

This Opinion is not a  
Precedent of the TTAB

Mailed: May 4, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Wellory, Inc.*

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Serial No. 88789909

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Stacey Trimmer and Nicholas Scannavino of Scannavino Law LLP,  
for Wellory, Inc.

Marlene Bell, Trademark Examining Attorney, Law Office 118,  
Michael W. Baird, Managing Attorney.

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Before Bergsman, Wellington, and Lykos,  
Administrative Trademark Judges.

Opinion by Wellington, Administrative Trademark Judge:

Wellory, Inc. (“Applicant”) seeks registration on the Principal Register of the standard character mark WELLORY for the following goods and services:

Downloadable mobile applications for connecting users and experts via messaging in the field of nutrition; none of the aforesaid relating to fitness, fashion, cosmetics or skincare in International Class 9; and

Nutrition counseling; none of the aforesaid relating to fitness, fashion, cosmetics or skincare in International Class 44.<sup>1</sup>

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<sup>1</sup> Application Serial No. 88789909 was filed on February 7, 2020, based upon Applicant’s allegation of first use anywhere and in commerce on December 1, 2018 for the goods and services in both classes, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

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), based on a likelihood of confusion with each of the following registered standard character marks that are owned by different entities:

**WELLORIA** (Reg. No. 2997307 or "Reg. '307") on the Principal Register for "providing online publications, namely newsletters and articles, in the fields of health, fitness, and lifestyle" in International Class 41.<sup>2</sup>

**WELLERY** (Reg. No. 5647777 or "Reg. '777") on the Principal Register for "retail department store services; on-line retail department store services; retail store services in the nature of pop-up shops in the fields of fashion, beauty, wellness and skin care" in International Class 35;

-and-

"health spa services for health and wellness of the body and spirit; cosmetic skin care services and salon services, namely, manicures, pedicures, facials, brow shaping, makeup services, massages, eye lash extensions and skin care treatments, tissue contouring and cellulite improvement" in International Class 44.<sup>3</sup>

**WELLTORY** (Reg. No. 5798062 or "Reg. '062") on the Principal Register for "downloadable software in the fields of healthcare, benefits programs, employee productivity and risk management, namely, software featuring tools and resources for users to monitor and manage stress, fitness, health, wellness and energy; downloadable software featuring tools and resources for users to monitor and manage stress, fitness, health, wellness and energy" in International Class 9.<sup>4</sup>

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Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system.

<sup>2</sup> Registration issued on September 20, 2005; renewed.

<sup>3</sup> Registration issued on January 8, 2019.

<sup>4</sup> Registration issued on July 9, 2019.

When the refusal was made final, Applicant appealed and requested reconsideration.<sup>5</sup> After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed.<sup>6</sup> We affirm the refusal to register as to both classes of goods and services.

### **Likelihood of Confusion**

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *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. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *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

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<sup>5</sup> Applicant filed two requests for reconsideration (on May 4, 2021 and on July 27, 2021 (captioned “request to remand”)), these were denied, respectively, on June 2, 2021 and August 30, 2021.

<sup>6</sup> Applicant’s main brief is at 18 TTABVUE, the Examining Attorney’s brief is at 20 TTABVUE and Applicant’s reply brief is at 21 TTABVUE.

the goods and differences in the marks.”). These factors and others are discussed below.

This decision addresses the three cited registrations individually as bases for the likelihood of confusion refusal to registration of Applicant’s mark. However, we initially address two issues—the strength or weakness of the cited registered marks and the addition of the exclusionary language in Applicant’s identification of goods and services—inasmuch as these issues have a general bearing on our likelihood of confusion analysis for each registration.

### **A. Strength or Weakness of the Cited Registered Marks**

Applicant argues that the “cited marks are relatively weak, entitled to a narrow scope of protection, and Applicant’s differences are enough to prevent any likelihood of confusion.”<sup>7</sup> Applicant specifically contends that the prefix WELL- “is highly descriptive, weak and entitled to only a narrow scope of protection, as shown by extensive third-party use, registrations, and ordinary definition.”<sup>8</sup> In support, Applicant relies on definitions of the terms “well,” “wellness,” and “well-being”;<sup>9</sup> copies of approximately 50 registrations and evidence of use of WELL-formative marks in connection with health and wellness services from third-party websites;<sup>10</sup>

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<sup>7</sup> 18 TTABVUE 5.

<sup>8</sup> *Id.*

<sup>9</sup> Copies of definitions, taken from Merriam-Webster online dictionary, attached to Applicant’s May 4, 2021 Request for Reconsideration, at TSDR pp. 17-29.

<sup>10</sup> *Id.* at pp. 96-165, and attached to Applicant’s September 17, 2020 response.

We note that Applicant submitted copies of third-party applications; however, these, as opposed to registrations, have no probative value other than as evidence that the applications were filed. *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1270 n.8 (TTAB 2009); *In re*

and 40 additional third-party registrations for WELL-formative marks covering health food, nutritional or vitamin supplements.<sup>11</sup>

“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace [or commercial] strength (secondary meaning).” *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). For likelihood of confusion purposes, “the strength of a mark is not a binary factor, but varies along a spectrum from very strong to very weak.” *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003).

As to conceptual strength, we note that the cited registrations issued on the Principal Register without a showing of acquired distinctiveness of the mark under Section 2(f) of the Trademark Act. 15 U.S.C. § 1057(b). Accordingly, the cited marks are presumed to be inherently distinctive and, therefore, are entitled to the normal scope of protection accorded an inherently distinctive mark. *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006).

The U.S. Court of Appeals for the Federal Circuit has held, however, that if there is evidence that a mark, or an element of a mark, is commonly adopted by many different registrants, such adoption may indicate that the common element has some non-source identifying significance which undermines its conceptual strength as an indicator of a single source. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136

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*Fiesta Palms LLC*, 85 USPQ2d 1360, 1366 n.7 (TTAB 2007); *Nike Inc. v. WNBA Enters. LLC*, 85 USPQ2d 1187, 1193 n.8 (TTAB 2007).

<sup>11</sup> Attached to Applicant’s May 4, 2021 Request for Reconsideration, at TSDR pp. 17-43.

(Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which a mark is used in ordinary parlance,’ ... that is, some segment that is common to both parties’ marks may have ‘a normally understood and well-recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak”) (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015)).

As to commercial weakness, the sixth *DuPont* factor “considers ‘[t]he number and nature of similar marks in use on similar goods (or services).’” *Omaha Steaks Int’l, Inc.* 128 USPQ2d at 1693 (quoting *DuPont*, 177 USPQ at 567).

Based on the plain meanings of the terms WELL and WELLNESS, which include, respectively, “free or recovered from infirmity or disease; healthy” and “the quality or state of being in good health especially as an actively sought goal,” we agree with Applicant that the term WELL is highly suggestive of the involved goods and services of Applicant and Registrants. The existence of numerous third-party registrations and evidence of use of WELL-formative marks further show commercial weakness of this prefix in the context of goods and services related to health, nutrition and fitness. *Jack Wolfskin*, 116 USPQ2d 1136; *see also Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). This finding of weakness of the term WELL means that consumers will look to other elements of marks containing this term in order to distinguish the source of the goods or services. *See Primrose Retirement Communities, LLC v. Edward Rose Senior Living, LLC*, 122 USPQ2d 1030, 1033 (TTAB 2016) (PRIMROSE and ROSE SENIOR LIVING were not

confusingly similar in the context of many third-party uses of ROSE and ROSE-formative marks, demonstrating that consumers had become alert to minute distinctions among the various marks).

However, it is important to note in this case that none of the third-party registrations or uses for marks that begin with WELL- have a suffix that approximates that in Applicant's or Registrants' marks in connection with the same or related goods and services.<sup>12</sup> Indeed, many of the third-party registrations and evidence of use involve marks that begin with WELL but are following by a very different endings such the marks convey very different commercial impressions. To wit:<sup>13</sup> WELLSCAN, WELLMAX, WELLOMICS, WELDIGEE, WELLISTRY, WELLOCITY, WELLOLOGY, and WELLOCRAZY. And the evidence of third-party use shows marks that include:<sup>14</sup> WELLPABLE, WELL—BE (or WELLBE), WELLNESS (stylized with design), WELLD, WELLOH (stylized with design), WELLYESS, and WELLQ (stylized with design).

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<sup>12</sup> There is evidence of three others using the term "Wellery" in their marks; however, it is not evident if the goods and services of these third-parties are related or it is clear that they do not involve goods and services related to those of Applicant and Registrants. Specifically, Applicant submitted printouts from a "The Wellery" website ([www.thewellery.com](http://www.thewellery.com)) that involves "an approachable wellness collective" and "well-designed and high-quality wellness products made perfectly for you." *Id.* at pp. 179-184. However, there is little further information that can be gleaned from these printouts and it remains unclear what "wellness products" are involved. A second "The Wellery" website ([www.thewellerymn.com](http://www.thewellerymn.com)) is for chiropractic services aimed at "babies and kids ... pregnancy ... families." *Id.* at pp. 185-187. A third website for "The Wellery" ([www.thewelleryllc.com](http://www.thewelleryllc.com)) touts the "meditation and mindfulness" services offered by an individual. *Id.* at pp. 188-191.

<sup>13</sup> List and copies of registrations found at *id.* at pp. 75-164.

<sup>14</sup> Evidence of third-party use of marks listed found at *id.* at pp. 165-291.

In sum, the evidence shows that WELL- is a conceptually and commercially weak prefix, but there is no evidence showing others using this prefix with a suffix, or additional term, so that the composite approximates Applicant's WELLORY mark or Registrants' marks, WELLORIA, WELLERY, and WELLTORY.

We have considered the fact that these three cited registrations coexist on the Principal Register; however, these three registrations are too few to conclude that consumers have become conditioned to encountering marks that begin with WELL- and have similar suffixes like those of the cited registrations. Moreover, as explained later in this decision, while certain goods or services listed in the registrations can be related to Applicant's goods or services, it does not necessarily follow that the Registrants' goods and services must be related to one another. In other words, the cited registrations may be distinguished from one another for different reasons.

**B. Applicant's Exclusionary Language in its Identification of Goods and Recitation of Services**

Applicant originally sought registration of its mark for goods and services described as follows:

Downloadable mobile applications for connecting users and experts via messaging in the fields of nutrition, health and wellness; Downloadable mobile applications for connecting users and experts via messaging in the field of nutrition, in Class 9; and

Dietary advice; Nutrition counseling; Health counseling; Providing wellness services, namely, personal assessments, personalized routines, maintenance schedules, and counseling; Providing a website featuring information and advice in the fields of diet, weight loss, diet planning and lifestyle wellness; Providing a website featuring information regarding healthy living and lifestyle wellness; Providing healthy lifestyle and nutrition services, namely, personal assessments, personalized routines, maintenance schedules, and counseling, in Class 44.



Applicant then amended the identifications, including an amendment to insert exclusionary language so that ultimately its mobile applications (or “apps” for short) and its nutrition counseling services are described as not “relat[ed] to fitness, fashion, cosmetics or skincare.”<sup>15</sup>

Although all of Applicant’s goods and services are now described as “not relating to fitness, fashion, cosmetics or skincare,” this does not end our likelihood of confusion analysis regarding relatedness of these goods and services with those of the Registrants. Rather, as discussed in more detail below, one aspect of our determination is whether the evidence shows that consumers are accustomed to encountering the types of goods and services offered by Applicant as well as the types of goods and services offered by each Registrant, from a single source. Should such a connection exist in the consumers’ minds, the goods and services may be related and the exclusionary language does not negate this determination. Thus, consumers may be unaware of the exclusion in Applicant’s identifications and, given an established relationship between the goods or services being offered under similar marks, consumers can likely be confused as to the source of the goods and services.

We also agree with the Examining Attorney’s statement that there exists an “innate or inherent nature of nutrition, upon which the applicant’s goods and services are based, is a component of health and wellness, and health and wellness are the

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<sup>15</sup> Applicant’s “request to remand” (12 TTABVUE) was addressed as, and denied, request for reconsideration by the Examining Attorney.

components upon which the registrants' goods and/or services are based.”<sup>16</sup> To illustrate this point, the Examining Attorney points to Applicant's own materials describing its goods and services: “...I've lost 12 pounds since working with my Wellory health coach ... Make health choices all day long. Stay accountable to making healthy choices to achieve long-lasting results ... Health made easy... Health is a long-term commitment and we're committed to you... .”<sup>17</sup> In other words, while it may be common knowledge, Applicant's specimen demonstrates nutrition is understood to be a fundamental component of health.

Applicant acknowledges that “broadly speaking,” the involved goods and services “relate in some way to ... ‘health and wellness,’” but argues that “this does not make them ‘per se’ related.”<sup>18</sup> In support, Applicant cites to a non-precedential Board decision,<sup>19</sup> and *Edwards Lifesciences Corp. v. VigiLanz Corp.*, 94 USPQ2d 1399, 1410 (TTAB 2010); *In re White Rock Distilleries Inc.*, 92 USPQ2d 1282, 1285 (TTAB 2009).

We agree with Applicant to the extent that goods or services are not necessarily related merely because “a general term or overarching relationship can be found to encompass them both.” *Edwards Lifesciences Corp.*, 94 USPQ2d at 1410. On the other hand, the involved goods or services need not be identical or even competitive to find a likelihood of confusion. See *On-line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000); *Recot, Inc. v. Becton*, 214 F.3d 1322, 54

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<sup>16</sup> 20 TTABVUE 14.

<sup>17</sup> *Id.*, citing to Specimen, submitted February 7, 2020, TSDR pp. 1-4.

<sup>18</sup> 18 TTABVUE 13.

<sup>19</sup> *In re Shah*, Serial No. 86759729 (TTAB Mar. 30, 2017).

USPQ2d 1894, 1898 (Fed. Cir. 2000). They need only be “related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [the goods and services] ... emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). In particular, with respect to software such as mobile apps and downloadable software, “it [is] proper for the [B]oard to ground its determination of relatedness in the fields for which [it is] ... created, rather than the media format in which [it is] ... delivered [- otherwise known as a] ... subject-matter-based mode of analysis ....” *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 78 USPQ2d 1944, 1948 (Fed. Cir. 2006).

Keeping the aforementioned discussions of weakness and the exclusionary language in mind, we continue our analysis by addressing the three cited registrations individually as bases for the likelihood of confusion refusal.

### **C. Applicant’s Mark WELLORY versus Reg. ’307 (WELLORIA)**

#### **1. Similarity of the Marks**

Under the first *DuPont* factor, we compare Applicant’s **WELLORY** mark and Registrant’s mark, **WELLORIA**, in their entirety, and taking into account appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Applicant argues that, because of the weakness of the initial shared term WELL, “customers only require a minute difference to distinguish WELL- formative marks

as related to health and wellness,” and that “[t]he Welloria mark both sounds different and is spelled with two different letters than Applicant’s mark...”<sup>20</sup>

The Examining Attorney, on the other hand, contends that the marks in their entirety are similar—that “the combination of the prefix and the suffixes that form the applicant’s mark and the registrants’ marks do not create any meaningful differences, and as a result, all of the marks convey the same and/or a very similar commercial impression.”<sup>21</sup> She argues that “because the marks are similar in sound, appearance, connotation, and commercial impression the marks are confusingly similar.”<sup>22</sup>

Here, despite the weakness of the shared element WELL, we find the differences between the marks to be minimal and insufficient for purposes of distinction. The registered mark, WELLORIA, is visually very similar to Applicant’s mark and can only be distinguished by the last 1-2 letters, -Y and -IA. Although the registered mark, when spoken, will possess an additional syllable, the marks remain aurally extremely similar.

In terms of meaning, there is no argument or evidence to suggest that either mark—WELLORY or WELLORIA—has any significance or meaning. That is, although the initial element WELL- is suggestive of the involved goods and services, the entire marks are coined terms. To the extent that the prefix dominates or dictates

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<sup>20</sup> 18 TTABVUE 12.

<sup>21</sup> 20 TTABVUE 8.

<sup>22</sup> *Id.*

the overall commercial impression for each mark by suggesting an overall health feature or intended healthy result of the goods and services, this same projected meaning applies to each mark.

Ultimately, we find the differences between the marks to be minimal and insufficient to overcome the overall similarity of the marks. We agree with the Examining Attorney that, when compared in their entireties, Applicant's mark, WELLORY, is more similar than not to the registered mark, WELLORIA.

Accordingly, the first *DuPont* factor weighs in favor of finding confusion likely based on Reg. '307.

## 2. Relatedness of the Goods and Services; Their Trade Channels

The Examining Attorney argues that the services listed in Reg. '307, namely, the provision of "providing online ... newsletters and articles, in the fields of health, fitness, and lifestyle," are closely related to Applicant's mobile app and counseling services in the field of nutrition.<sup>23</sup> In support, she relies on Internet evidence showing eight other entities that render services and mobile apps featuring nutrition consultation as well as online publications that feature nutrition, health and/or wellness information, and nutrition and wellness consultation services.<sup>24</sup> For example, the Jenny Craig website ([www.jennycraig.com](http://www.jennycraig.com)) touts a mobile application in the field of nutrition advice and provides information in the fields of health, fitness

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<sup>23</sup> 20 TTABVUE 10.

<sup>24</sup> Evidence attached to November 5, 2020 Office Action; June 2, 2021 Office Action (denying first Request for Reconsideration); and August 30, 2021 Office Action (denying second Request for Reconsideration).

and lifestyle.<sup>25</sup> Indeed, the Jenny Craig mobile app allows users to track their nutrition (“what you eat and drink ... nourishment”) as well as “weight loss” and “exercise.”<sup>26</sup> The mobile app can also be used to “share your week” and get the advice of a “consultant ... [to] view your progress so that they can provide you with more personalized service.”<sup>27</sup>

Another website, Weight Watchers ([www.weightwatchers.com](http://www.weightwatchers.com)) advertises an app for tracking “food, activity, water, and sleep” as well ability to “read expert content personalized to the goal you set in your weekly check-in.”<sup>28</sup> The same class of consumers, namely those seeking to improve their overall health through either proper nutrition and fitness, are being offered the goods and services as those described in the application and cited Reg. ’307.

Based on the record, we find Applicant’s goods and services in Classes 9 and 44 are closely related to the provision of online newsletters and articles in the fields of health, fitness, and lifestyle. These are also the types of goods and services that may be offered on the same website, by the same entity, and advertised to the same class of consumers. Accordingly, the second and third *DuPont* factors weigh in favor of finding confusion likely based on this registration.

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<sup>25</sup> See June 2, 2021 Office Action, TSDR at pp. 67-87.

<sup>26</sup> *Id.* at 67-69.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at TSDR pp. 154-205.

### 3. Degree of Care

Applicant argues that “[c]onsumers of the Applicant’s goods and services tend to be more conscious buyers because they carefully choose which nutrition and dietary advice is right for them, just as they are encouraged to carefully consider their food choices.”<sup>29</sup> Applicant further argues that “the very nature of Applicant’s nutrition counseling services denotes a distinct trade channel and requires a careful purchaser because this is an individualized, customized service involving communications with an expert.”<sup>30</sup>

The record does not support a finding that consumers of Applicant’s goods or services, or those of the Registrant, will necessarily be sophisticated in their purchasing selection. This lack of evidence prevents giving weight to the purchaser sophistication factor in favor of no likelihood of confusion. *See In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991) (“no evidence to suggest that purchasers of ... [involved] goods are any more sophisticated than purchasers of any other retail goods.”).

We further note that the involved goods and services may be purchased by ordinary consumers in all income levels with varying degrees of sophistication. As such, we must consider the least sophisticated consumers, include general consumers seeking information or guidance in the fields of nutrition, health and fitness. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d

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<sup>29</sup> 18 TTABVUE 16-17.

<sup>30</sup> *Id.* at 17.

1157, 1163 (Fed. Cir. 2014) (affirming that TTAB properly considered all potential purchasers for recited services, including both sophisticated and unsophisticated investors, since precedent requires consumer care for likelihood-of-confusion decision be based “on the least sophisticated potential purchasers”). We thus hold this factor neutral.

#### 4. Balancing of Factors – Conclusion

Despite the weakness of the shared prefix in Applicant’s mark, WELLORY, and the cited mark, WELLORIA, the marks are overall very similar and because Applicant’s mobile app and counseling services, all in the field of nutrition, are closely related to Registrant’s provision of online newsletters and articles in the fields of health, fitness, and lifestyle, and these goods and services may be offered to the same types of consumers in the same trade channels, confusion is likely to occur.

Accordingly, upon balancing all of these factors, we affirm the refusal to registration of Applicant’s mark as to its goods and services in Classes 9 and 44, based on a likelihood of confusion with the Reg. ’307 (WELLORIA).

### **D. Applicant’s Mark WELLORY versus Reg. ’777 (WELLERY)**

#### 1. Similarity of the Marks

In comparing Applicant’s **WELLORY** mark and Registrant’s **WELLERY** mark in their entirety, and considering their appearance, sound, connotation and commercial impression, *DuPont*, 177 USPQ at 567, we find them extremely similar.

Again, despite the weakness of the initial element WELL-, the marks can only be distinguished by third to last letter in each mark. Indeed, Applicant acknowledges



that “the Wellery mark appears to be phonetically equivalent to the Applicant’s mark.”<sup>31</sup> Consumers may easily mistake the marks for one another both aurally and visually. Once more, because both marks are coined terms that can only be distinguished by a single letter and based on the initial, shared element, WELL, the marks may be perceived equally as suggestive an overall positive health feature or result from the involved goods and services.

Accordingly, the first *DuPont* factor weighs in favor of finding confusion likely based on Reg. ’777.

## 2. Relatedness of the Goods and Services; Trade Channels

Reg. No. ’777 covers services that, in pertinent part, are described as “health spa services for health and wellness of the body and spirit” in Class 44. The Examining Attorney contends that these services are related to Applicant’s services because the evidence shows that others provide both health spa services and nutrition consultation services at a single location.<sup>32</sup> The record includes seven instances of health spas that, in addition to providing health spa services such as massage therapy, skincare, “wellness” treatments, etc., also specifically tout their “nutritional counseling” services on their website.<sup>33</sup> For example, the AdventHealth website advertises the following services:

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<sup>31</sup> 18 TTABVUE 12.

<sup>32</sup> 20 TTABVUE 11.

<sup>33</sup> Printouts attached to August 30, 2021 Office Action, at TSDR pp. 26-41. The Examining Attorney also relies on evidence from the Nike website ([www.nike.com](http://www.nike.com)), but we find this evidence less probative. Attached to June 2, 2021 Office Action, at TSDR pp. 88-121. Although the website shows that Nike offers online retail store services featuring athletic apparel and Reg. No. ’777 covers online retail department store services, this does little to show that


AdventHealth Wellness Center and Spa Celebration See All Locations

## Day Spa

**Look and Feel Your Best**  
**Rejuvenate Your  
Body, Mind and  
Spirit**

Rest is powerful. It refreshes, rejuvenates and rebuilds the mind, body and spirit. Rest empowers you to function at your best. The Day Spa at AdventHealth Celebration features a full array of luxurious spa services, organic spa products and healing spa treatments designed to nourish the whole person. Choose from massage therapy, facials, waxing, body wraps, and acupuncture. In this healing environment, you can rest, relax and let stress float away. Energize your senses and find inner peace.

[Download our pricing menu.](#)  
[Download our brochure.](#)



And

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consumers are accustomed to encountering online retail department store services, on the one hand, and nutrition counseling and nutrition-related mobile apps, on the other hand. In other words, the evidence merely demonstrates that Nike offers a mobile app that offers “nutrition tips” and an online store selling athletic apparel, and, by itself, this does not indicate that consumers are accustomed to encountering nutrition counseling or mobile apps, and retail **department** store services, being offered from the same source.

AdventHealth Wellness Center and Spa Celebration See All Locations

## Nutrition and Counseling Services

### Nutrition **Services**


Nutrition is the pillar of the CREATION Life philosophy. It provides your body with the fuel it needs to keep moving and feeling energized throughout the day. The wrong food choices can contribute to diseases and complications that reduce your quality of life. Simple changes can make a big difference. At AdventHealth Wellness Center Celebration we're here to help you make them.

One of our expert dietitians will sit one-on-one with you. Through our comprehensive nutrition counseling, you'll gain tools and knowledge to help you make positive, beneficial and lasting nutritional changes. We'll guide you through:

- Healthy pregnancy
- Medical nutrition therapy
- Weight management

We offer prevention and treatment options for:

- Diabetes/Prediabetes
- Heart disease or cardiovascular health concerns
- Metabolic syndrome



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Another example is Angel Touch Skin Care & Massage, which advertises the following services on its website:

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<sup>34</sup> *Id.* at TSDR pp. 26-27.



And



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On this record, we find Applicant's nutrition consultation services are closely related to Registrant's health spa services for health and wellness of the body and

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<sup>35</sup> *Id.* at TSDR pp. 28-29.

spirit. The evidence shows that these are the types of services that may be advertised and offered by the same entity, at the same location, and to the same class of consumers – in other words, these services travel in the same trade channels.

Accordingly, the second and third *DuPont* factors weigh in favor of finding confusion likely.

### 3. Degree of Care

Again, the record does not support a finding that consumers of Applicant's or Registrant services will necessarily be sophisticated in their purchasing selection and this prevents giving weighing this factor in favor of no likelihood of confusion. The health spa and nutrition consultation services may be sought by ordinary consumers in all income levels with varying degrees of sophistication and must consider the least sophisticated consumers.

### 4. Balancing of Factors – Conclusion

Despite the weakness of the shared prefix in Applicant's mark, WELLORY, and the cited mark, WELLERY, the marks remain very similar. Because Applicant's nutrition consultation services are closely related to Registrant's health spa services, and these same services may be offered to the same types of consumers in the same trade channels, we find confusion is likely.

Accordingly, upon balancing all of these factors, we affirm the refusal to registration of Applicant's mark, as to services in Class 44, based on a likelihood of confusion with the Reg. '777 (WELLERY).

**E. Applicant's Mark WELLORY versus Reg. '062 (WELLTORY)**

1. Similarity of the Marks

We now compare Applicant's **WELLORY** mark and Registrant's **WELLTORY** mark in their entireties, and considering their appearance, sound, connotation and commercial impression, *DuPont*, 177 USPQ at 567, and, again, find them extremely similar. The only difference between them is the addition of the letter T in the middle of Registrant's mark which can easily be overlooked by consumers viewing these marks. While the addition of this letter helps create a slight aural difference when the marks are verbalized, the last syllable in each mark will likely to be pronounced as "ree." In other words, the marks remain very close in appearance and sound. The slight differences in the marks do not create dissimilar marks. *See e.g., Alfacell v. Anticancer Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE v. ONCONASE: "As seen and spoken, this middle portion may be missed by many of the relevant purchasers."); *Kabushiki Kaisha Tokeiten v. Scutto*, 228 USPQ 461, 462 (TTAB 1985) ("[T]he term 'SEYCOS' is simply so close in appearance and pronunciation to 'SEIKO' as to make source confusion inevitable when the marks are used in connection with identical goods."); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes

important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions”).

In terms of meaning or connotation, the marks are coined but may convey the same suggestive connotation—that Applicant’s mobile app and Registrant’s downloadable software can help consumers obtain overall positive wellness or health results.

Accordingly, the first *DuPont* factor weighs in favor of finding confusion likely based on Reg. ’062.

## 2. Relatedness of the Goods and Services; Trade Channels

Reg. No. ’062 identifies goods that include “downloadable software featuring tools and resources for users to monitor and manage stress, fitness, health, wellness and energy” in Class 9. These goods are very closely related to mobile app “for connecting users and experts via messaging in the field of nutrition; none of the aforesaid relating to fitness, fashion, cosmetics or skincare,” in Class 9.

The Examining Attorney submitted Internet evidence showing others provide downloadable software, including mobile apps, that provide nutritional information and counseling, as well as helping monitor fitness, health and general wellness. Fitbit, for example, offers a mobile app that provides “personalized support from a certified health coach” for fitness workouts as well as “show[ing] how your stress, sleep, nutrition and activity all fit together.”<sup>36</sup> Weightwatchers also has a mobile app

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<sup>36</sup> Printouts attached to June 2, 2021 Office Action, at TSDR pp. 26-33 and 58-65.

for tracking “food” and “activity” and includes “expert content personalized to the goal you set in your Weekly Check-In.”<sup>37</sup> The Weightwatchers app also allows users to “Connect ... a membership-only social network where people ... share tips, setbacks ...”<sup>38</sup> Indeed, Registrant’s downloadable software, as described in the registration, encompasses a mobile app with the same purpose as Applicant’s mobile app—that is, to provide the consumer with nutritional information and consultation, and as well as helping the app user monitor their fitness, health, wellness and energy. Although Applicant describes its mobile app as not relating to “fitness,” consumers may not be aware of this exclusion and this language does not negate the fact that consumers are exposed to downloadable software and mobile apps that monitor fitness and providing information in the field of nutrition. As the evidence clearly demonstrates, the terms “health” and “nutrition” and “fitness” and “wellness” and “energy” have meanings that, to the consumer, are interrelated or encompassing of one another.

In sum, Applicant’s Class 9 goods and the goods in Reg. No. ’062 are very closely related, and the second *DuPont* factor weighs in favor of finding confusion likely.

### 3. Degree of Care

Again, the record does not support a finding that consumers of Applicant’s or Registrant services will necessarily be sophisticated in their purchasing selection and this prevents giving weight to this factor in favor of no likelihood of confusion. In particular, there is no evidence showing a mobile app involving nutrition or

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<sup>37</sup> *Id.* at pp. 154

<sup>38</sup> *Id.* at 166.



downloadable software to track one's health is expensive; rather, these goods can be purchased by consumers in all income levels with varying degrees of sophistication, including the least sophisticated. We thus hold this factor neutral.

#### 4. Balancing of Factors – Conclusion

Despite the weakness of the shared prefix in Applicant's mark, WELLORY, and the cited mark, WELLTORY, the marks are very similar. Because Applicant's mobile app is closely related to Registrant's downloadable software, and these same goods may be directed to the same consumers, we find confusion is likely.

Upon balancing all of these factors, we affirm the refusal to registration of Applicant's mark, as to the goods in Class 9, based on a likelihood of confusion with the Reg. '062 (WELLTORY).

**Decision:** The Section 2(d) refusal to register Applicant's mark for the goods and services identified in International Classes 9 and 41 is affirmed based on each of the three cited registrations.