is often “less significant in creating the mark’s commercial impression,” *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001), and may be given little weight. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000). *See also In re Detroit Athletic*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (Fed. Cir. 1997)). Here, the disclaimers of “EDIBLES” and “MEDICINALS”

in the respective application and registration distinguish this case from *In re Hearst Corp.*, in which the Federal Circuit held that the Board did not give proper weight to the second element of the mark, VARGA GIRL, for calendars. 25 USPQ2d at 1239. There, the element “GIRL,” which had not been disclaimed, altered the commercial impression of the VARGA GIRL mark. That is not the case here.

The disclaimed element “MEDICINALS”<sup>9</sup> in the cited mark, and the disclaimed element “EDIBLES”<sup>10</sup> in Applicant’s mark, reinforce the nature of the identified goods and do not change the overall commercial impression engendered by the marks. See *In re Detroit Athletic*, 128 USPQ2d at 1049-50 (citation omitted); See also J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:45 (5th ed. June 2022 Update) (“The fact that in a registration, certain descriptive or generic terms are disclaimed indicates that those terms are less significant and the other parts of the mark are the dominant parts that will impact most strongly on the ordinary buyer.”); TMEP § 1207.01(b)(viii). In fact, considering the similar definitions for “EDIBLES” and “MEDICINALS,” we find that Applicant’s mark and the registered mark are similar in meaning inasmuch as they both connote goods for human consumption, originating from “Mary,” through which one can maintain or improve one’s health or well-being. See, e.g., *In re Cynosure, Inc.*, 90 USPQ2d 1644

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<sup>9</sup> “Medicinal” is a noun for “a preparation or product having the properties of medicine.” (<https://www.thefreedictionary.com/medicinals>) (last accessed June 1, 2022). “Medicine” is a noun defined as “any drug or remedy for use in treating, preventing, or alleviating the symptoms of disease.” (<https://www.thefreedictionary.com/medicine>) (last accessed June 1, 2022). We take judicial notice of these definitions.

<sup>10</sup> “Edibles” is defined as “something that is suitable or safe to eat: something edible.” Sept. 10, 2020 Office Action at 98.

(TTAB 2009) (holding CYNERGY for medical lasers for, *inter alia*, treatment of the face and skin, and SYNERGIE PEEL for medical devices for microdermabrasion, likely to cause confusion, noting that “SYNERGIE” is the dominant portion of the cited mark and “PEEL” is insufficient to distinguish the marks); *In re J.M. Originals Inc.*, 6 USPQ2d 1393 (TTAB 1987) (holding JM ORIGINALS (with “ORIGINALS” disclaimed) for various items of apparel, and JM COLLECTABLES for sport shirts, likely to cause confusion).

On balance, the presence of the identical dominant element, “MARY’S,”<sup>11</sup> the tendency of consumers to shorten marks, and the similar connotations and commercial impressions of the marks outweigh any dissimilarities in sound and appearance of Applicant’s mark and the registered mark. Indeed, consumers may mistakenly believe that Applicant’s mark is a variant of the registrant’s mark identifying a product line extension, or vice versa.

Considering the marks in their entireties, we find that Applicant’s mark, MARY’S EDIBLES, is similar to the cited mark, MARY’S MEDICINALS. Thus, this *DuPont* factor weighs in favor of a finding of likelihood of confusion.

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<sup>11</sup> The Examining Attorney posits, “Applicant’s mark is likely to appear to prospective purchasers as a shortened form of Registrant’s marks, or an extension of a family of marks.” (7 TTABVUE 7). As to the family of marks argument, in *ex parte* proceedings, “examining attorneys do not have access to the evidence and information needed to establish whether a family of marks exists.” *In re Mobay Chem. Co.*, 166 USPQ 218, 219 (TTAB 1970). *See also In re Hitachi High-Techs. Corp.*, 109 USPQ2d 1769, 1772 (TTAB 2014); TMEP § 1207.01(d)(xi).

#### **D. Length of Time of Concurrent Use Without Actual Confusion**

Finally, we address Applicant’s argument that confusion is unlikely because there has been no actual confusion. (6 TTABVUE 15). Under the eighth *DuPont* factor, we consider “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at \*6 (TTAB 2020) (quoting *DuPont*, 177 USPQ at 567). In *Guild Mortg.*, the Board held that unlike other *DuPont* factors, the eighth factor “requires us to look at **actual market conditions**, to the extent there is evidence of such conditions of record.” *Id.* at \*6 (emphasis in original).

However, “[u]ncorroborated statements of no known instances of actual confusion ... are of little evidentiary value,” especially in ex parte examination. *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1205 (Fed. Cir. 2003); *see also Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (“Attorney argument is no substitute for evidence.”). Here, Applicant’s statement of no known instances of actual confusion is uncorroborated. Due to the absence of any supporting evidence, the eighth *DuPont* factor is neutral.

### **III. Conclusion**

Balancing all of the relevant likelihood of confusion factors, we find that confusion is likely between Applicant’s mark, MARY’S EDIBLES, for “Nutritional supplements in the form of gummies” in International Class 5, and the cited mark, MARY’S MEDICINALS, given the relatedness of the involved goods, and the similarities

between the marks in sound, appearance, connotation, and overall commercial impression.

**Decision:** The refusal to register the mark, MARYS EDIBLES, in International Class 5 for “Nutritional supplements in the form of gummies,” is affirmed under Trademark Act Section 2(d) on the ground of likelihood of confusion.