

This Opinion is Not a
Precedent of the TTAB

Mailed: August 2, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Congo, LLC

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Serial No. 88952001

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Julie Laemmle Watts of Wyatt Tarrant & Combs, LLP for Congo, LLC.

Shaila E. Lewis, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

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Before Cataldo, Larkin, and Dunn,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

Congo, LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark CONGO for services ultimately identified as “wholesale and retail store services featuring energy drinks, protein shakes, and dietary and nutr[i]tional supplement products; wholesale distributorships featuring energy drinks, protein shakes, and dietary and nutr[i]tional supplement products; Transportation logistics services, namely, arranging the transportation of dietary

and nutritional products, energy drinks, protein shakes for others, expressly excluding any transportation services in the oil industry” in International Class 35.¹

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 it so resembles the standard-character mark CONGO APPLE PEAR, registered on the Principal Register for “Non-alcoholic beverages containing fruit juices; fruit flavored beverages; fruit-flavored drinks; fruit based beverages; fruit based beverages enhanced with antioxidants; fruit flavored beverages enhanced with antioxidants” in International Class 32,² as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. The case is fully briefed.³ We affirm the refusal to register.

I. Preliminary Matter

The Examining Attorney attached to her brief a definition of the word “Congo” as “[a] country of Central Africa astride the equator,” 10 TTABVUE 14 (THE AMERICAN

¹ Application Serial No. 88952001 was filed on June 7, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

² The cited Registration No. 5073315 issued on November 1, 2016. The registrant has disclaimed the exclusive right to use APPLE PEAR apart from the mark as shown.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. Applicant’s appeal brief appears at 8 TTABVUE and its reply brief appears at 11 TTABVUE. The Examining Attorney’s brief appears at 10 TTABVUE.

HERITAGE DICTIONARY), and requests that the Board take judicial notice of this definition. *Id.* at 8 n.2. In its reply brief, Applicant does not object to the Examining Attorney’s request, and acknowledges that “the word ‘Congo’ may, by definition, refer to a country in Africa. . . .” 11 TTABVUE 2. Accordingly, we grant the Examining Attorney’s request and have considered the definition of “Congo” for whatever probative value it may have. *In re Premiere Distillery, LLC*, 103 USPQ2d 1483, 1484 n.2 (TTAB 2012) (granting the examining attorney’s request to take judicial notice of a dictionary definition of “Russia” attached to the examining attorney’s brief).

II. Record on Appeal⁴

The record on appeal includes USPTO electronic records regarding the cited registration,⁵ a dictionary definition of the word “antioxidant,”⁶ third-party webpages regarding the sale of various non-alcoholic beverages,⁷ and a screenshot from Applicant’s website at congobrands.com.⁸

⁴ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status and Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁵ April 27, 2021 Final Office Action at TSDR 18-20. The Examining Attorney initially also cited a registration of a different mark for trucking services as a bar to registration under Section 2(d), but withdrew that citation prior to appeal. *Id.* at TSDR 1. We will not summarize record evidence directed to the withdrawn refusal.

⁶ *Id.* at TSDR 21.

⁷ *Id.* at TSDR 2-17, 22-26; December 27, 2021 Denial of Request for Reconsideration at TSDR 2-41.

⁸ October 27, 2021 Request for Reconsideration at TSDR 12.

III. Analysis of Section 2(d) Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, 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.” Our determination of the 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 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); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). Applicant directs its arguments to these two key factors, 8 TTABVUE 5-13, 11 TTABVUE 2-5, and “submits that Applicant’s Mark and the Cited Mark are not likely to be confused when taking into account the marks in their

entireties and the dissimilarities of the goods and services provided in connection with each respective mark.” 8 TTABVUE 4.⁹

A. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘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.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.”¹⁰ *Id.* (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)).

⁹ As noted above, we consider those *DuPont* factors for which there is evidence and argument. No other *DuPont* factors appear to be relevant on this record.

¹⁰ Applicant’s retail store services feature energy drinks, protein shakes, and dietary and nutritional supplements, all of which are consumed by at least some members of the general public, and the average customers for those services thus include ordinary consumers.

Applicant argues that the standard-character CONGO and CONGO APPLE PEAR marks “appear different despite sharing a common literal element” under “a ‘subjective eyeball test’ which is appropriate when considering the appearance of a mark.” 8 TTABVUE 5. According to Applicant, “[u]nder a ‘subjective eyeball’ test, Applicant’s Mark appears different from the Cited Mark, with the Cited Mark including two additional and unique literal elements of ‘APPLE’ and ‘PEAR,’ which are noticeably absent from Applicant’s Mark,” *id.* at 6, and the “two additional elements of the Cited Mark cannot be dissected or overlooked and are enough to reduce the degree of similarity between Applicant’s Mark and the Cited Mark, especially in view of the differences in the goods and services, and therefore avoid a likelihood of confusion.” *Id.* at 7.

With respect to sound, Applicant argues that “the additional, distinctive elements of the Cited Mark change the way each respective mark sounds when said aloud, further distinguishing the two marks,” *id.*, and that “by no stretch of the imagination does Applicant’s two-syllable CONGO Mark sound like Registrant’s five-syllable CONGO APPLE PEAR Mark. When these differences are verbalized the marks are very different.” *Id.*

As to meaning, Applicant argues that

[w]hile the Cited Mark, CONGO APPLE PEAR, connotes an exotic or unique flavor or inclusion of apple and pear with Registrant’s goods, Applicant’s Mark, CONGO, is arbitrary in connection with its services. The differing commercial impressions created by the respective marks is therefore more than enough to eliminate any potential confusion, especially in view of the fact that the respective marks are not used on the same goods or services.

Id. at 9.

The Examining Attorney responds that “the marks are similar in appearance and commercial impression because the dominant words in the marks, namely, ‘CONGO,’ are identical.” 10 TTABVUE 7. She notes that the first words in each mark are identical, and that consumers are more inclined to focus on those words, *id.*, and that “the additional words in registrant’s mark, ‘APPLE PEAR,’ are generic and have been disclaimed.” *Id.* at 8. She further argues that the marks are similar in meaning because the “sole distinctive element in each mark is the word ‘CONGO,’ which refers to a country in central Africa,” *id.*, and that CONGO “has the same meaning and connotation in applicant’s and registrant’s respective marks because the spelling is identical, and ‘Congo’ has no meaning other than its geographic significance, as shown in the attached dictionary evidence.” *Id.* at 9.

In its reply brief, Applicant argues that

the Examining Attorney has placed too much weight on the term CONGO and not enough weight on the additional terms APPLE PEAR, neither of which can be dissected from the Cited Mark. Applicant’s Mark and the Cited Mark are both unique and, when considering the relevant *du Pont* likelihood of confusion factors properly, there is not a likelihood of confusion between the two.

11 TTABVUE 2. Applicant also repeats its argument that the word CONGO in the marks “is arbitrary when used by Applicant in connection with Applicant’s services,” but evocative of “an exotic or unique flavor of beverages” when used in the cited mark. *Id.* at 3.

We agree with Applicant that the marks must be considered in their entirety, but “in articulating reasons for reaching a conclusion on the issue of confusion, 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 entirety.” *Sabhnani v. Mirage Brands, LLC*, 2021 USPQ2d 1241, at *30 (TTAB 2021) (quoting *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (internal quotation omitted)). The word CONGO is the dominant portion of the cited mark CONGO APPLE PEAR, in which the words APPLE PEAR have been disclaimed, because CONGO is “the first word in the mark and the only one with source-identifying significance.” *Id.*, at *33 (finding that MIRAGE was the dominant portion of the mark MIRAGE BRANDS). We turn now to the required comparison of the marks in their entirety, giving greater weight in that comparison to the word CONGO in the cited mark than to the words APPLE PEAR.

We first address Applicant’s argument that “a ‘subjective eyeball test’ . . . is appropriate when considering the appearance of a mark.” 8 TTABVUE 5. Applicant cites *Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc.*, 856 F.2d 1445, 8 USPQ2d 1237 (9th Cir. 1988), for this proposition. We are not bound by this regional circuit court decision, and while we give it respectful consideration, we must reject its analysis to the extent that it conflicts with the analysis that we must apply under controlling Federal Circuit and Board precedents.

The Ninth Circuit held in *Miss World* that the district court had erred in its analysis of the marks’ similarity because “it should have analyzed each of the elements that make up what has been called the ‘similarity trilogy,’” *Miss World*, 8

USPQ2d at 1242, namely, sight, sound, and meaning, *id.* at 1241, and the court commented that “the sight element may be analyzed only by a ‘subjective ‘eyeball’ test.” *Id.* *Miss World* appears to have involved at least one composite word-and-design mark, *id.* at 1242 (describing the display of one the marks as including “a ‘star figure’ in place of the period normally found after “Mrs.”), but to the extent that the Ninth Circuit held that a “subjective eyeball test” applies to the visual similarity or dissimilarity of every type of mark, including standard-character word marks of the sort at issue here, we reject the court’s test.¹¹

The Board has applied what it has described as a “subjective eyeball test” only in the context of design and color marks. *See, e.g., In re Medline Indus., Inc.*, 2020 USPQ2d 10237, at *11 (TTAB 2020) (“the issue of the similarity of two color marks ‘is really nothing more than a subjective ‘eyeball test.’”) (quoting *In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1381 (TTAB 2012)); *Gen. Foods Corp. v. Ito Yokado Co.*, 219 USPQ 822, 828 (TTAB 1983) (the issue of the similarity of design marks “must in the end come down to a subjective ‘eye ball’ reaction.”). By their nature, these types of marks do not lend themselves to the sort of comparison that is possible in the case of word marks, whose similarity or dissimilarity in appearance can be analyzed and articulated based on objective factors such as the number, positioning,

¹¹ The Ninth Circuit cited the 1984 version of Professor McCarthy’s treatise TRADEMARKS AND UNFAIR COMPETITION (“MCCARTHY”) in support of its statement about the “subjective eyeball test.” *Miss World*, 8 USPQ2d at 1242 (citing MCCARTHY § 23:7, at 63 (2d ed. 1984)). The current version states that “[s]imilarity of appearance between marks is really nothing more than a subjective ‘eyeball’ test,” MCCARTHY, § 23:25 (5th ed. 2020), but goes on to say that “[b]ecause a picture is worth a thousand words, there is little in the way of guidance to determine the degree of visual similarity which will cause a likelihood of confusion of buyers,” and to discuss the visual similarity or dissimilarity of design and picture marks. *Id.*

and nature of the words in the marks. We must, of course, use our eyeballs in assessing the visual similarities and dissimilarities of the standard-character marks CONGO and CONGO APPLE PEAR, but we believe that we can objectively articulate our analysis and conclusions on that issue.

The cited mark CONGO APPLE PEAR begins with the dominant, source-identifying word CONGO that comprises the entirety of Applicant's mark. Consumers typically notice the initial portion of a mark first, *In re Dare Foods Inc.*, 2022 USPQ2d 291, at *10 (TTAB 2022) (citing *Detroit Athletic Co.*, 128 USPQ2d at 1049), and in forming a "general rather than a specific impression" of the CONGO APPLE PEAR mark, a consumer is more likely to retain the dominant, source-identifying word CONGO in the mind's eye than the entire mark. "Consumers may not necessarily encounter the marks in close proximity and must rely upon their recollections thereof over time." *Id.*, at *8.

Consumers who separately encounter the CONGO word mark are not likely to view it as significantly different in appearance from the cited word mark as they recall it, and certainly would not focus on the differences that can be identified in a side-by-side comparison of the marks. Because the cited mark begins with, and Applicant's mark consists of, the identical word CONGO, the marks are more similar than dissimilar in appearance. *See, e.g., id.*, at *10 ("On the basis of the identical, distinctive term RAINCOAST, we find the marks RAINCOAST TRADING and RAINCOAST DIP are more similar than dissimilar in appearance"); *Sabhnani*, 2021 USPQ2d 1241, at *35 (MIRAGE BRANDS and ROYAL MIRAGE and design

marks “are more similar than dissimilar in appearance when considered in their entirety” notwithstanding visual differences between the respective marks); *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 1187 (TTAB 2018) (finding the marks CHATEAU LAROQUE and LAROQUE CITÉ DE CARCASSONNE and design to be “more similar than dissimilar in appearance”).

With respect to sound, we disagree with Applicant’s assertion that “by no stretch of the imagination does Applicant’s two-syllable CONGO Mark sound like Registrant’s five-syllable CONGO APPLE PEAR Mark.” 8 TTABVUE 7. Just as word marks are not compared in appearance by viewing them side-by-side, they are not compared in sound by pronouncing them sequentially. A consumer with a general rather than specific impression of the sound of the cited CONGO APPLE PEAR mark is most likely to remember the lead, source-identifying word CONGO, which is identical in sound to Applicant’s mark. But even if the CONGO and CONGO APPLE PEAR marks are spoken and heard sequentially, they are more similar than dissimilar in sound due to the common presence of the word CONGO. *See, e.g., Dare Foods*, 2022 USPQ2d 291, at *10 (finding the marks RAINCOAST TRADING and RAINCOAST DIP to be more similar than dissimilar in sound); *Sabhnani*, 2021 USPQ2d 1241, at *36 (finding that “the words ROYAL MIRAGE and MIRAGE BRANDS are more similar than dissimilar in sound because of the common presence of the word MIRAGE.”); *In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018) (standard-character mark INDIGO and INDIGO AR composite mark found to be more similar than dissimilar in sound). “The similarity in sound will be greater,”

indeed, the marks would be identical to the ear, “if consumers engage in ‘the penchant of consumers to shorten marks,’” and “drop the non-source-identifying word[s] [APPLE PEAR] when verbalizing” the cited mark. *Sabhnani*, 2021 USPQ2d 1241, at *36 (quoting *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016) (penchant to shorten marks “would lead many consumers to drop the highly descriptive/generic term ‘Blonde’ when calling for” the applicant’s TIME TRAVELLER BLONDE beer)).

Finally, the marks CONGO and CONGO APPLE PEAR are similar in connotation and commercial impression due to the common presence of the word CONGO, which, as Applicant acknowledges, 11 TTABVUE 2, refers to a country in Africa. Applicant’s claim that in its mark, CONGO “is arbitrary in connection with its services,” 8 TTABVUE 9, while the cited CONGO APPLE PEAR mark “connotes an exotic or unique flavor or inclusion of apple and pear with Registrant’s goods,” *id.*, is based entirely on argument of counsel, which “is no substitute for evidence.” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *15 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799). Unlike in the cases cited by Applicant, 8 TTABUVE 7-8; 11 TTABVUE 3, “there is no evidence here, or other reason to find” that the word CONGO “has one meaning when used with” Applicant’s wholesale and retail store services featuring various beverages, “and a second and different meaning when used with” the various beverages identified in the cited registration, “based on the nature of the respective goods [and services].” *Embiid*, 2021 USPQ2d 577, at *21. Indeed, even assuming that the cited CONGO APPLE PEAR mark “connotes an exotic or unique flavor or

inclusion of apple and pear with Registrant's goods," 8 TTABVUE 9, it could readily be viewed as identifying particular beverages offered in the course of rendering wholesale and retail store services featuring beverages under the CONGO mark, which Applicant calls its "company name." *Id.* at 11. *See Sabhnani*, 2021 USPQ2d 1241, at *39 (finding that where the respondent's MIRAGE BRANDS word and composite marks were "house marks," the petitioner's ROYAL MIRAGE composite mark could readily be viewed as identifying a particular product "that emanates from Respondent's MIRAGE BRANDS 'house'.");¹² *Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (finding that purchasers of the opposer's GOTT and JOEL GOTT wines were likely to assume that applicant's water-related beverages sold under the mark GOTT LIGHT and design were "merely a line extension of goods emanating from opposer.").

The CONGO and CONGO APPLE PEAR marks are more similar than dissimilar in appearance and sound, and quite similar in meaning. The first *DuPont* factor supports a finding of a likelihood of confusion.

B. Similarity or Dissimilarity of the Goods and Services

"Next, we compare the goods and services as they are identified in the involved application and cited registration, the second *du Pont* factor." *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *4 (TTAB 2019). "The goods and services need not be

¹² In *Sabhnani*, the Board reiterated that the "weighing of the relevant [*DuPont*] factors must take into account the confusion that may flow from extensive promotion of a similar or identical mark by a junior user," *Sabhnani*, 2021 USPQ2d 1241, at *17 (quoting *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993)), under the doctrine of reverse confusion.

identical or even competitive to find a likelihood of confusion.” *Id.* “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.” *Id.* (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1366, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012)).

Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both the applicant’s services and the goods listed in the cited registration.

Id., at *4-5.

Applicant argues, based on extrinsic evidence of the actual use of its mark, that it uses its CONGO mark in connection with distribution, store, and logistics services involving “its brands 3D Energy Drinks and Alani Nu, whereas the Cited Mark is not the owner’s brand or company name,” but rather “a flavor name under the Cited Registration owner’s company name of Bai Brands, LLC.” 8 TTABVUE 11. Applicant claims that “it is helpful to Applicant’s argument that Registrant’s name—Bai—is the beverage brand name and that the Cited Mark—CONGO APPLE PEAR—is a flavor name associated with Registrant’s brand.” *Id.* at 12. Applicant concludes that consumers “are not likely to be confused into believing that the services and goods are manufactured by, sponsored by, or emanate from the same source.” *Id.* at 11.

Applicant further argues that its services, “as identified in the Application, and the Cited Registration’s goods, as identified in the Cited Registration, are very

distinct services versus goods, are targeted towards different consumers, and do not travel in the same trade channel.” *Id.* According to Applicant, the Examining Attorney “has provided insufficient evidence showing the relatedness of the services provided by Applicant and the goods provided by Registrant” because she relies on numerous “screenshots of various beverages” that “are not helpful to the Examining Attorney’s argument regarding brand names versus flavor names.” *Id.* at 12. Applicant also discusses the Examining Attorney’s “screenshots from convenience stores such as CVS, Walgreens, and Rite Aid,” *id.*, which Applicant claims “do not establish the same mark being used for both services such as Applicant’s and goods such as Registrant’s” because “the screenshots show a different mark for the services than the various goods.” *Id.* at 13.

The Examining Attorney responds that “the goods and services are related because applicant and registrant each sell drinks, and applicant’s other products relate to drinks or beverages.” 10 TTABVUE 10. She points to Internet evidence that she claims shows that fruit-based drinks, for which the cited mark is registered, and energy drinks, which are the subject of Applicant’s services, are themselves related because they are commonly sold under the same mark. *Id.* at 10-11. She argues that “[b]ecause applicant sells energy drinks, protein shakes, and dietary and nutritional supplement products through retail stores, and applicant sells fruit-based beverages, the evidence of record confirms that applicant’s and registrant’s goods and services are related.” *Id.* at 11. She rejects Applicant’s argument that “the goods are unrelated because ‘CONGO’ is its company name, while registrant uses ‘CONGO’ only as the

name of a flavor for its beverages” because the record shows that “many companies use their house mark or company name on their products.” *Id.* She concludes that “if applicant’s consumers see the word ‘CONGO’ on registrant’s fruit-based beverages, they are likely to be confused as to the source of the goods because the evidence of record shows that the goods are related, and companies often use their company name on their beverages.” *Id.*

In its reply brief, Applicant argues

[t]he Examining Attorney’s focus on the relatedness of energy drinks to fruit-based beverages is misplaced, and the alleged relatedness of the respective goods and services is not supported by substantial evidence. Applicant is providing wholesale and retail store services, wholesale distributorships, and transportation logistics services. While these services pertain to energy drinks, protein shakes, and dietary and nutritional supplements (which, despite the Examining Attorney’s assertion, are not all related to drinks or beverages), Applicant is *not* seeking registration of its mark for use in connection with the actual energy drinks, protein shakes, or dietary and nutritional supplements. Therefore, Applicant’s services are not confusingly similar to the Cited Registration’s goods.

11 TTABVUE 4-5 (emphasis supplied by Applicant).

The services identified in the application include “wholesale and retail store services featuring energy drinks, protein shakes, and dietary and nutr[i]tional supplement products.”¹³ The goods identified in the cited registration are “Non-

¹³ “The Examining Attorney need not prove, and we need not find, similarity as to each [service] listed in the description of [services].” “It is sufficient for finding a likelihood of confusion if relatedness is established for any [service] encompassed by the identification of [services] within” Applicant’s single-class application. *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126

alcoholic beverages containing fruit juices; fruit flavored beverages; fruit-flavored drinks; fruit based beverages; fruit based beverages enhanced with antioxidants; fruit flavored beverages enhanced with antioxidants.” Retail store services have frequently been found to be related to goods sold by those retail stores. *See, e.g., Detroit Athletic Co.*, 128 USPQ2d at 1051 (“we have held that confusion is likely where one party engages in retail services that sell goods of the type produced by the other party”); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (the applicant’s “general merchandise store services would include the sale of furniture identified in the cited registration); *Country Oven*, 2019 USPQ2d 443903, at *5-6 (finding that it was “a matter of common knowledge” that “retail bakery shops” sell bakery products, and that where the identification of retail store services “contain[ed] no restrictions on the kind of bakery sold at the retail bakery shops,” the Board had to “consider Applicant’s services to encompass a broad spectrum of bakery products that quite obviously include[d] goods of the type identified in the cited registration, i.e., ‘bread buns,’” such that “the identifications in the application and registration themselves support finding the goods and services are related.”);¹⁴ *In re*

n.5 (TTAB 2015)). *See also Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981).

¹⁴ In *Country Oven*, the Board acknowledged that under the Federal Circuit’s decision in *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014), “something more’ than that the service at issue uses the product at issue may be required where ‘the relatedness of the goods and services is not evident, well-known or generally recognized.’” *Country Oven*, 2019 USPQ2d 443903, at *12 (quoting *St. Helena Hosp.*, 113 USPQ2d at 1087). The Board found, however, that “the relationship between baked goods, including bread buns, and bakeries is the opposite of obscure, unknown, or generally unrecognized,” and that “the relevant line of case law holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other.” *Id.*, at *13. For the reasons discussed below, we similarly find here that the

House Beer, LLC, 114 USPQ2d 1073, 1078 (TTAB 2015) (“ it has often been recognized that likelihood of confusion may arise where confusingly similar marks are used on goods, on the one hand, and in connection with sales of such goods, on the other”); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks”). *See also* MCCARTHY, § 24:25 (“Where the services consist of retail sales services, likelihood of confusion is found when another mark is used on goods which are commonly sold through such a retail outlet.”).

Here, unlike in *House Beer*, in which the involved goods and services were “beer” and “retail store services featuring beer,” respectively, the retail store services identified in the application do not feature the precise beverages identified in the cited registration. Applicant’s retail store services feature “energy drinks, protein shakes, and dietary and nutr[i]tional supplement products,” while the cited registration covers “Non-alcoholic beverages containing fruit juices; fruit flavored beverages; fruit-flavored drinks; fruit based beverages; fruit based beverages enhanced with antioxidants; fruit flavored beverages enhanced with antioxidants.” Such exact correspondence is unnecessary, however, because it “is settled that the

relationship between certain of the beverages identified in the cited registration and the retail store services featuring energy drinks identified in the application is not “obscure, unknown, or generally unrecognized,” and there is thus “no need for ‘something more.’” *Id.*, at *14.

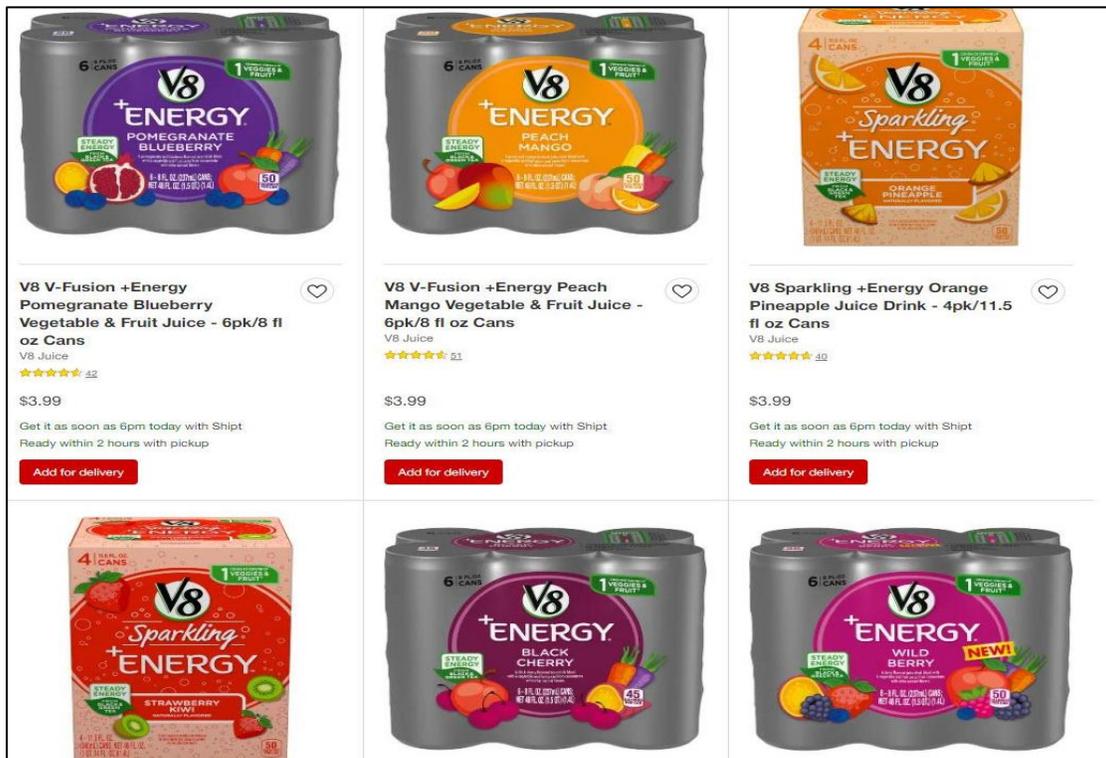
likelihood of confusion may result from the use by different parties of the same or similar marks in connection with goods, on the one hand, and services which deal with or are related to those goods, on the other,” *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1639-40 (TTAB 2007) (finding that retail store services featuring women’s clothing were related to cosmetics), and the “energy drinks” featured in the application encompass at least two of the beverages identified in the cited registration.

In assessing relatedness, “[w]e begin with the identifications of goods and services in the registration and application under consideration.” *Country Oven*, 2019 USPQ2d 443903, at *5. The “energy drinks” featured in Applicant’s retail store services are broadly described and “contain no restrictions on the kinds of [energy drinks] sold” in Applicant’s retail stores. *Id.* On the face of the respective identifications, the “energy drinks” sold in Applicant’s retail stores encompass at least the “fruit flavored beverages” and “fruit-flavored drinks” identified in the cited registration, and “we must consider Applicant’s services to encompass a broad spectrum of [energy drinks] that quite obviously includes goods of the type identified in the cited registration, i.e., [‘fruit flavored beverages’ and ‘fruit-flavored drinks’].” *Id.*, at *5-6. “We find that the identifications in the application and registration themselves support finding the goods and services are related.” *Id.*, at *6.

Our conclusion is confirmed by the record, which shows that goods identified as “energy” drinks are often fruit-flavored, and that retailers sell both energy drinks and “fruit flavored beverages” and “fruit-flavored drinks”:



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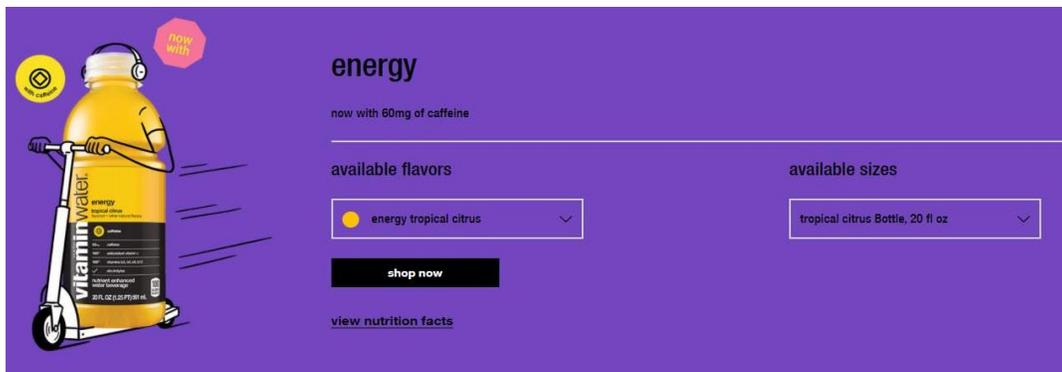
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¹⁵ April 27, 2021 Final Office Action at TSDR 10.

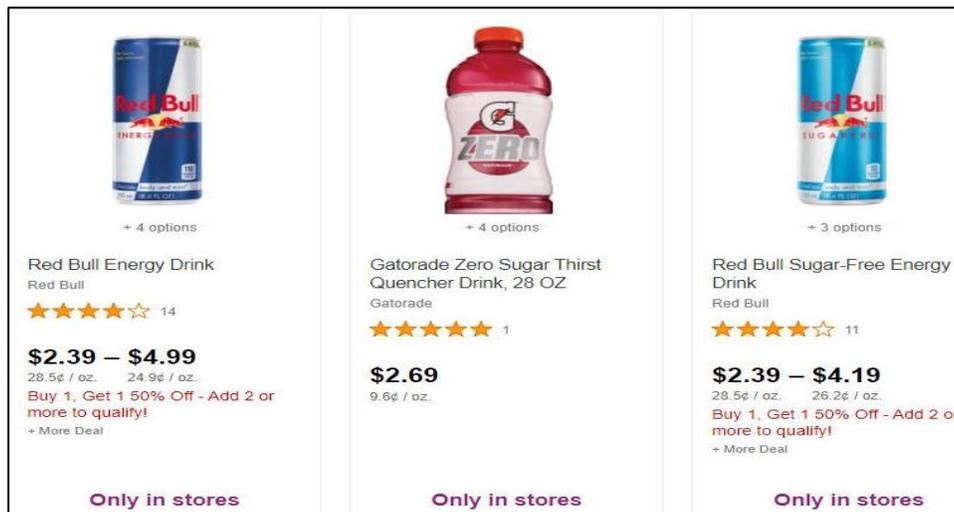
¹⁶ *Id.* at TSDR 24.



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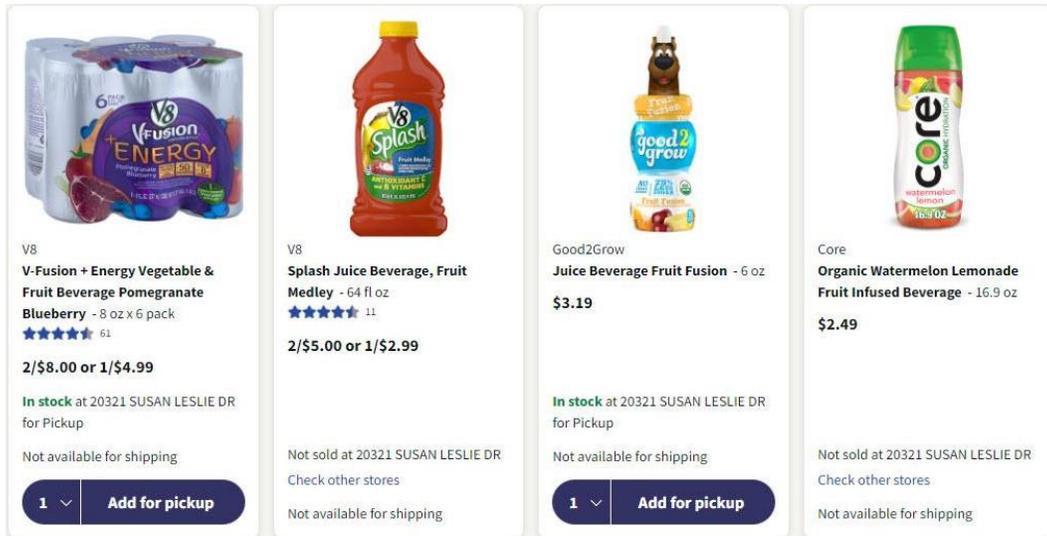


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¹⁷ December 27, 2021 Denial of Request for Reconsideration at TSDR 6.

¹⁸ *Id.* at TSDR 12.

¹⁹ *Id.* at TSDR 35 (CVS).



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Accordingly, we deem Applicant’s “wholesale and retail store services featuring energy drinks . . .” to include the sale of the “fruit flavored beverages” and “fruit-flavored drinks” identified in the cited registration. Under “the relevant line of case law[, which] holds that confusion may be likely to occur from the use of the same or similar marks for goods, on the one hand, and for services involving those goods, on the other,” *Country Oven*, 2019 USPQ2d 443903, at *13, it is of no moment that “Applicant is *not* seeking registration of its mark for use in connection with the actual energy drinks, protein shakes, or dietary and nutritional supplements.” 11 TTABVUE 4-5 (emphasis supplied by Applicant).²¹ “The evidence of record suffices to

²⁰ *Id.* at TSDR 39 (Walgreens).

²¹ It is similarly of no moment that CONGO “is Applicant’s company name, which uses its distribution, store, and logistics services in connection with its brands 3D Energy Drinks and Alani Nu,” while “the Cited Mark is not the owner’s brand or company name,” but rather “a flavor name under the Cited Registration owner’s company name of Bai Brands, LLC.” 8 TTABVUE 11. “[W]e do not consider how Applicant and Registrant actually use their marks in the marketplace, but rather how they appear in the registration and the application. We must compare the marks as they appear in the drawings, and not on any labels [or other materials] that may have additional wording or information.” *Aquitaine Wine USA*, 126 USPQ2d at 1186.

show that Applicant's services and Registrant's goods are clearly related," *Country Oven*, 2019 USPQ2d 443903, at *14, and "the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that [they] emanate from the same source," *id.*, at *4, when sold under the similar CONGO and CONGO APPLE PEAR marks. The second *DuPont* factor supports a finding of a likelihood of confusion.

C. Summary

Both relevant *DuPont* factors support a finding of a likelihood of confusion. The CONGO and CONGO APPLE PEAR marks are similar, and Applicant's retail store services featuring energy drinks encompass the sale of at least two of the beverages, "fruit flavored beverages" and "fruit-flavored drinks," identified in the cited registration. A consumer who encounters a CONGO APPLE PEAR fruit-flavored energy drink sold by a retailer operating under the CONGO mark would surely believe mistakenly that CONGO APPLE PEAR is the retailer's house brand.

Decision: The refusal to register is affirmed.