

This Opinion is Not a  
Precedent of the TTAB

Mailed: March 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Better Life Nutritional Supplements, LLC*

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Serial No. 90389844

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David L. Oppenhuizen of Oppenhuizen Law PLC,  
for Better Life Nutritional Supplements, LLC.

Troy Knight, Trademark Examining Attorney, Law Office 107,  
J. Leslie Bishop, Managing Attorney.

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Before Greenbaum, Lynch, and Lebow,  
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Better Life Nutritional Supplements, LLC (“Applicant”) seeks registration on the Principal Register of the mark WAKE-UP CALL in standard characters for “Dietary supplements; Nutritional supplements” in International Class 5.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90389844 was filed December 17, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s alleged bona fide intent to use the mark in commerce.

The Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), based on a likelihood of confusion with the previously registered mark WAKE UP CALL, also in standard characters, for “Skin care products, namely, non-medicated skin serum” in International Class 3.<sup>2</sup> After the Examining Attorney made the refusal final, Applicant filed a request for reconsideration and appealed. The Examining Attorney denied reconsideration, the appeal proceeded, and Applicant and the Examining Attorney filed briefs.

For the reasons set forth below, we affirm the refusal to register.

### **Likelihood of Confusion**

Our determination under Section 2(d) involves an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). The Board considers only those *DuPont* factors for which there is evidence and argument. *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *see also Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, \*\*3 (Fed. Cir. 2020) (“Not all *DuPont* factors are relevant in each case . . . .”). Two key considerations are the similarities between the marks and the relatedness of the goods. *See In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24,

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<sup>2</sup> Registration No. 4590051 issued August 19, 2014, and has been maintained.

29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

### **A. Similarity of the Marks**

We compare the marks “in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *DuPont*, 177 USPQ at 567). “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), *aff’d mem.*, 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)). We assess not whether the marks can be distinguished in a side-by-side comparison, but rather whether their overall commercial impressions are so similar that confusion as to the source of the goods offered under the respective marks is likely to result. *Coach Servs. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Labs. Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant’s mark WAKE-UP CALL and the cited mark WAKE UP CALL are phonetically identical, identical in meaning and commercial impression, and nearly identical visually. The only difference between the marks is the inclusion of a hyphen in Applicant’s mark, and the presence or absence of the hyphen is insignificant. *See The Pierce-Arrow Society v. Spintek Filtration, Inc.*, 2019 USPQ2d 471774, \*31 (TTAB 2019) (“The presence of the hyphen in Applicant’s mark does not distinguish it from

Opposer's mark.") (citing *Thymo Borine Lab. v. Winthrop Chem. Co.*, 155 F.2d 402, 69 USPQ 512, 514 (CCPA 1946) (hyphen in mark THY-RIN has "no significance in speech") and *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (MAGNUM without hyphen is "essentially identical" to MAG-NUM with hyphen), *aff'd mem.*, 2011 U.S. App. LEXIS 22673, 2011 WL 5400095 (Fed. Cir. Nov. 9, 2011)). Consumers would attribute the same meaning to, and derive the same general impression from, WAKE-UP CALL in Applicant's mark and the cited mark WAKE UP CALL.

In a tacit concession of this *DuPont* factor, Applicant's only argument related to our comparison under this factor is that "even identical marks can coexist without confusion" if the goods are dissimilar.<sup>3</sup> While that is a true statement, it does not help Applicant with this *DuPont* factor. Given their overall resemblance in appearance, sound, connotation and commercial impression, we find Applicant's mark and the cited mark virtually identical. This factor weighs heavily in favor of likely confusion.

## **B. The Relatedness of the Goods**

In analyzing the relatedness of the goods under the second *DuPont* factor, we look to the identifications in the application and cited registration. *See In re Detroit Ath. Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018); *Stone Lion Capital Partners v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d

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<sup>3</sup> 6 TTABVUE 6 (Applicant's Brief).

1783, 1787 (Fed. Cir. 1990). The application recites dietary supplements and nutritional supplements, and the cited registration identifies skin serum.

### **1. Internet Evidence**

To demonstrate the relatedness of Applicant's and Registrant's goods, the Examining Attorney introduced numerous screenshots from various third-party websites offering both types of goods under the same mark. For example:

The Honest website offers skin serum and prenatal supplements under the same HONEST mark.<sup>4</sup>

Similarly, the Pacifica website offers various skin serums and several nutritional supplements under the PACIFICA mark.<sup>5</sup>

Along the same lines, the Young Living website features a few skin serums, as well as supplements under the YOUNG LIVING and design mark.<sup>6</sup>

The doTERRA website offers, under that mark, both skin serum and supplements.<sup>7</sup>

The Kora Organics website offers, under the KORA ORGANICS mark, skin serum and supplements.<sup>8</sup>

The Now website promotes, under the NOW SOLUTIONS mark, skin renewal serum and supplements that "provide the nutrients your body needs to promote and maintain healthy hair, skin and nails."<sup>9</sup>

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<sup>4</sup> July 19, 2021 Office Action at TSDR 4-5 (honest.com).

<sup>5</sup> July 19, 2021 Office Action at TSDR 6-7 (pacificabeauty.com).

<sup>6</sup> July 19, 2021 Office Action at TSDR 10-11 (youngliving.com)

<sup>7</sup> November 1, 2021 Office Action at TSDR 3-6 (doterra.com).

<sup>8</sup> November 1, 2021 Office Action at TSDR 13, 16-17 (koraorganics.com).

<sup>9</sup> November 1, 2021 Office Action at TSDR 22-23, 27-28 (nowfoods.com).

The Paula's Choice Skincare website features dietary "skin supplements" and various skin serums, all under the PAULA'S CHOICE mark.<sup>10</sup>

The Perricone MD site offers, under that mark, various skin serums and supplements, including some identified as "Skin & Total Body" supplements.<sup>11</sup>

The Swanson website promotes, under the SWANSON SERUM mark, skin serums and supplements.<sup>12</sup>

The Herbalife Nutrition website offers, under the HERBALIFE mark, skin serums and various supplements.<sup>13</sup>

The Murad website features MURAD serums as well as MURAD "Skincare Supplements."<sup>14</sup>

The Gundry MD site features both skin serum and supplements under the GUNDRY MD mark.<sup>15</sup>

This evidence supports a finding that the goods in the application and the cited registration are related by showing that consumers are accustomed to encountering them offered under the same mark. *See Detroit Ath. Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence that third parties use the same mark for the goods and services at issue because "[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both"); *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir.

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<sup>10</sup> November 1, 2021 Office Action at TSDR 30-34 (paulaschoice.com).

<sup>11</sup> November 1, 2021 Office Action at TSDR 36-43 (perriconemd.com).

<sup>12</sup> November 1, 2021 Office Action at TSDR 45, 49-52 (swansonvitamins.com).

<sup>13</sup> November 1, 2021 Office Action at TSDR 8; June 7, 2022 Denial of Reconsideration at TSDR 3-4 (herbalife.com).

<sup>14</sup> June 7, 2022 Denial of Reconsideration at TSDR 5-6 (murad.com).

<sup>15</sup> June 7, 2022 Denial of Reconsideration at TSDR 7-8 (gundrymd.com).

2002) (stating that evidence that “a single company sells the goods and services of both parties, if presented, is relevant to a relatedness analysis”).

Many of the retail websites the Examining Attorney introduced are specifically devoted to skincare, and they expose consumers to supplements as part of a skincare regimen that also includes traditional cosmetic skincare products such as skin serums. For example, the Perricone MD website states:

Supplements are at the heart of Dr. Perricone’s three-tier philosophy of healthy aging and beautiful skin. **Combine supplements with** anti-inflammatory diet and **topical skincare** to look and feel your very best.<sup>16</sup>

Thus, the goods at issue are shown to be promoted for use together as two of the three parts of a skincare program. Similarly, on the Gundry MD site, on the same page with the heading “Skincare,” consumers find, under the GUNDRY MD mark, both “age-defying serum that helps support skin’s natural elasticity” and supplements that “visibly smooth, tighten, and firm skin from the inside out.”<sup>17</sup> The Jane Iredale website features supplements touted as “Skin Ultimate,” “Skin Complete,” “Skin Omegas,” and “Skin Youth Biome,”<sup>18</sup> showing that supplements are marketed as a skincare product. The Murad website, in addition to promoting MURAD serums as “[a] skincare step you absolutely can’t skip,” also promotes a line of “Skincare Supplements by Murad,” noting that they “multitarget cells” and that “healthier cells

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<sup>16</sup> November 1, 2021 Office Action at TSDR 41 (perriconemd.com) (emphasis added).

<sup>17</sup> June 7, 2022 Denial of Reconsideration at TSDR 7 (gundrymd.com).

<sup>18</sup> July 19, 2021 Office Action at TSDR 9 (janeiredale.com).

= healthier-looking skin, period.”<sup>19</sup> This type of evidence emphasizes the complementary nature of the goods, and reflects a practice in the retail market of presenting these products for use together for the same purpose. This is especially compelling relatedness evidence.

Applicant maintains that the Examining Attorney’s third-party online retail evidence is “anecdotal,” and submitted its own counter-evidence which, according to Applicant, shows that “the same or highly similar mark is being used to market dietary or nutritional supplements, by a first entity, and skin serums or highly similar skin care products, by a second entity.”<sup>20</sup>

However, we find some deficiencies in Applicant’s evidence. For example, some of the goods are not the same as the ones at issue, and involve other types of cosmetics (e.g., barrier skin cream that guards against grease, paint, glue, etc.)<sup>21</sup> or more specific types of supplements (e.g., children’s gummy vitamins, muscle mass hormones, CBD gummies).<sup>22</sup> Consumers who encounter these more specifically and differently targeted goods likely would be less inclined to mistakenly assume they come from the same source even if the marks are similar. By contrast, Applicant’s unrestricted identification must be construed to encompass all types of dietary and nutritional supplements, including those specifically targeted to skincare. *See S.W.*

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<sup>19</sup> June 7, 2022 Denial of Reconsideration at TSDR 5-6 (murad.com).

<sup>20</sup> 6 TTABVUE 14 (Applicant’s Brief); *see* May 22, 2022 Request for Reconsideration Exhibit C.

<sup>21</sup> May 2, 2022 Request for Reconsideration at TSDR 424.

<sup>22</sup> May 2, 2022 Request for Reconsideration at TSDR 393, 413, 423.



*Mgmt., Inc. v. Ocinomled, Ltd.*, 115 USPQ2d 1007, 1025 (TTAB 2015) (where the goods in an application or registration are broadly described, they are deemed to encompass all the goods of the nature and type described therein); *In re Hughes Furniture Indus., Inc.*, 114 USPQ2d 1134, 1137 (TTAB 2015) (“Applicant’s broadly worded identification of ‘furniture’ necessarily encompasses Registrant’s narrowly identified ‘residential and commercial furniture.’”). Consumers who encounter skin serum and skincare supplements under the same mark would be inclined to mistakenly assume they come from the same source.

Also, unlike the nearly identical standard-character marks at issue, most of these third-party marks include stylization and/or design elements, and appear with other distinguishing matter. For example, Applicant presents as “the same or highly similar” CARB BOOM! for energy gel and BOOM! BY CINDY JOSEPH for an unspecified type of cosmetic.<sup>23</sup> Applicant’s also presents as “the same or highly similar” the marks shown below, but consumers encountering them see the first stylized, interlocking CB with “CORDY BIOTECH” underneath it and the second, differently stylized cb with “CELLBONE” underneath it:<sup>24</sup>

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<sup>23</sup> May 2, 2022 Request for Reconsideration at TSDR 407-08.

<sup>24</sup> May 2, 2022 Request for Reconsideration at 425-26.



Thus, the coexistence of such uses presents a different scenario than would the coexistence on the Trademark Register, with all its attendant presumptions, of the standard-character marks at issue in this case, which could be presented much more similarly. Because a registration in standard characters is “entitled to depictions of the standard character mark regardless of font style, size, or color,” we must presume that Applicant’s mark could appear in the same font and color as the cited mark would. *See Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1259 (Fed. Cir. 2011). We also lack information about any potential commercial or conceptual weakness of the common terms in the third-party use evidence.<sup>25</sup> For the cited mark at issue in this case, Applicant had the opportunity to submit such weakness evidence and did not do so, leaving the cited mark entitled to the full scope

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<sup>25</sup> For example, “vitality” may be conceptually weak for supplements that “support[] energy” or for a hydrating lip serum “that last[s]!” May 2, 2022 Request for Reconsideration at TSDR 431-32.

of protection accorded an inherently distinctive registered mark. Ultimately, we do not find most of the third-party use evidence analogous.

Applicant's argument that consumers would rarely encounter the types of products at issue together is not borne out by the record., While Applicant points to alleged brick-and-mortar marketplace realities about beauty product counters at department stores and vitamin aisles of pharmacies as a basis for distinction,<sup>26</sup> the Internet evidence indicates that consumers commonly encounter these types goods together under the same mark, including on specialized skincare retail websites.

## **2. Third-Party Registration Evidence**

Both the Examining Attorney and Applicant also introduced third-party registrations as evidence of relatedness of the lack thereof. The Examining Attorney's records of use-based registrations show that the same entity has registered a single mark identifying goods identical to those in the subject application as well as goods identical the cited registration.<sup>27</sup> Such registration evidence is considered relevant to show that the respective goods are of a type that may emanate from a single source under one mark. *L'Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1140 (TTAB 2012); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988), *aff'd* (unpublished), No. 88-1444, 864 F.2d 149 (Fed. Cir. Nov. 14, 1988). Applicant submitted a much larger

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<sup>26</sup> 6 TTABVUE 11 (Applicant's Brief).

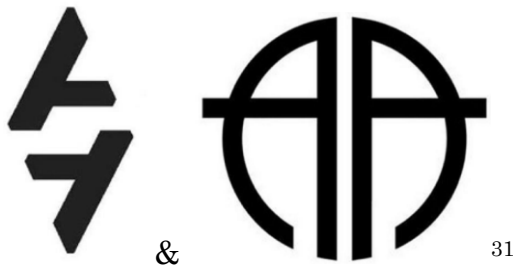
<sup>27</sup> November 1, 2021 Office Action at TSDR 62-106. We consider only relevant registration records in which the goods at issue have not been deleted and remain part of the "live" registration, and therefore disregard Registration Nos. 3632082 and 3476535. *Id.* at 53-61. The other registrations remain live and include the relevant goods.

number of third-party registrations -- pairs of allegedly identical or similar marks registered to different parties for some of the same goods at issue.<sup>28</sup> According to Applicant, this “demonstrates that the USPTO actually has a long and consistent practice of not finding dietary and nutritional supplements to be related or similar to skin serums.”<sup>29</sup>

However, Applicant’s evidence does not support the proposition for a host of reasons, including:

- Many of the registrations do not identify skin serums or legally identical goods, and instead list other types of skincare products (even some “for animals”)<sup>30</sup> that are not at issue in this case.
- While Applicant characterized the pairs of marks as “identical or highly similar,” we reject that contention as to many of the pairs. As just a few examples, Applicant includes the following, which we consider a far cry from analogous in their degree of similarity to WAKE-UP CALL versus WAKE UP

CALL:



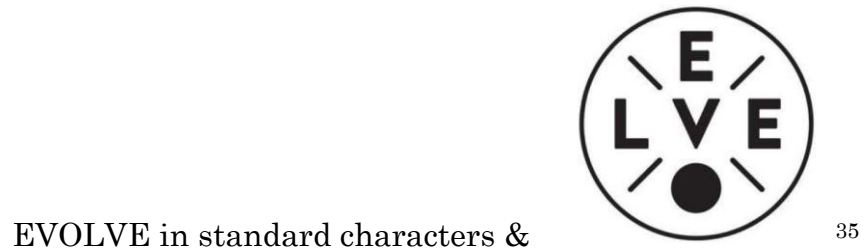
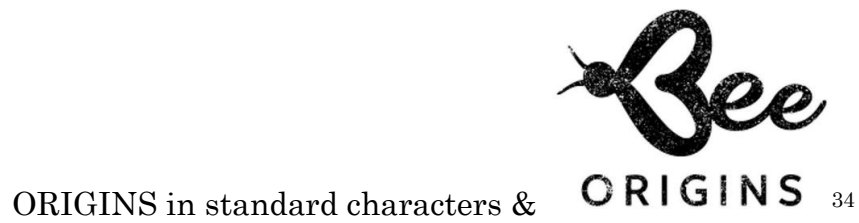
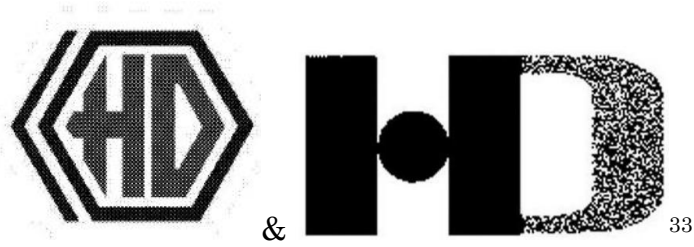
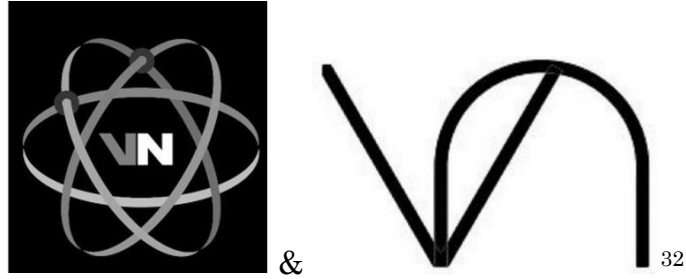
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<sup>28</sup> September 21, 2021 Response to Office Action; May 2, 2022 Request for Reconsideration.

<sup>29</sup> 6 TTABVUE 13 (Applicant’s first brief).

<sup>30</sup> *E.g.*, May 2, 2022 Request for Reconsideration at TSDR 197.

<sup>31</sup> May 2, 2022 Request for Reconsideration at TSDR 115-17.



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<sup>32</sup> May 2, 2022 Request for Reconsideration at TSDR 126-27.

<sup>33</sup> May 2, 2022 Request for Reconsideration at TSDR 118-19.

<sup>34</sup> May 2, 2022 Request for Reconsideration at TSDR 128-19.

<sup>35</sup> September 24, 2021 Response to Office Action at TSDR 27-28.



GOOD in standard characters &

<sup>36</sup>



LIVE GREEN in standard characters &

<sup>37</sup>



SUNNY EYES in standard characters & Sunny Gummies <sup>38</sup>

- We lack information about potential weakness of any common elements in the pairs of cited marks.<sup>39</sup>
- Applicant’s blanket assertion does not take account of nuances in the registrations that affect their commercial impressions. As one example shows, the registered mark, REGULAR GIRL for supplements containing soluble fiber conjures up a different meaning of “regular” in the digestive context than in

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<sup>36</sup> September 24, 2021 Response to Office Action at TSDR 29-30.

<sup>37</sup> September 24, 2021 Response to Office Action at TSDR 55-56.

<sup>38</sup> May 2, 2022 Request for Reconsideration at TSDR 198-99.

<sup>39</sup> For example, we do not know whether and to what extent the common terms in MIGHTY CLEAN for supplements and MIGHTY HEALER for non-medicated skin care preparations, or in HAPPY PILLS for supplements and HAPPY HYALURONIC for serums might be considered conceptually weak in the relevant industries. May 22, 2022 Request for Reconsideration at TSDR 275-76, 290-91. Applicant has not offered any evidence of conceptual weakness of the cited mark at issue in this case.

REGULAR GIRL COSMETICS for cosmetics (that do not include serums, as another issue).<sup>40</sup>

- Applicant presents the pairs of registrations as having different owners, but Applicant’s evidentiary record does not necessarily support that proposition. Instead of submitting the customary USPTO records (available online) that reflect any recorded assignments and show the current listed ownership for the registrations, Applicant only submitted copies of original registration certificates. Thus, registrations may have been assigned after issuance and some of the pairs of registrations could be commonly owned.

Finally, to the limited extent that essentially identical registered marks coexist for skin serum and nutritional and dietary supplements, we lack contextual information about the underlying marketplace at the time of registration of each pair and any consent agreements or other considerations that may be distinguishable from the case at hand. Additionally, the mere existence of these pairs of registrations “does not prove that they coexisted during that time without confusion in the marketplace.” *In re Thomas*, 79 USPQ2d 1021, 1028 (TTAB 2006). Also, this showing of issued pairs of registrations does not take account of the unknown number of applicants who may have been refused registration of marks for one type of the relevant goods, based on a prior registration of the same or a similar mark for the other type of relevant goods. *See In re Ala. Tourism Dep’t*, 2020 USPQ2d 10485, \*11 (TTAB 2020) (“Applicant’s evidentiary submission almost certainly presents an incomplete picture of USPTO

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<sup>40</sup> September 24, 2021 Response to Office Action at TSDR 57-58.

practice, as it omits marks in applications that were refused registration under Section 2(b) in a manner likely to be highly consistent with the action in this case.”).

The Board rejected arguments and evidence similar to Applicant’s in *In re Toshiba Medical Systems Corp.*:

Applicant points to six pairs of registrations and argues that the USPTO “has allowed similar marks for MRI and ultrasound equipment.”... We note that “the third party registrations relied on by applicant cannot justify the registration of another confusingly similar mark.” *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983). *See also Curtice-Burns, Inc. v. Northwest Sanitation Products, Inc.*, 530 F.2d 1396, 189 USPQ 138 (CCPA 1976); *Accord In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001) (“Even if some prior registrations had some characteristics similar to Nett Designs’ application, the PTO’s allowance of such prior registrations does not bind the Board or this court”).

91 USPQ2d 1266 (TTAB 2009).

Ultimately, the prior decisions and actions of other trademark examining attorneys in registering other marks are not binding as an indication that goods are not related.

### **3. Caselaw**

We also have considered Applicant’s reliance on *Vital Pharm., Inc. v. Kronholm*, 99 USPQ2d 1708 (TTAB 2011) for the proposition that the types of goods at issue are not related, but are not persuaded for numerous reasons. First, the case involved different goods – supplements versus cosmetics and perfumes. Second, Applicant’s summary of the case conspicuously omits that the opposer failed to submit any evidence other than attaching pleaded registrations to its notice of opposition, and did not file a brief. *Id.* at 1708-09. The Board concluded that “[t]he evidence of record does not make a *prima facie* case for opposer.” *Id.* at 1712. Thus, *Vital Pharm.*



certainly does not stand for the proposition that these types of goods cannot be considered related; instead, the case reflects a failure of proof by a litigant that did not avail itself of the opportunity to submit evidence in the proceeding. Third, even if *Vital Pharm.* had involved a more robust record, our precedent points out “the limited utility of reliance, in lieu of supporting evidence, on past decisions in which the Board has or has not found various [goods] to be related.” *In re Embiid*, 2021 USPQ2d 577 at \*26 (TTAB 2021). We must rely on the evidentiary record before us regarding potential relatedness, including the marketplace evidence and current registration evidence, rather than the holding of a case that was based on a different evidentiary record compiled (or not) by the involved parties at that time. While prior decisions assessing the relatedness of goods may be valuable for their instruction on what kinds of evidence resulted in the Board’s conclusions, they do not constitute evidence to support relatedness or unrelatedness in another proceeding. *See Hyde Park Footwear Co. v. Hampshire-Designers, Inc.*, 197 USPQ 639, 643 (TTAB 1977). Ultimately, “each case must be decided on its own facts and the differences are often subtle ones.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014).

On this record, we find Applicant’s goods related to those in the cited registration.<sup>41</sup> The second *DuPont* factor weighs in favor of likely confusion.

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<sup>41</sup> To the extent Applicant suggests that the nature of the goods at issue in this case requires “something more” than the usual legal standard for relatedness of goods, we reject the contention. The “something more” standard has been applied when comparing **services** and goods that are not inherently related, requiring, for example, “show something more than that similar or even identical marks are used for food products and for restaurant services.” *In re Coors Brewing*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003); *see also In re St. Helena Hosp.*, 113 USPQ2d at 1087 (explaining the need to show “‘something more’ than

### **C. The Trade Channels and Classes of Consumers**

Turning to the trade channels, the third-party retail website evidence discussed above establishes that goods such as Applicant's and Registrant's travel in some of the same channels of trade to the same classes of consumers. Applicant has not argued otherwise. Thus, the third *DuPont* factor weighs in favor of likely confusion.

### **D. Conclusion**

The near identity of the marks for related goods that move in some of the same channels of trade to the same classes of customers renders confusion likely. 15 U.S.C. § 1052(d).

**Decision:** The refusal to register Applicant's mark is affirmed.

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the mere fact that the goods and services are "used together" in situations where the relatedness of the goods and services is obscure or not generally recognized).