

This Opinion is Not a
Precedent of the TTAB

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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Plum, Inc.

Serial No. 86572736

Thomas W. Cook of Thomas Cook Intellectual Property Attorneys
for Plum, Inc.

Barney Charlon, Trademark Examining Attorney, Law Office 104,
Dayna Browne, Managing Attorney.

Before Zervas, Masiello and Lynch,
Administrative Trademark Judges.

Opinion by Lynch, Administrative Trademark Judge:

Plum, Inc. (“Applicant”) seeks registration on the Principal Register of the mark

PLUM in standard characters for the following services in International Class 36:

Financial advisory and consulting services relating to commercial real estate; financial advisory and consulting services relating to commercial real estate, in the fields of credit lending, and mortgage banking; financial advisory and consulting services relating to commercial real estate, namely, providing information and research in the field of real estate finance and investment, and providing information in the field of real estate via the Internet; financial services

relating to commercial real estate, namely, mortgage brokerage, providing loans secured by commercial paper; financial services relating to commercial real estate, namely, credit lending, real estate investing services, and mortgage banking; financial services relating to commercial real estate, namely, origination, acquisition, disposition, servicing, and securitization of mortgage loans or real estate investing services, all excluding charge card and credit card services and related payment processing services.¹

The Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with two marks registered by different owners, BLACKPLUM in standard characters for, in relevant part, “Financial advice and consultancy services; Financial and investment services, namely, asset and investment acquisition, consultation, advisory and development; Financial planning and investment advisory services,”² and PLUMDOG in standard characters for “Mortgage brokerage.”³

After the Examining Attorney made the refusal final, Applicant appealed. We affirm the refusal to register based on the cited mark BLACKPLUM but reverse as to the cited mark PLUMDOG.

Likelihood of Confusion

The 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, hereinafter referred to as “*du Pont* factors”); *see also In re Majestic*

¹ Application Serial No. 86572736 was filed March 23, 2015 based on use in commerce under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

² Registration No. 4641895.

³ Registration No. 4241892.

Distilling Co., 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the services. See *In re Chatam Int'l Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (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.”). We address these and other relevant *du Pont* factors below.

A. The Services

The recited services in the subject application and each of the cited registrations overlap in part. The BLACKPLUM registration includes “Financial advice and consultancy services,” which is broad enough to encompass Applicant’s “Financial advisory and consulting services relating to commercial real estate.” When a registration describes services broadly, and contains no limitation as to their nature, type, channels of trade, or class of purchasers, it is presumed that the registration encompasses all services of the type described. See, e.g., *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re Jump Designs, LLC*, 80 USPQ2d 1370, 1374 (TTAB 2006); *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). Therefore, we consider the BLACKPLUM Registrant’s services to include financial advice and consultancy relating to commercial real estate, rendering them identical in part to Applicant’s services. Turning next to the PLUMDOG registration, both it and the subject application recite

“mortgage brokerage” services. The PLUMDOG Registrant’s unrestricted mortgage brokerage services would encompass Applicant’s “financial services relating to commercial real estate, namely, mortgage brokerage.” In a single-class application such as this one, “[l]ikelihood of confusion must be found if there is likelihood of confusion involving *any item* that comes within the identification of goods in the involved application.” *Jump Designs*, 80 USPQ2d at 1374 (emphasis in original) (citing *Tuxedo Monopoly, Inc. v. General Mills Fun Group*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)); *see also In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126, n.5 (TTAB 2015) (“it is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

Nonetheless, we note as an aside that the Examining Attorney also submitted additional evidence, in the form of use-based third-party registrations that identify services such as those in the subject application and the cited registrations under the same mark.⁴ These registrations suggest that the relevant services may emanate from the same source. *See Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1432 (TTAB 2013) (“The use-based, third-party registrations . . . also have probative value to the extent that they serve to suggest that the goods listed therein are of a kind which may emanate from a single source under a single mark.”); *see also In re Infinity Broadcasting Corp. of Dallas*, 60 USPQ2d 1214, 1217-18 (TTAB 2001); *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993). We

⁴ July 4, 2015 Office Action at 9-23.

do not agree with Applicant's criticism that these registrations cover such a vast array of services that they lack probative value. We find them relatively focused, in that three of the four registrations recite services only in International Class 36, while the fourth registration covers both that class and a concentrated range of services in International Class 45. Nor do we concur that the third-party registration evidence should be deemed similar to that in *In re Donnay Int'l, Societe Anonyme*, 31 USPQ2d 1953, 1955 (TTAB 1994), in which two third-party registrations that included rackets and soccer balls did not persuade the Board that it was "the norm for companies to sell both." Given that the *Donnay Int'l* case involved its own set of unique facts that included a smaller number of third-party registrations as well as a consent from the owner of the cited registration, the case is not analogous.

B. Trade Channels, Consumers and Conditions of Purchase

Turning to the trade channels and classes of consumers, because Applicant's identified services and those in the cited registrations are in part identical or overlapping, we presume that the relevant services move in the same normal channels of trade for such services and that they are available to the same classes of customers. *See Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (affirming Board finding that where the identification is unrestricted, "we must deem the goods to travel in all appropriate trade channels to all potential purchasers of such goods"); *In re Viterra*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (finding Board entitled to rely on this legal presumption in determining likelihood of confusion); *American Lebanese Syrian Assoc. Charities*

Inc. v. Child Health Research Inst., 101 USPQ2d 1022, 1028 (TTAB 2011). Applicant makes numerous unsupported assertions about consumer sophistication and care, including that “Applicant knows, and here asserts, that prospective purchasers will scrutinize the company providing these services in great detail before entering into a contract for such services.”⁵ However, “[s]tatements in a brief cannot take the place of evidence.” *In re Simulations Publ’ns, Inc.*, 521 F.2d 797, 187 USPQ 147, 148 (CCPA 1975); *Galen Med. Assocs., Inc. v. United States*, 369 F.3d 1324, 1339 (Fed. Cir. 2004) (“Statements of counsel . . . are not evidence.”).

Also, in furtherance of its position on purchaser care and sophistication, Applicant improperly relies on claims as to the nature of its services that are narrower than the identification, specifically that “for commercial real estate loans, such as Applicant’s, . . . the overwhelming majority of loans involve multi-million dollar amounts....”⁶ Yet we must “focus on the application and registrations rather than on real-world conditions, because ‘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.’” *Stone Lion Capital Partners, L.P. v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Houston Comp. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990)). As noted above, the recitation of “Financial advisory and consulting services relating to commercial real estate” and “financial services relating to commercial real estate, namely, mortgage brokerage”

⁵ 4 TTABVUE 10 (Applicant’s Brief).

⁶ *Id.*

controls the analysis. Individual entrepreneurs and small businesses obtain commercial real estate mortgages and seek advice about commercial real estate. Even though the services relate to finance, they still may be offered to a broad range of individuals and businesses, with widely varying degrees of experience, care and sophistication. Thus, we find that the relevant customers are not necessarily sophisticated. *See Stone Lion Capital Partners*, 110 USPQ2d at 1163 (“Accordingly, the Board properly considered all potential investors for the recited services, including ordinary consumers seeking to invest in services with no minimum investment requirement. Although the services recited in the application also encompass sophisticated investors, Board precedent requires the decision to be based ‘on the least sophisticated potential purchasers.’”). While we recognize that commercial real estate-related services may be purchased with a degree of care, rather than impulsively, this fact “does not necessarily preclude [purchasers] mistaking one trademark from another” or demonstrate that they otherwise would be immune from confusion as to the source or sponsorship of the services. *Wincharger Corp. v. Rhino Inc.*, 297 F.2d 261, 132 USPQ 289, 292 (CCPA 1962).

C. Similarity of the Marks

Turning to the comparison of the applied-for and cited marks, we consider them “in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (quoting *du Pont*, 177 USPQ at 567). The test assesses 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. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *see also Edom Laboratories Inc. v. Lichter*, 102 USPQ2d 1546, 1551 (TTAB 2012).

Applicant's proposed mark is PLUM in standard characters, and the marks in the cited registrations are BLACKPLUM and PLUMDOG, also in standard characters. Applicant submitted mainstream dictionary definitions of "plum," as: "a round, juicy fruit that has red or purple skin, sweet yellow flesh, and a hard seed at the center;" "something that many people want or think is very good;" and "a dark reddish-purple color."⁷ Applicant also submitted the following definition of "plum" from Investopedia.com: "A choice investment, or one that has outperformed other comparable investments...."⁸ Applicant's specimen shows the word PLUM used in conjunction with a design of the fruit, shown below:



We compare each of the cited marks to Applicant's mark, in turn.

First, as to the BLACKPLUM registration, although the word BLACK appears in the mark along with PLUM, the mark still is similar in sound and appearance to

⁷ January 4, 2016 Response to Office Action at 2-7 (merriam-webster.com).

⁸ May 14, 2016 Request for Reconsideration at 2 (investopedia.com)

Applicant's mark due to the shared term PLUM. The record includes evidence that "black plum" is the common name of a species of plum found in the United States.⁹ Thus, the shared meaning of PLUM and BLACKPLUM engenders a very similar commercial impression. *See In re M. Serman & Co.*, 223 USPQ 52, 53 (TTAB 1984) (likely confusion between CITY WOMAN and CITY GIRL); *Ralston Purina Co. v. Old Ranchers Canning Co.*, 199 USPQ 125, 128 (TTAB 1978) (likely confusion between TUNA O' THE FARM and CHICKEN OF THE SEA). Overall, we find these marks similar.

By contrast, we find that despite also containing the term PLUM, PLUMDOG has a very different connotation and commercial impression. Unlike with BLACKPLUM, the record includes no evidence that PLUMDOG has a particular meaning. Consumers most likely would view the "plum" portion of this mark as a modifier of "dog," such that, considered in its entirety, the PLUMDOG mark creates a commercial impression of a kind of dog. We find that this differs significantly from the impression created by PLUM alone, even for the same services. *See Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 USQP2d 1459, 1460 (Fed. Cir. 1998) (affirming no likelihood of confusion where CRISTAL and CRYSTAL CREEK "evoked very different images in the minds of the relevant consumers"). Overall, we find that PLUM and PLUMDOG differ, especially in connotation and commercial impression.

⁹ February 3, 2016 Office Action at 910 (Wikipedia.org); *id.* at 11-13 (biodiverseed.com); *id.* at 14-15 (minnesotaseasons.com).

D. Sixth *du Pont* Factor

Under the sixth *du Pont* factor, we consider “[t]he number and nature of similar marks in use on similar goods.” *du Pont*, 177 USPQ at 567. The Federal Circuit has held that evidence of the extensive registration and use of similar marks by others can be powerful evidence of a mark’s weakness. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. v. Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015). Applicant argues that multiple third-party uses of “plum” within “the field of finance” shows that consumers can “distinguish between a number of companies based on relatively small differences” in the names.¹⁰

Of the use evidence proffered by Applicant, we find only a portion of it probative, but most of it lacks persuasive force to show commercial weakness of “plum” in the context of the relevant services. For example, Plum Financial Services is an Australian company with “offices in Melbourne and Sydney,”¹¹ and the listing from the Super Guide website shows an “au” country code domain, denoting Australia.¹² This foreign evidence has little probative value as to how U.S. consumers would perceive “plum.” See *In re Thermo LabSystems, Inc.* 85 USPQ2d 1285, 1290 n.6 (TTAB 2007). Gracie Plum Investments describes itself as “a management organization and parent organization” of two subsidiaries involving healthcare compliance and

¹⁰ 4 TTABVUE 11 (Applicant’s Brief).

¹¹ May 14, 2016 Request for Reconsideration at 14, 16 (facebook.com/pages/Plum-Financial-Services & plum.com.au).

¹² *Id.* at 22 (superguide.com.au).

network services, and it “invests a portion of all pooled revenues into local community development and advancement missions.”¹³ Other examples involve credit card services, crowdfunding, or services of an unspecified nature.¹⁴ These uses fall well outside the range of the services at issue in this case.

Turning to the more relevant third-party evidence, the quantity is limited to four examples,¹⁵ and Applicant proffered no evidence regarding the extent of such third-party use. Considering the record in its entirety, the probative evidence in the record does not support Applicant’s contention that “the word ‘plum’ is not distinctive within the field of finance.”¹⁶ The purpose of introducing third-party uses is to show that a plethora of similar marks have so conditioned customers that they distinguish marks on the basis of minute distinctions. *Veuve Clicquot Ponsardin*, 73 USPQ2d at 1689. In this case, Applicant’s evidence does not demonstrate that the third-party use was so widespread as to condition the consuming public in this way.

Conclusion

We have considered all of the arguments and evidence of record and all relevant *du Pont* factors. The overall similarity, particularly in meaning and commercial impression, of the PLUM and BLACKPLUM marks for overlapping services that move at least in part in the same channels of trade to the same classes of customers

¹³ *Id.* at 4, 6 (Portsmouth-dailytimes.com & gracieplum99.com).

¹⁴ *Id.* at 12 (Americanexpress.com), 26 (plumfund.com), 20 (yourlocalretailers.com).

¹⁵ *Id.* at 8 (plumalley.co), 10 (plumcapital.net), 18 (pluminvestors.com), 24 (plumtreefinancialplanning.com).

¹⁶ 4 TTABVUE 11 (Applicant’s Brief).

renders confusion likely. Although the record indicates that there are a few other “plum”-formative uses in the marketplace, the probative third-party use evidence is fairly minimal. Turning to the comparison to the PLUMDOG registered mark, however, the overall difference between PLUM and PLUMDOG leads us to the opposite conclusion. The additional matter in PLUMDOG creates a significant variation in meaning and commercial impression and therefore renders confusion unlikely. *See Keebler Co. v. Murray Bakery Prods.*, 866 F.2d 1386, 1388, 9 USPQ2d 1736, 1739 (Fed. Cir. 1989) (agreeing with the Board that the “more important fact for resolving the issue of likelihood of confusion . . . is the dissimilarity in commercial impression between the marks”).

Decision: The refusal to register Applicant’s mark based on likely confusion with Registration No. 4641895 is affirmed. However, the refusal to register Applicant’s mark based on likely confusion with Registration No. 4241892 is reversed.