

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: March 17, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board

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In re Your Gummy Vitamins LLC

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Serial No. 90007282

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Roy D. Gross of the Roy Gross Law Firm LLC,
for Your Gummy Vitamins LLC.

Khanh M. Le, Trademark Examining Attorney, Law Office 116,
Elizabeth Jackson, Managing Attorney.

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Before Adlin, Pologeorgis, and Johnson,
Administrative Trademark Judges.

Opinion by Pologeorgis, Administrative Trademark Judge:

Your Gummy Vitamins LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark NUNC for, as amended, “Dietary supplements and nutritional supplements for promoting nutrition and health, excluding tablets and powdered mixes used to make beverages or drinks and excluding formulations for beauty enhancement” in International Class 5.¹

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¹ Application Serial No. 90007282, filed on June 17, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. 1051(b), based on an allegation of a bona fide intent to use the mark in commerce.

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 of likelihood of confusion with the stylized mark NUNC, as displayed below, registered on the Principal Register for "Cosmetics and cosmetic preparations; aromatic oils; air fragrancing preparations; fragrances and perfumery; skin soap; dentifrice" in International Class 3.²

NUNC

When the refusal was made final, Applicant appealed and requested reconsideration. When the request for reconsideration was denied, the appeal resumed. The appeal is fully briefed. We affirm the refusal to register under Section 2(d) of the Trademark Act.³

I. Evidentiary Objection

We initially turn to an evidentiary objection lodged by the Examining Attorney regarding evidence presented by Applicant for the first time with its appeal brief.⁴ The Examining Attorney objects to screenshots from Registrant's website, third-party

² Registration No. 5766520 was issued on June 4, 2019.

³ Trademark Status & Document Retrieval ("TSDR") citations refer to the docket and electronic file database for the involved application. All citations to the TSDR database are to the downloadable .pdf version of the documents. References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

⁴ Examining Attorney's Brief, p. 5 (11 TTABVUE 6).

registrations, and a screenshot from the Dashing Diva website, all submitted for the first time as exhibits to Applicant's appeal brief.

Applicant argues that the Board should consider the evidence based on § 1203.02(e) of the Trademark Manual of Examining Procedure (TMEP) (July 2021).⁵ It appears that Applicant is actually relying on TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 1203.02(e) (2021) to support its argument, which provides as follows:

Exhibits attached to a brief that were not made of record during examination are untimely, and generally will not be considered. However, if the examining attorney, in their brief, discusses the exhibits attached to the applicant's brief without objecting to them, or if the applicant discusses, in its reply brief, exhibits attached to the examining attorney's brief without objection, they may be deemed to have been stipulated into the record and may be considered. (citations omitted).

Applicant emphasizes the following language in TBMP § 1203.02(e) to support its argument that we should consider the evidence attached to its brief: "or if the applicant discusses, in its reply brief, exhibits attached to the examining attorney's brief without objection, they may be deemed to have been stipulated into the record and may be considered."⁶

We disagree with Applicant that we should consider this evidence based on TBMP § 1203.02(e). Here, the Examining Attorney did not discuss the exhibits attached to Applicant's appeal brief as if they were properly of record, but, as noted above, objected to them as untimely submitted. Moreover, the Examining Attorney did not

⁵ Applicant's Reply Brief, pp. 3-4 (12 TTABVUE 5-6).

⁶ *Id.* at p. 4 (12 TTABVUE 6).

attach any exhibits to her brief that were not previously submitted prior to briefing and to which Applicant did not object. Thus, Applicant's reliance on TBMP § 1203.02(e) is misplaced.

It is well-settled that the record in an ex parte proceeding should be complete prior to appeal. Trademark Rule 2.142(d); 37 CFR § 2.142(d). Exhibits that are attached to a brief but not made of record during examination are untimely, and will not be considered. *See In re Fitch IBCA, Inc.*, 64 USPQ2d 1058, 1059 n.2 (TTAB 2002); *see also* TBMP §§ 1203.02(e) and 1207.01. To the extent Applicant wished to introduce additional evidence after its appeal had been filed, Applicant should have filed a written request with the Board to suspend the appeal and remand the application for further examination pursuant to Trademark Rule 2.142(d). Applicant did not do so. Accordingly, the Examining Attorney's evidentiary objection is sustained, and we give no consideration to the evidence submitted for the first time with Applicant's appeal brief.

II. Likelihood of Confusion

Our determination under Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) ("*DuPont*"); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We have considered each *DuPont* factor for which there is evidence and argument of record. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v.*

Capital City Bank Grp. Inc., 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods or services. See *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) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”); see also *In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)).

A. Strength of the Cited NUNC Mark

“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 registration for the mark NUNC

was issued on the Principal Register without a showing of acquired distinctiveness under Section 2(f) of the Trademark Act. Accordingly, the cited mark is presumed to be inherently distinctive and, therefore, it should be entitled to the normal scope of protection accorded an inherently distinctive mark.

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 (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)).

Here, there are no third-party registrations properly of record for marks that comprise, in whole or in part, the cited mark NUNC for goods identical or similar to those listed in the cited registration.⁷ Thus, there is no evidence to demonstrate that

⁷ Although Applicant submitted third-party registrations with its appeal brief to demonstrate the weakness of the cited NUNC mark, we have given no consideration to this third-party registration evidence because, as explained above, the evidence was untimely submitted. Even if Applicant had timely submitted this evidence, we note that the third-party registrations are for goods unrelated to those listed in the cited registration; therefore, they

the cited NUNC mark is conceptually weak.

As to commercial weakness, the sixth *DuPont* factor “considers ‘[t]he number and nature of similar marks in use on similar goods.’” *Omaha Steaks Int’l, Inc.* 128 USPQ2d at 1693 (quoting *DuPont*, 177 USPQ at 567). Because there is no evidence of record showing third-party use of marks identical or similar to the cited mark for goods identical or similar to those listed in the cited registration, the sixth *DuPont* factor is neutral in our likelihood of confusion analysis.

B. Similarity of the Marks

We next consider the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 369 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.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019)).⁸

do not demonstrate that the term NUNC is conceptually weak in connection with Registrant’s listed goods. *See, e.g., Omaha Steaks Int’l v. Greater Omaha Packing*, 908 F.3d 1315, 128 USPQ2d 1686, 1694 (Fed. Cir. 2018) (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case”); TMEP § 1207.01(d)(iii).

⁸ In its request for reconsideration, Applicant argues, among other things, that the Section 2(d) refusal should be withdrawn because the USPTO has previously allowed identical marks for identical or similar goods or services owned by different registrants to co-exist on the register. *See Applicant’s July 10, 2021 Request for Reconsideration* (TSDR pp. 12-14). Applicant provided a mere list of third-party registrations to support its argument. *Id.* In her denial of Applicant’s reconsideration request, the Examining Attorney properly noted that:

Here, both Applicant's and Registrant's marks are comprised of an identical, single term, namely, NUNC. The only difference between the marks is that Applicant's mark is in standard characters and the cited mark appears in a particular block letter font. However, this difference is of no consequence because Applicant is entitled to all depictions of its standard character mark regardless of the font, style, size, or color. In other words, Applicant's mark could at any time in the future be displayed in a manner identical or similar to that of Registrant's mark, that is, the word NUNC may be displayed in the same font or style as Registrant's mark. *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909-11 (Fed. Cir. 2012); *Citigroup Inc.*, 98 USPQ2d at 1259. *See also In re i.am.symbolic, LLC*, 123 USPQ2d at 1748 ("Symbolic does not, and cannot, dispute that the mark, I AM in standard character form, and the registrants' marks, I AM in standard character, typed, or stylized form, are pronounced the same way and, at a minimum, legally identical.")

Accordingly, although the cited mark is registered in a particular font, the marks are nonetheless legally identical in sound, appearance, connotation and overall commercial impression.

Thus, the first *DuPont* factor heavily favors a finding of likelihood of confusion.

C. Relatedness of the Goods

We next compare the parties' respective goods under the second *DuPont* factor.

(1) a list of registrations does not make them properly of record; and (2) decisions and actions of other trademark examining attorneys in applications for other marks have little evidentiary value and are not binding upon the USPTO or the Board. *See* August 25, 2021 Denial of Request for Reconsideration (TSDR p. 3). Applicant, however, did not pursue this argument in its appeal brief and, therefore, it is forfeited. *In re Google Techs. Holdings, LLC*, 980 F.3d 858, 2020 USPQ2d 11465 (Fed. Cir. 2020).

In making our determination regarding the relatedness of the goods, we must look to the goods as identified in Applicant's application and the goods listed in the cited registration. *See Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *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 the sales of goods are directed.")); *see also In re Giovanni Food Co.*, 97 USPQ2d 1990, 1991 (TTAB 2011).

It is sufficient that the respective goods are related in some manner, or that the conditions and activities surrounding the marketing of the goods are such that they would or could be encountered by the same persons under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same source. *See Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (internal citation omitted); *Hilson Research, Inc. v. Soc'y for Human Res. Mgmt.*, 27 USPQ2d 1423, 1432 (TTAB 1993). The issue here, of course, is not whether consumers would confuse Applicant's goods with Registrant's goods, but rather whether there is a likelihood of confusion as to the source of these goods. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012); *In re Rexel Inc.*, 223 USPQ 830, 831 (TTAB 1984). Moreover, registration must be refused if Applicant's mark for any of its identified goods is likely to cause

confusion with the Registrant's mark for any of its identified goods. *See SquirtCo v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 938-39 (Fed. Cir. 1983) (holding that a single good from among several may sustain a finding of likelihood of confusion); *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981) (likelihood of confusion must be found if there is likely to be confusion with respect to any item that comes within the identification of goods or services in the application).

Applicant's goods, as amended, are "Dietary supplements and nutritional supplements for promoting nutrition and health, excluding tablets and powdered mixes used to make beverages or drinks and excluding formulations for beauty enhancement." Registrant's listed goods are "Cosmetics and cosmetic preparations; aromatic oils; air fragrancing preparations; fragrances and perfumery; skin soap; dentifrice."

In support of her argument that Applicant's and Registrant's goods are related, the Examining Attorney submitted Internet evidence from approximately eleven online retailer websites demonstrating that a single entity commonly promotes and provides Applicant's goods and Registrant's goods under the same mark.⁹ A representative sample is provided below:

⁹ September 23, 2020 Office Action (TSDR pp. 6-51) 51-57; January 28, 2021 Final Office Action (TSDR pp. 7-58); and August 25, 2021 Denial of Request for Reconsideration (TSDR pp. 4-59).

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This evidence supports a finding that Applicant’s and Registrant’s goods commonly emanate from a single source. *See, e.g., In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015) (relatedness found where Internet evidence demonstrated goods commonly emanated from the same source under a single mark); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that “a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis”).

Applicant argues that its identified goods are sufficiently narrow and different to

avoid confusion with the goods listed in the cited registration.¹⁰ More specifically, Applicant notes that it has excluded beauty formulations from the scope of its nutritional and dietary supplements.¹¹

Applicant's argument is unavailing. As noted above, the parties' respective goods do not need to be identical in order to find a likelihood of confusion. Instead, they just need to be related in some manner such that if offered under similar marks may give rise to the mistaken belief that they originate from the same source. The record before us sufficiently demonstrates that Applicant's and Registrant's goods are the type offered by a single entity under the same mark.

Accordingly, the second *DuPont* factor also favors a finding of a likelihood of confusion.

D. Similarity of Trade Channels and Classes of Purchasers

We next consider established, likely-to-continue channels of trade, the third *DuPont* factor. Because there are no limitations or restrictions as to trade channels or classes of purchasers in the respective identifications of goods, we presume that the parties' respective goods are or would be marketed in all normal trade channels for such goods and to all normal classes of purchasers of such goods. *In re i.am.symbolic*, 123 USPQ2d at 1750 (quoting *In re Viterra Inc.*, 101 USPQ2d at 1908 and *Hewlett-Packard v. Packard Press*, 281 F.3d 1261, 62 USPQ2d 1001, 1005 (Fed. Cir. 2002)).

¹⁰ Applicant's Appeal Brief, p. 5 (9 TTABVUE 6).

¹¹ *Id.*

Applicant argues that the goods listed in the cited registration are not sold in the United States.¹² Applicant's argument is an impermissible collateral attack on the cited NUNC registration. An abandonment or nonuse challenge would be appropriate in a cancellation proceeding, but it is not appropriate or permissible in this ex parte proceeding. *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534-35 (Fed. Cir. 1997) ("Dixie's argument that DELTA is not actually used in connection with restaurant services amounts to a thinly-veiled collateral attack on the validity of the registration ... the present ex parte proceeding is not the proper forum for such a challenge.").

Applicant also argues that the trade channels are different because Registrant is a Japanese company whose business focuses on education and senior care services, as well as beauty salons, but only in Japan.¹³ As noted above, because there are no limitations or restrictions in the trade channels or classes of purchasers of either Applicant's or Registrant's identification of goods, we must presume that the parties' respective goods are marketed in all normal trade channels for those goods and to all normal classes of purchasers for such goods, regardless of what any extrinsic evidence might show to be the actual trade channels and purchasers for the goods. *In re Jump Designs LLC*, 80 USPQ2d 1370 (TTAB 2006); *In re Smith & Mehoffey*, 31 USPQ2d 1531 (TTAB 1994); *In re Elbaum*, 211 USPQ 639 (TTAB 1981).

¹² *Id.* at p. 10 (9 TTABVUE 11).

¹³ *Id.* In support of its argument, Applicant relies on evidence that was untimely submitted with its appeal brief. As noted above, we have given no consideration to this evidence.

Here, the third-party use Internet evidence submitted by the Examining Attorney shows that the parties' respective goods, at a minimum, are offered in the same or overlapping channels of trade by the same online retailers. Moreover, it is common knowledge that both cosmetics and nutritional and dietary supplements are sold at brick and mortar retail establishments such as drugstores. In this case, the relevant classes of consumers for both Applicant's and Registrant's goods include ordinary consumers who wish to improve or maintain their health and appearance, and who therefore purchase cosmetic goods, as well as dietary and nutritional supplements. Accordingly, the trade channels and classes of consumers for the goods at issue, at a minimum, overlap.

III. Conclusion

We have considered all of the arguments and evidence of record pertaining to the issue of likelihood of confusion and have found that: (1) Applicant's mark is legally identical to Registrant's mark; (2) the parties' respective goods are related; and (3) the channels of trade and classes of purchasers overlap. In view thereof, we conclude that Applicant's mark, when used in association with its identified goods, so resembles Registrant's mark for the goods listed in the cited registration as to be likely to cause confusion or mistake, or to deceive under Section 2(d) of the Trademark Act.

Decision: The refusal to register Applicant's standard character mark NUNC under Section 2(d) of the Trademark Act is affirmed.