

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 Sulde Global Inc.

Serial No. 88326285

Francis John Ciaramella of Francis John Ciaramella, PLLC,
for Sulde Global Inc.

Mark V. Sparacino, Trademark Examining Attorney, Law Office 103,
Stacy Wahlberg, Managing Attorney.

Before Adlin, Coggins and Lebow,
Administrative Trademark Judges.

Opinion by Lebow, Administrative Trademark Judge:

Applicant, Sulde Global Inc., applied to register the mark HYDROPIK, in standard characters, on the Principal Register for “Apparatus for cleaning teeth and gums using high pressure water for home use; Water apparatus for cleaning teeth and gums for home use,” in International Class 21.¹

The Trademark Examining Attorney refused registration under Section 2(d) of the

¹ Application Serial No. 88326285 was filed on March 5, 2019, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b).

Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, when used in connection with the identified goods, so resembles the registered marks listed below owned by Registrant, Waterpik, Inc., as to be likely to cause confusion:

WATERPIK, in typed characters, for "hygienic and therapeutic irrigation appliances, liquid-jet-emitting fixtures and powered toothbrush units for use therewith, and combinations and parts of the foregoing" in International Class 10, and "toothbrushes and power-driven toothbrush appliances" in International Class 21;²

WATERPIK, in typed characters, for "oral irrigators" in International Class 10, and "oral healthcare products, namely, electric toothbrushes and handheld flossers" in International Class 13;³ and

waterpik for "dental instruments, namely, oral irrigators and tongue cleaners" in International Class 10, and "oral healthcare products, namely, electric toothbrushes, and hand-held flossers," in International Class 21.⁴

When the refusal was made final, Applicant appealed and filed a request for reconsideration which was denied. The appeal is fully briefed.

We affirm the refusal.

I. Applicable Law

The fundamental purpose of Trademark Act § 2(d) is to prevent confusion as to source, and to protect registrants from damage caused by registration of confusingly similar marks. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985). Our analysis is based on all of the probative evidence of record. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973)

² Registration No. 923514, registered November 9, 1971; renewed.

³ Registration No. 2600387, registered July 30, 2002; renewed.

⁴ Registration No. 2634356, registered July 23, 2002; renewed.

(“*DuPont*”). In making our determination, we consider each *DuPont* factor for which there is evidence and argument. *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, two key considerations are the similarities between the marks and the similarities between the goods. *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.”).

We focus our analysis on the typed form mark WATERPIK in cited Registration No. 2600387 (“the Registration”) because if we find confusion likely between that cited mark and Applicant’s mark, we need not consider the likelihood of confusion between Applicant’s mark and the other cited WATERPIK marks. Conversely, if we find no likelihood of confusion between Applicant’s mark and the mark in that registration, we would not find a likelihood of confusion between Applicant’s mark and the other cited WATERPIK marks. *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010).

A. Similarity of the Goods and Trade Channels

The second *DuPont* factor considers the “similarity or dissimilarity and nature of the goods or services as described in an application or registration ...,” and the third *DuPont* factor considers the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 177 USPQ at 567. We must make our determinations for these factors based on the goods as they are identified in the application and cited registrations. See *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1534 (Fed. Cir. 1997); *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014).

The Examining Attorney argues that “[t]he respective goods are related because they are all water apparatus for cleaning teeth and gums and all may be used for home use. The respective goods are effectively identical.”⁵ “In this case, the application/registration [sic] uses broad wording to describe the apparatus for cleaning teeth and gums, which presumably encompasses all goods of the type described, including applicant’s/registrant’s more narrow list of apparatus for cleaning teeth and gums.”⁶ Applicant does not dispute the legal identity of the goods.

We agree that Applicant’s and Registrant’s goods are legally identical in part. The Registration identifies “oral irrigators.” “Irrigation” is “the therapeutic flushing of a body party with a stream of liquid” and “the cleansing of a canal or cavity ... by

⁵ 11 TTABVUE 14 (Examining Attorney’s Brief).

⁶ *Id.* at 14-15.

flushing with water or other fluids.”⁷ An “irrigator is “an apparatus used for irrigation // [e.g.] a dental irrigator.”⁸ Registrant’s goods, which are not limited in scope in the registrations (i.e., to home or commercial use) clearly overlap with Applicant’s “apparatus for cleaning teeth and gums using high pressure water for home use” and “water apparatus for cleaning teeth and gums for home use.”

Neither the Examining Attorney nor Applicant addresses trade channels in its brief. However, since Applicant’s and Registrant’s goods are in part legally identical we presume that these goods travel through the same channels of trade to the same or overlapping classes of purchasers. *In re Information Builders Inc.*, 2020 USPQ2d 10444, 3 (TTAB 2020) (citing *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968)).

The second and third *DuPont* factors weigh heavily in favor of finding likelihood of confusion.

B. Similarity or Dissimilarity of the Marks

We turn next to the first DuPont factor, which considers the “similarities or dissimilarities of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *In re Detroit Athletic Co.*, 903 F.3d 1296, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Similarity in any

⁷ Taber’s medical dictionary (tabers.com); Merriam-Webster’s medical dictionary (merriam-webster.com/medical); accessed November 20, 2020. The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. See *In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013); *In re Red Bull GmbH*, 78 USPQ2d 1375, 1378 (TTAB 2006).

⁸ Merriam-Webster’s medical dictionary, accessed November 20, 2020.

one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 Fed. App’x. 516 (Fed. Cir. 2019). “[T]he more similar the goods at issue, the less similar the marks need to be for the Board to find a likelihood of confusion.” *In re Hitachi High-Technologies Corp.*, 109 USPQ2d 1769, 1773 (TTAB 2014); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (“When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines.”).

The test is 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. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)). Our focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. *See Neutrogena Corp. v. Bristol-Myers Co.*, 410 F.2d 1391, 161 USPQ 687, 688 (CCPA 1969) (many consumers “may have but dim recollections from having previously seen or heard one or the other of the involved marks.”); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014).

The Examining Attorney provided dictionary evidence defining “hydro,” when used as a prefix, as “water,” and as “a combining form meaning ‘water,’ used in the


formation of compound words.”⁹ He thus argues that “applicant’s mark HYDROPIK means ‘water pik’ and conveys the same idea, stimulates mental reaction and has the same overall meaning as the registered marks for WATERPIK,” and concludes that “[t]he respective marks are confusingly similar”¹⁰

Applicant acknowledges that “[s]imilarity is not limited to the eye or ear. The mental impact of a similarity in meaning may be so pervasive as to outweigh any visual or phonetic differences. That is, the ‘psychological imagery evoked by the respective marks’ may overpower the respective similarities or differences in appearance and sound,” (quoting J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:26 (4th ed.) (internal citations omitted by Applicant)).¹¹ Nevertheless, Applicant disputes the Examining Attorney’s contention that the marks are similar in meaning and commercial impression. Applicant claims the commercial impressions are different based on a comparison of how the marks are displayed based on a couple of screenshots from Registrant’s website, including the one show below and highlighted by Applicant in its brief:

⁹ August 22, 2019 Office Action, TSDR 14-21 (definitions from American Heritage dictionary and dictionary.com).

¹⁰ *Id.* at 7-8.

¹¹ 8 TTABVUE 8 (Applicant’s Brief).

Application	Prior Marks
HYDROPIK	<p data-bbox="521 268 927 294">Waterpik-Store.com - WP-300 Traveler™ Water Flosser</p> <p data-bbox="1183 268 1266 294">Page 1 of 1</p> 

Applicant's argument, in fact, flounders on a number of points. Notably, Applicant focuses only on Registrant's stylized **waterpik** mark and presents that mark in a side-by-side comparison with Applicant's standard character mark. For purposes of our analysis, we may not limit the two typed form WATERPIK registrations to the form that is displayed on Registrant's website. "Registrations with typed drawings are not limited to any particular rendition of the mark and, in particular, are not limited to the mark as it is used in commerce." *Cunningham v. Laser Golf Corp.*, 222 F. 3d 943, 950, 55 USPQ2d 1842, 1847 (Fed. Cir. 2000). Furthermore, Applicant's standard character HYDROPIK mark may appear in any font, including the same font as the Registrant's stylized mark. *See In re Viterra Inc.*, 671 F.3d 1358, 101

USPQ2d 1905, 1909 (Fed. Cir. 2012) (holding that the specific font style of a mark cannot serve as the basis to distinguish it from a mark in standard character form); *In re Aquitaine Wine USA, LLC*, 2018 TTAB LEXIS 108, 126 USPQ2d 1181, 1186 (TTAB 2018) (literal elements of a standard character mark may be presented in any font style, size or color).

Notwithstanding their differences in appearance and sound, when considered in their entirety, the marks HYDROPIK and WATERPIK have the same meaning and commercial impression, especially because they are used for legally identical goods which “pick” with water pressure. Taking into account the lesser degree of confusing similarity needed between marks used in connection with virtually identical goods, the first *DuPont* factor weighs in favor of finding likelihood of confusion. *Century 21 Real Estate Corp.* 23 USPQ2d at 1700; *In re Hitachi High-Technologies Corp.*, 109 USPQ2d at 1773.

C. Purchasing Conditions

The fourth *DuPont* factor considers “[t]he conditions under which and buyers to whom sales are made, i.e. ‘impulse’ vs. careful, sophisticated purchasing.” *DuPont*, 177 USPQ at 567. “When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.” *Recot, Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000).

Applicant contends that “the buyers of the respective goods ... will be a [sic] sophisticated. In other words, consumers making purchases of [goods] from either the Applicant or the [Registrant] are well educated, and not likely to make such

purchases on impulse. As such, the [goods] offered by the Applicant and [Registrant] are aimed at discriminating purchasers.”¹² In addition, Applicant argues that Registrant “and Applicant deal in respective goods ... that can be extremely expensive. If the goods ... are relatively expensive, more care is taken and buyers are less likely to be confused as to source or affiliation.”¹³

The Examining Attorney responds that “[i]t is not clear that the purchasers are sophisticated, but even if they are, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.”¹⁴ Further, he argues, “where the purchasers consist of both professionals and the public, the standard of care for purchasing the goods is that of the least sophisticated potential purchaser.”¹⁵ This last point is unnecessary, since we have already determined that the goods are overlapping: Registrant’s unrestricted goods include Applicant’s goods that are “for home use.”

Applicant has provided no evidence that Registrant’s and Applicant’s goods are “extremely expensive.” The two prices Applicant provided for Registrant’s goods are \$69.99 and \$79.99.¹⁶ Applicant has provided no evidence relating to the cost of its own goods, which could be cheaper. Considering that there are no price point limitations

¹² 9 TTABVUE 10 (Applicant’s Brief).

¹³ *Id.*

¹⁴ 11 TTABVUE 14 (Examining Attorney’s Brief).

¹⁵ *Id.*

¹⁶ April 28, 2020 Request for Reconsideration, TSDR 17-18.

in the parties' respective identifications of goods, we may not read limitations into them. Furthermore, it is settled that even sophisticated purchasers are not immune from source confusion, especially in cases such as the instant one involving similar marks and closely related goods. *See In re Research Trading Corp.*, 793 F.2d 1276, 230 USPQ 49, 50 (Fed. Cir. 1986) (“[t]hat the relevant class of buyers may exercise care does not necessarily impose on that class the responsibility of distinguishing between similar trademarks for similar goods”) (citing *Carlisle Chem. Works, Inc. v. Hardman & Holden Ltd.*, 434 F.2d 1403, 58 C.C.P.A. 751, 168 USPQ 110, 112 (CCPA 1970) (“Human memories even of discriminating purchasers...are not infallible.”)). Moreover, even if some purchasers of Registrant's and Applicant's goods are sophisticated, the standard of care is that of the least sophisticated potential purchaser. *Stone Lion*, 110 USPQ2d at 1163 (cited in *In re FCA US LLC*, 126 USPQ2d 1214, 1222 (TTAB 2018) (“Board precedent requires our decision to be based on the least sophisticated potential purchasers.”)).

The fourth *DuPont* factor is neutral.

D. “Fame” or Strength of the Cited Marks

We now turn to the fifth *DuPont* factor, which considers the “fame” or strength of Registrant's marks. *DuPont*, 177 USPQ at 567. “[T]he strength of a mark is not a binary factor”; it “varies along a spectrum from very strong to very weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015). “Fame, if it exists, plays a dominant role in the likelihood of confusion analysis because famous marks enjoy a broad scope of protection or exclusivity of use. A famous mark has extensive public recognition and renown.” *In re Mr. Recipe, LLC*,

118 USPQ2d 1084, 1086 (TTAB 2016) (citing *Bose Corp. v. QSC Audio Prods. Inc.*, 293 F.3d 1367, 63 USPQ2d 1303, 1305 (Fed. Cir. 2002); *Recot, Inc. v. M.C. Becton*, 54 USPQ2d at 1897 and *Kenner Parker Toys, Inc. v. Rose Art Indus., Inc.*, 963 F.2d 350, 22 USPQ2d 1453, 1456 (Fed. Cir. 1992)).

Applicant erroneously argues that “there is no evidence that the cited registrations are famous or have acquired secondary meaning within the marketplace.”¹⁷ The Examining Attorney did submit evidence, which he argues “indicates that WATERPIK is a famous mark for oral irrigators,”¹⁸ including the following (emphasis added):

- A review from msn.com listing Registrant’s WATERPIK oral irrigators and electric toothbrush/flosser as number one and two of the “9 Best Water Flossers” it listed, and stating in its “Guide to the Best Water Flossers of 2019” that Registrant “was founded in 1962” and **“is famous for oral water flossers.”**¹⁹
- A review from bestelectrictoothbrushlab.com identifies Registrant’s water flossers as two of its five “top picks” of the “Best water flossers,” and states that **“Waterpik is the most famous brand of oral irrigators.”**²⁰
- An article from periocenter.com titled “Are You Flossing The Right Way?” from periocenter.com, which states that “to flush out

¹⁷ *Id.* at 11.

¹⁸ *Id.* at 12. “Because of the nature of the evidence required to establish the fame of a registered mark, the Board does not expect Trademark Examining Attorneys to submit evidence as to the fame of the cited mark in an ex parte proceeding, and they do not usually do so.” *Mr. Recipe*, 118 USPQ2d at 1086 (citing *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006)). “Rather, in an ex parte appeal the ‘fame of the mark’ factor is normally treated as neutral because the record generally includes no evidence as to fame.” *Id.* (citing *In re Thomas, id.*, and *In re Davey Prods. Pty Ltd.*, 92 USPQ2d 1198, 1204 (TTAB 2009) (noting that the absence of evidence as to the fame of the registered mark “is not particularly significant in the context of an ex parte proceeding”).”

¹⁹ 5 TTABVUE 7-14 (Request for Reconsideration Denied, Part 1).

²⁰ *Id.* at 15-23.

bacteria and loose biofilm out of the pockets, water flosser (sic) **(such as the famous Waterpik brand)**, is one of the most prominent ways to keep your gum (sic) clean.”²¹

- A review of Registrant’s WATERPIK oral irrigator from dentalsreview.com that states **“Waterpik is so famous that many people would like to work for the company.”**²²
- A review of Registrant’s WATERPIK flosser and sonic toothbrush that states **“WaterPik is famous for its hydraulic flossing equipment** and in this area the device does not disappoint.”²³
- An article from petguide.com titled “Global Pet Expo 2017: Waterpik Goes to the Dogs with New Pet Wand Pro,” which refers to Registrant as **“the people behind the famous water flossers.”**²⁴
- A walmart.com customer review of a competing product, the Ikeepi Water Flosser, as a “Great **alternative to more famous brand**. If you are looking for a cheaper alternative to waterpick (sic) this is a great product.”²⁵
- An article from holisticprimarycare.com titled “Sinus Cleansing Could Cut Drug Overuse for Sinusitis, URIs,” dated August 31, 2010, which states “[t]he WaterPik company, **famous for its ‘water flossing’ dental hygiene systems**, is hoping to improve the acceptability of sinus cleansing with its recent launch of its SinuSense line.”²⁶
- An article from astonishworks.com titled “Waterpik Sonic Fusion Price You Must See,” dated May 9, 2020, which states that **“Waterpik flossers are famous** in light of the fact that they offer such a significant number of incredible advantages.”

²¹ 7 TTABVUE 3-5 (Request for Reconsideration Denied, Part 2).

²² *Id.* at 6-9.

²³ *Id.* at 11-15.

²⁴ *Id.* at 16-17.

²⁵ 6 TTABVUE 5-12 (Request for Reconsideration Denied, Part 3).

²⁶ *Id.* at 14-16.

The articles and reviews provided by the Examining Attorney are probative of the perceptions of the authors and their readers. While this fame evidence is not overwhelming, it does indicate that Registrant's WATERPIK mark has achieved a certain level of renown in the eyes of consumers. Applicant has not suggested that any of this evidence is flawed.

The fifth *DuPont* factor thus weighs slightly in favor of finding likelihood of confusion.

E. The Number and Nature of Similar Marks Used on Similar Goods

The sixth *DuPont* factor considers the number and nature of similar marks in use for similar goods. *DuPont*, 177 USPQ at 567. Applicant contends that Registrant's mark is conceptually weak because "the phrase WATERPIK is highly suggestive (i.e., that the [Registrant's] product consists of a tool with a long handle (a pick) that uses water)." ²⁷

For purposes of our analysis, we find that "PIK" is highly suggestive, and thus fairly weak conceptually. However, we are not persuaded that the combined term WATERPIK is so "highly suggestive" of toothbrushes and related dental tools that it warrants a narrow scope of protection, especially where the term has been found to have some commercial strength. *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975) (scope of protection afforded a highly suggestive term is less than that accorded an arbitrary or coined mark). In any event, even suggestive marks are entitled to

²⁷ 9 TTABVUE 5 (Applicant's Brief). Based on this assertion, Applicant concluded that "the design elements are the dominant portion of (sic) Prior Marks" (emphasis added), a conclusion that we rejected.

protection against similar marks for identical goods. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108, 109 (CCPA 1974) (“Confusion is confusion. The likelihood thereof is to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and a ‘strong’ mark.”). *See Pickering & Co., Inc. v. Bose Corp.*, 181 USPQ 602 (TTAB 1974).

Applicant also contends that Registrant’s WATERPIK mark is commercially weak, providing USPTO TESS printouts of nine use-based third-party registrations for marks that include the terms “PIK,” “PIKK,” “PIC,” “PICS,” “PICK,” or “PICKS,” either as part of a unitary term with additional wording, or as part of a phrase.²⁸ Applicant argues that “[a]s a result of such registrations and continued co-existence, it cannot be said that Applicant’s mark will create a likelihood of confusion.”²⁹ The cited third-party registrations are shown below.

Reg. No.	Mark	Goods or Services
4711257	JETPIK POWER FLOSS SYSTEM	Dental instrument, namely, picks, oral irrigators, and tongue scrapers
4467079	JETPIK	Oral hygiene products, namely, dental picks
1793554	SUPER PIK	Dental hygiene instrument; namely, an instrument to remove plaque and food particles from the teeth and dental appliances, a scaler and an instrument to massage the gums to help prevent gum disease, each of the foregoing excluding oral irrigation devices

²⁸ April 28, 2020 Request for Reconsideration, TSDR 20-32. Applicant identified another registration for the mark PIK POCKET (Reg. No. 1445019, no disclaimer of “PIK”) for “subgingival irrigation delivery tips,” but Registrant owns this registration.

²⁹ 9 TTABVUE 5 (Applicant’s Brief).

4918395	PIK PODS	Tooth bleaching preparations
5561929	DENTEK COMFORT PICKS	Interdental brushes for cleaning the teeth; oral hygiene devices, namely, interdental cleaners
3720185	CLEANPIC	Thin, solid toothpicks; all of the foregoing excluding oral irrigation devices
699916	PICK-A-DENT	Tooth Picks
5198157	HYDRO PULSE ("PULSE" disclaimed)	Dental instruments, namely, oral irrigators; Dental instruments, namely, oral irrigator with teeth whitening function; Dental instruments, namely, replacement heads and attachments for use with oral irrigators
4878833	TOOTH-PYKS	On-line retail store services featuring dental products, aids, and gifts, namely, mouthwash and toothpaste, xylitol gum, dry mouth products, teeth whitening, toothbrushes, dental floss and tongue scrapers, and toothbrush sanitizers
3880793	AIR PICS	Oral hygiene devices, namely, interdental cleaners

The Examining Attorney argues that “these third-party registrations are not relevant because the refusal is not based on applicant’s mark containing either the term HYDRO or the term PIK”; that “third-party registrations are entitled to little weight on the issue of confusing similarity because the registrations are ‘not evidence that the registered marks are actually in use or that the public is familiar with them,’” quoting *In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1167 n.5 (TTAB 2013); and that “the existence on the register of other seemingly similar marks does not provide a basis for registrability for the applied-for mark,” citing *AMF Inc. v. Am.*

Leisure Prods., Inc., 474 F.2d 1403, 1406, 177 USPQ 268, 269 (C.C.P.A. 1973) and *In re Total Quality Grp., Inc.*, 51 USPQ2d 1474, 1477 (TTAB 1999).

We agree that the third-party registrations identified by Applicant have limited probative value and are insufficient to show that Registrant's marks considered in their entireties are weak. One of the third-party registered marks, HYDRO PULSE, has no pick-formative term in the mark, so it is also irrelevant. The remaining registrations, at best, show that "pick" (and misspellings thereof) is, conceptually, somewhat weak for dental care products and services. But in this case, the similarities between the marks do not end there. Rather, Applicant's mark has the exact same structure and order as Registrant's, but merely replaces WATER with the synonymous term HYDRO used for identical goods. Thus, the weakness of pick/pic/pik is not enough to prevent consumer confusion. In short, none of these third-party registrations use a term synonymous with WATER, and thus they are of limited probative value.

The sixth *DuPont* factor is neutral in our analysis.

F. Absence of Actual Confusion

Referring to the eighth *DuPont* factor, which considers "the length of time during and conditions under which there has been concurrent use without evidence of actual confusion," *In re Guild Mortg. Co.*, 129 USPQ2d at 1162 (quoting *DuPont*, 177 USPQ at 567), Applicant contends that "[t]here has been no documented evidence that shows that any consumers have confused the respective marks in commerce. There

have been no demonstrated events of confusion by consumers between the respective marks.”³⁰

The “absence of any reported instances of actual confusion would be meaningful only if the record indicated appreciable and continuous use by [Applicant] of its mark for a significant period of time in the same markets as those served by [Registrant] under its marks.” *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). However, the record is devoid of any evidence of any use by Applicant, whose application is based on an intent to use. Accordingly, the eighth *DuPont* factor is neutral in our analysis.

II. Conclusion

In sum, we find that the first, second, third, and fifth *DuPont* factors weigh in favor of finding likelihood of confusion (the second and third factors, heavily) and are dispositive in this case. The fourth, sixth, and eighth *DuPont* factors are neutral.

Decision: The refusal to register is affirmed.

³⁰ 9 TTABVUE 11 (Applicant’s Brief).