

This Opinion is Not a
Precedent of the TTAB

Mailed: March 13, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Better Life Nutritional Supplements, LLC

Serial No. 90389844

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.

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 5.¹

¹ 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 3.² 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,

² 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.³ 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

³ 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.⁴

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

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

The doTERRA website offers, under that mark, both skin serum and supplements.⁷

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

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."⁹

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

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

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

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

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

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

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