

This Opinion is Not a
Precedent of the TTAB

Mailed: January 22, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re In Mocean Group LLC
—

Serial No. 88716250
—

Joseph E. Sutton of Sutton IP Associates, PA, for In Mocean Group LLC.

Andrea B. Cornwell, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

—
Before Wolfson, Larkin, and English,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

In Mocean Group LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark SUGAR BEACH (BEACH disclaimed) for goods ultimately identified as “Bathing suits; Beach cover-ups; Beachwear; Body suits; Bras; Dresses; Dresses for swimming; Jogging suits; Shirts; Swimwear; T-shirts;

Tank-tops; Tops as clothing; all marketed and sold primarily to retail stores offering clothing and not cosmetics” in International Class 25.¹

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 that it so resembles the registered standard character mark SUGAR BEACH for “bath care and body care products, namely, bath gels, bath salts, body cleansers, body creams, body lotions, body polish, body scrub, exfoliants for skin, hand cream, shower gel, and liquid hand soap” in International Class 3,² as to be likely, when used in connection with the goods identified in the application, to cause confusion, to cause mistake, or to deceive.

Applicant appealed the Examining Attorney’s final refusal. Applicant and the Examining Attorney have filed briefs.³ We affirm the refusal to register.

I. Evidentiary Matter

Before proceeding to the merits of the refusal, we address an evidentiary matter. Applicant attached to its brief electronic records regarding various third-party registrations of marks for various goods and services. 4 TTABVUE 10-20. The

¹ Application Serial No. 88716250 was filed on December 5, 2019 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intention to use the mark in commerce.

² The cited Registration No. 4056729 issued on November 15, 2011 and a combined Section 8 and 15 declaration has been accepted and acknowledged.

³ Citations in this opinion to the briefs refer to TTABVUE, the Board’s online docketing system. *Turdin v. Tribolite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). Specifically, the number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page number(s) of the docket entry where the cited materials appear.

Examining Attorney objects to these registrations on the ground of untimeliness. 6 TTABVUE 3. We sustain the objection.

Trademark Rule 2.142(d), 37 C.F.R. § 2.142(d), provides that “[t]he record in the application should be complete prior to the filing of an appeal” and that “[e]vidence should not be filed with the Board after the filing of a notice of appeal.” “The evidence submitted with Applicant’s appeal brief that Applicant did not previously submit during prosecution . . . is untimely and will not be considered.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1744 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019). Accordingly, we have not considered the attachments.

II. Record on Appeal⁴

The record on appeal consists of pages from the USPTO databases regarding the cited registration, made of record by the Examining Attorney,⁵ and Internet webpages of companies that sell the involved goods under the same marks, made of record by the Examining Attorney.⁶

III. Likelihood of Confusion Refusal

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, mistake, or deception. 15 U.S.C.

⁴ Citations in this opinion to the application record are to pages in the Trademark Status & Document Retrieval (“TSDR”) database of the United States Patent and Trademark Office (“USPTO”).

⁵ March 10, 2020 Office Action at TSDR 2-3.

⁶ *Id.* at TSDR 4-25; April 1, 2020 Final Office Action at TSDR 2-79.

§ 1052(d). Our determination of the likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Two key *DuPont* factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because 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.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

A. Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we consider “the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005). The involved standard character SUGAR BEACH marks “are identical in appearance, sound, connotation, and commercial impression.” *In re Country Oven, Inc.*, 2019 USPQ2d 443903, *3 (TTAB 2019). The first *DuPont* factor “therefore weighs heavily in favor of finding a likelihood of confusion.” *Id.* at *4.

B. Similarity or Dissimilarity of the Goods and Channels of Trade

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567), while the third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *Id.* at 1052 (quoting *DuPont*, 177 USPQ at 567). *See also Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-63 (Fed. Cir. 2014).

The goods need not be identical, but “need only be related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source.” *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)).

“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both the applicant’s [goods] and the goods listed in the cited registration.” *Country Oven*, 2019 USPQ2d 443903 at *4-5.

“[B]ecause the marks are identical, the degree of similarity between the goods . . . required for confusion to be likely declines.” *DeVivo v. Ortiz*, 2020 USPQ2d 10153,

*11 (TTAB 2020) (citing *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015)).

The goods identified in the application are “Bathing suits; Beach cover-ups; Beachwear; Body suits; Bras; Dresses; Dresses for swimming; Jogging suits; Shirts; Swimwear; T-shirts; Tank-tops; Tops as clothing; all marketed and sold primarily to retail stores offering clothing and not cosmetics,” while the goods identified in the cited registration are “bath care and body care products, namely, bath gels, bath salts, body cleansers, body creams, body lotions, body polish, body scrub, exfoliants for skin, hand cream, shower gel, and liquid hand soap.”

The Examining Attorney relies on webpages showing that one or more of the clothing items identified in the application and one or more of the bath and body care products identified in the cited registration are frequently sold under the same mark. Applicant dismisses the evidence showing the sale of those goods under the marks VICTORIA’S SECRET, AVON, and MARY KAY on the ground that these marks are “well-known and/or famous marks that have been registered for many types of or varieties of goods, including for cosmetics and clothing.” 4 TTABVUE 3.⁷ Applicant argues that

this is not sufficient to prove that cosmetics and clothing are normally or typically marketed or sold in the same stores or channels of trade, or that purchasers would “likely” believe that Applicant’s goods and Registrant’s

⁷ Applicant requests that the Board take judicial notice of third-party registrations of these marks as evidence that well-known marks are used for a wide variety of goods. 4 TTABVUE 3. We decline that request in keeping with our policy not to take judicial notice of registrations in USPTO records. *In re MK Diamond Prods.*, 2020 USPQ2d 10882, *1 n.5 (TTAB 2020) (citing *In re Jonathan Drew Inc.*, 97 USPQ2d 1640, 1644 n.11 (TTAB 2011)).

goods emanate from or are affiliated with the same source. These three instances of the same source marketing and selling both clothing and cosmetics are the exception to the rule and are not typical or “likely”; and these marks referenced by the Examiner (via the web pages attached to the first office action) are registered for many UNRELATED goods (or classes), as mentioned above.

Id. at 4.

Applicant further argues that online retailers “market and sell not only clothing and cosmetics, but many types of goods in many different unrelated fields,” *id.*,⁸ and that this alone does not make the goods related for purposes of likelihood of confusion.

Id. Applicant claims that “cosmetics and clothing are NOT normally marketed and sold together by the same entity; and purchasers do NOT normally associate those different kinds of goods, even when carrying the same mark, as being associated with the same source.” *Id.*

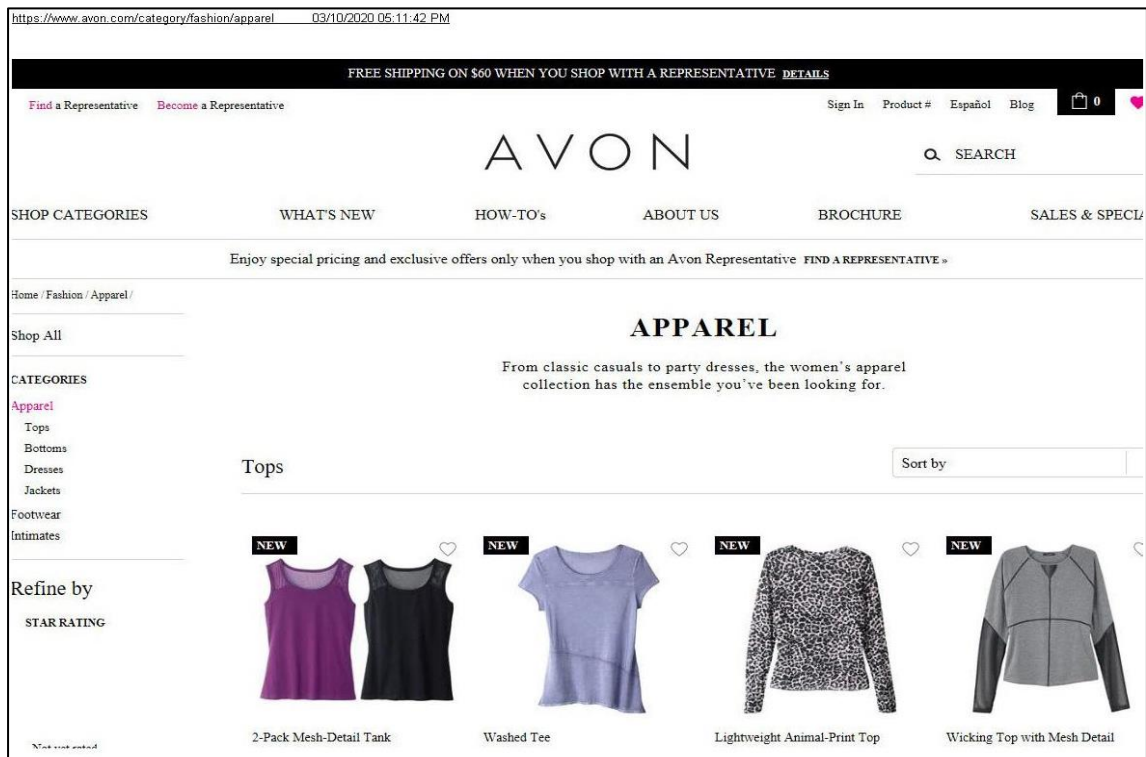
Finally, Applicant argues that the restriction on the channels of trade for its clothing in the amended identification, which provides that its goods are “all marketed and sold primarily to retail stores offering clothing and not cosmetics,” *id.* at 7-8, “limits Applicant’s goods to clothing stores,” *id.* at 8, and “excludes sales of Applicant’s goods to any customers or stores that market or sell cosmetics.” *Id.*

The Examining Attorney responds that she made of record multiple webpages in addition to those of Avon, Mary Kay, and Victoria’s Secret, all of which show that entities commonly sell cosmetics and clothing under the same mark. 6 TTABVUE 6-

⁸ Applicant cites the registrations attached to its appeal brief, 4 TTABVUE 4, which we have excluded as untimely.

7. She argues that the relatedness of cosmetics and clothing is not limited to instances of the use of famous marks, and that the Board “has previously considered the relatedness of clothing and personal cosmetics, finding the goods to be related in a number of instances.” *Id.* at 8.

The record shows that retailers, including ones who appear to be primarily cosmetics companies and ones who appear to be primarily clothing companies, frequently sell various forms of cosmetics, including bath and body care products, and various articles of clothing, including women’s clothing, under the same marks, including house marks. Portions of most of the webpages in the record are set forth below:



⁹ March 10, 2020 Office Action at TSDR 4. The Avon website also displays other clothing items. *Id.* at TSDR 5-8.

https://www.avon.com/product/nakedproof-affirm-yourself-firming-body-cream-66706
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DESCRIPTION INGREDIENTS

Set the tone—and always stay firm. The firming body cream is clinically proven to visibly banish crepey skin for a more toned, defined look. In fact, 96% showed improvement in firmness and tone of their abdomen and hip area*. 6.7 fl. oz.

#NAKEDPROOF is a proven body care line that delivers powerful results. Reveal the skin you're in with body care designed for real women.

BENEFITS
* Caffeine Complex stimulates natural collagen production to visibly firm skin

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Description

The ultimate wellness scent experience with botanical inspiration. Awaken your senses with our newest collection: Relaxing coconut milk and rose. Invigorating green pear and citrus. Rejuvenating pomegranate and lotus. A rich sugar scrub with walnut shell powder gently exfoliates for smooth, glowing skin.

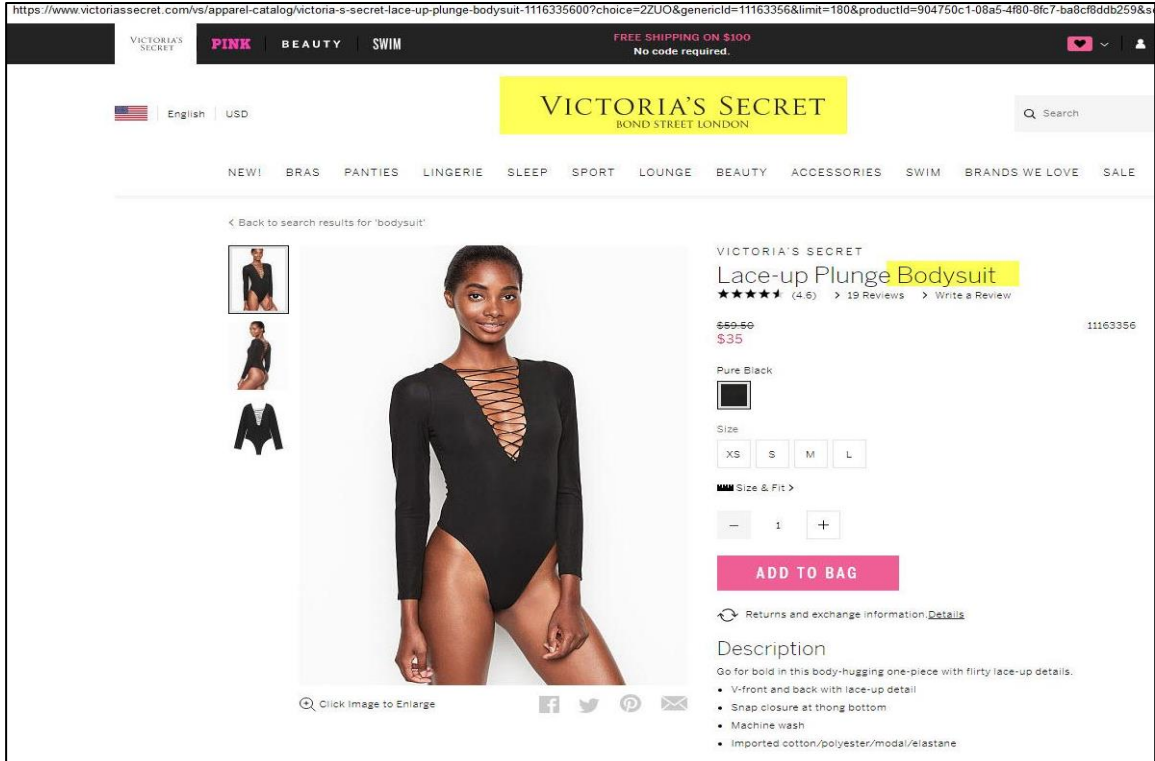
Click Image to Enlarge

COCONUT MILK & ROSE

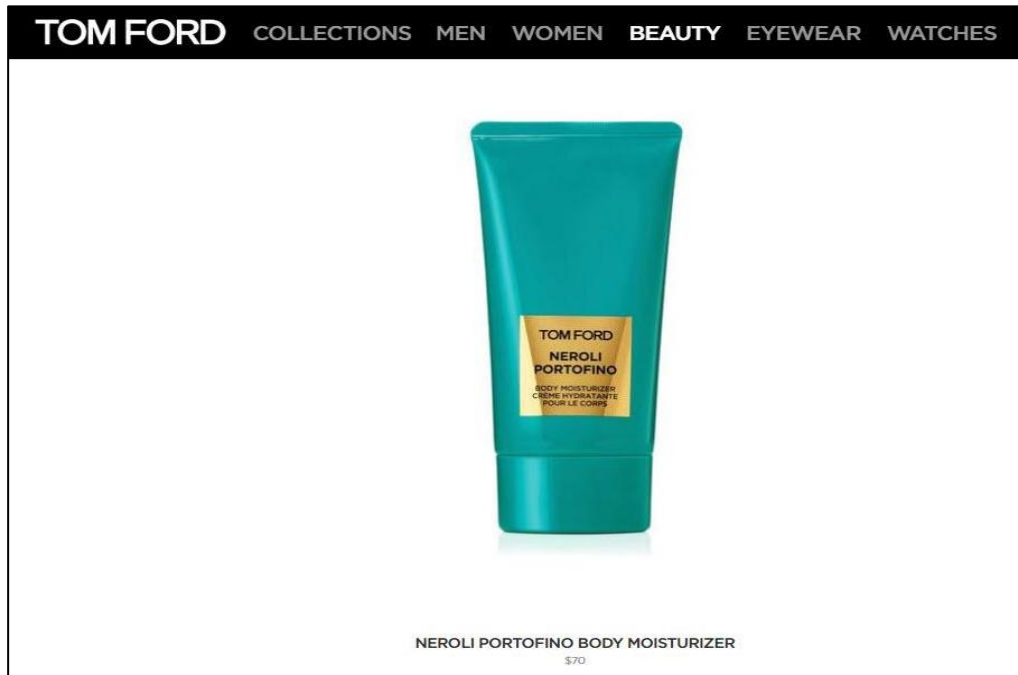
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¹⁰ *Id.* at TSDR 10. The Avon website also displays other cosmetics. *Id.* at TSDR 11-12.

¹¹ *Id.* at TSDR 20 (highlighting supplied by the Examining Attorney).



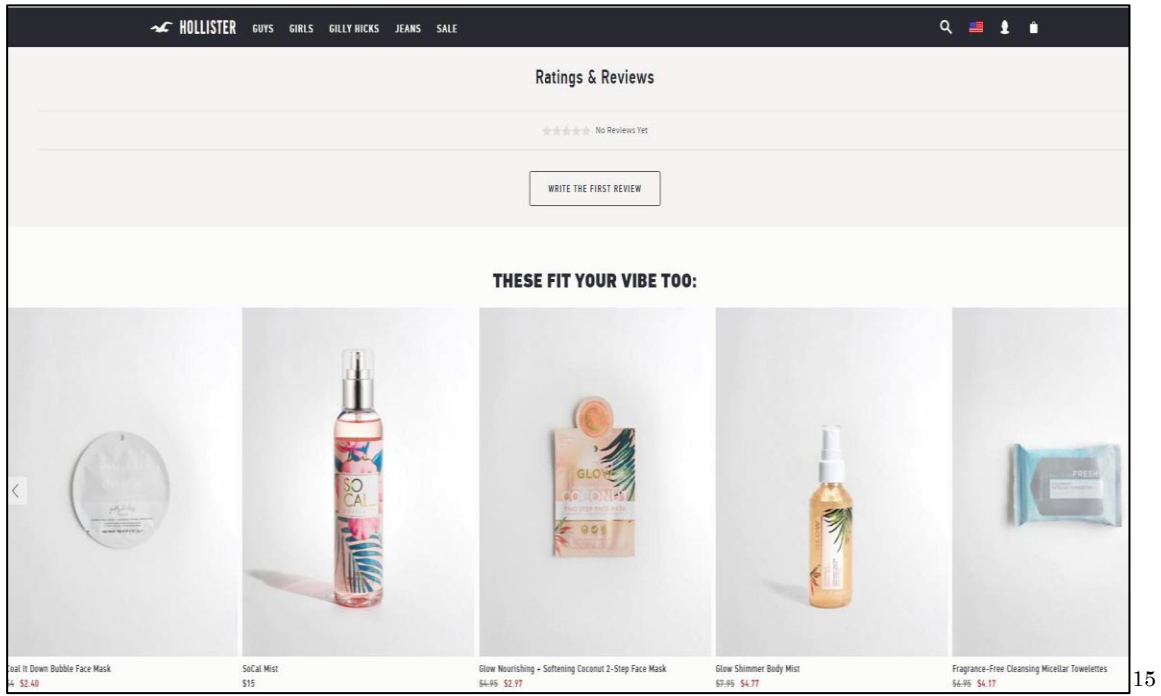
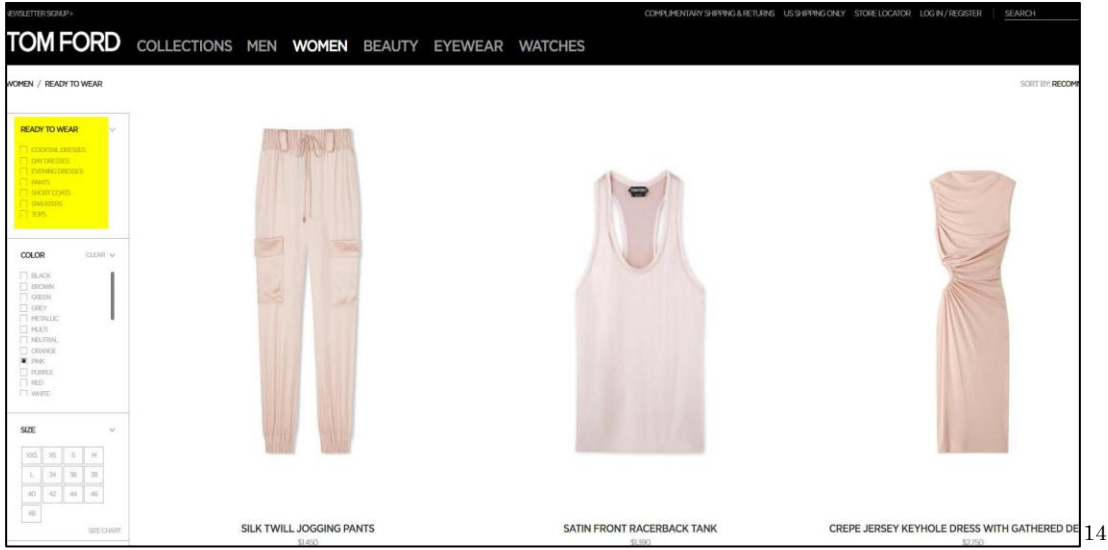
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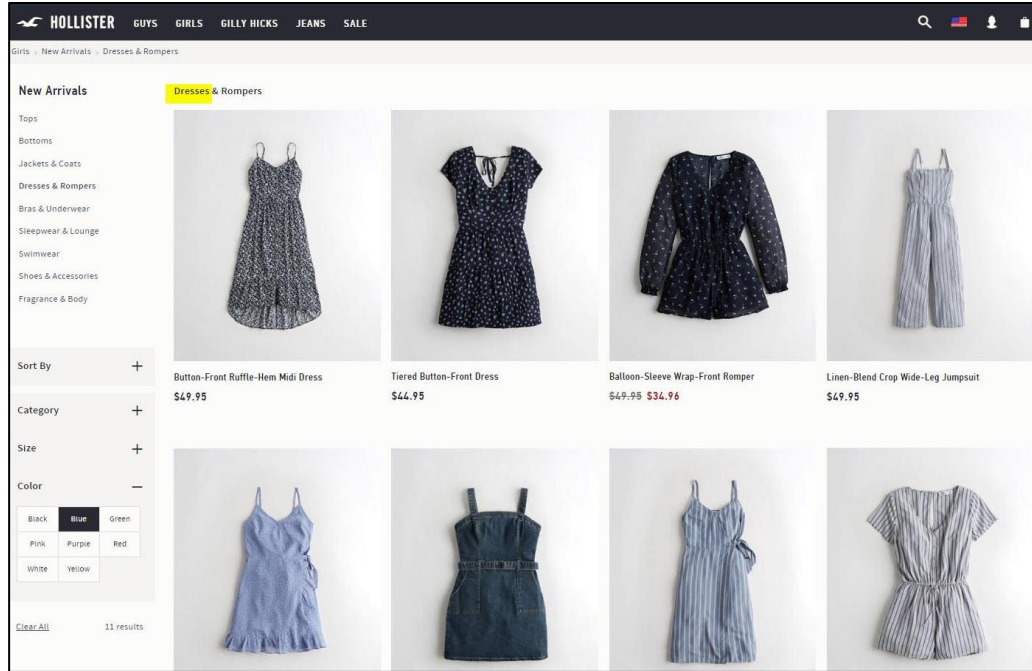
¹² *Id.* at TSDR 21 (highlighting supplied by the Examining Attorney). The Victoria's Secret website also displays other clothing items. *Id.* at TSDR 22-25.

¹³ April 1, 2020 Final Office Action at TSDR 57.

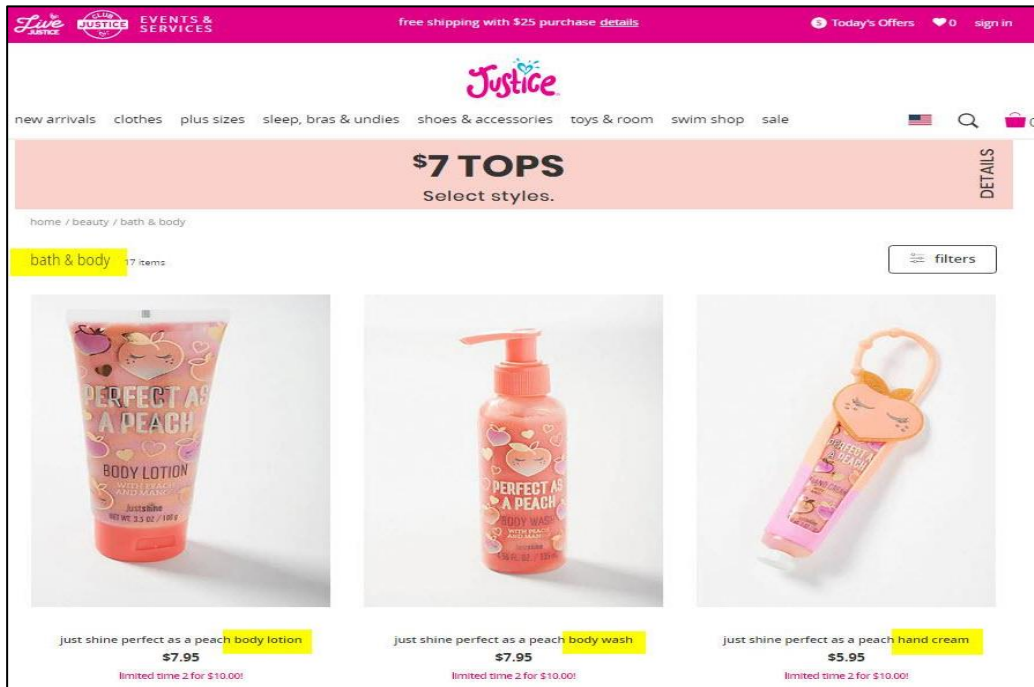


¹⁴ *Id.* at TSDR 58 (highlighting supplied by the Examining Attorney). The Tom Ford website also displays other clothing items. *Id.* at TSDR 59-62.

¹⁵ *Id.* at TSDR 20.



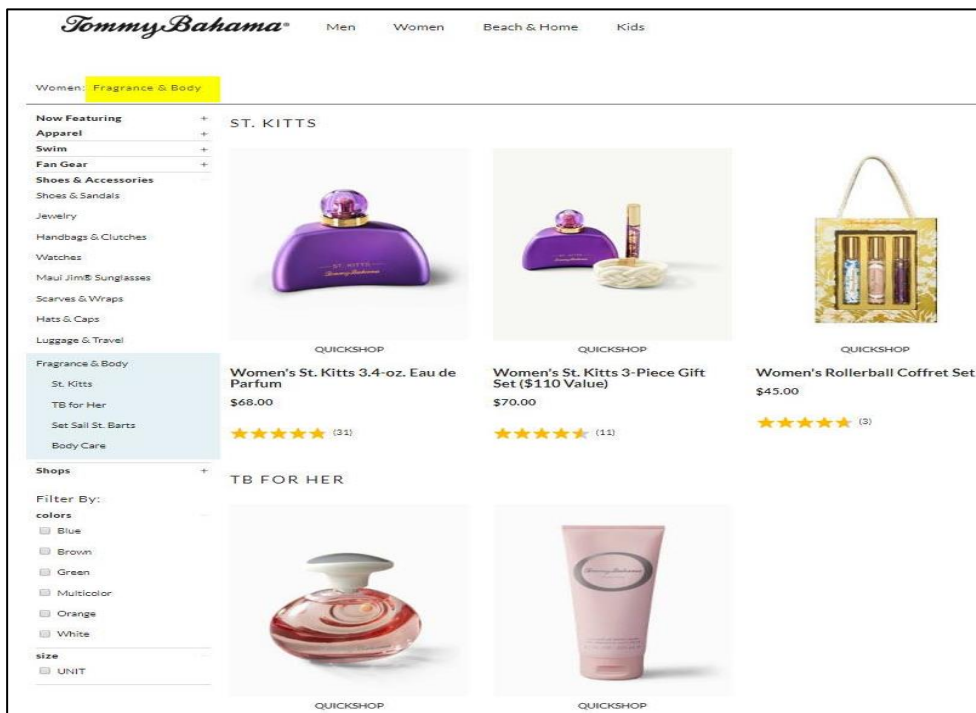
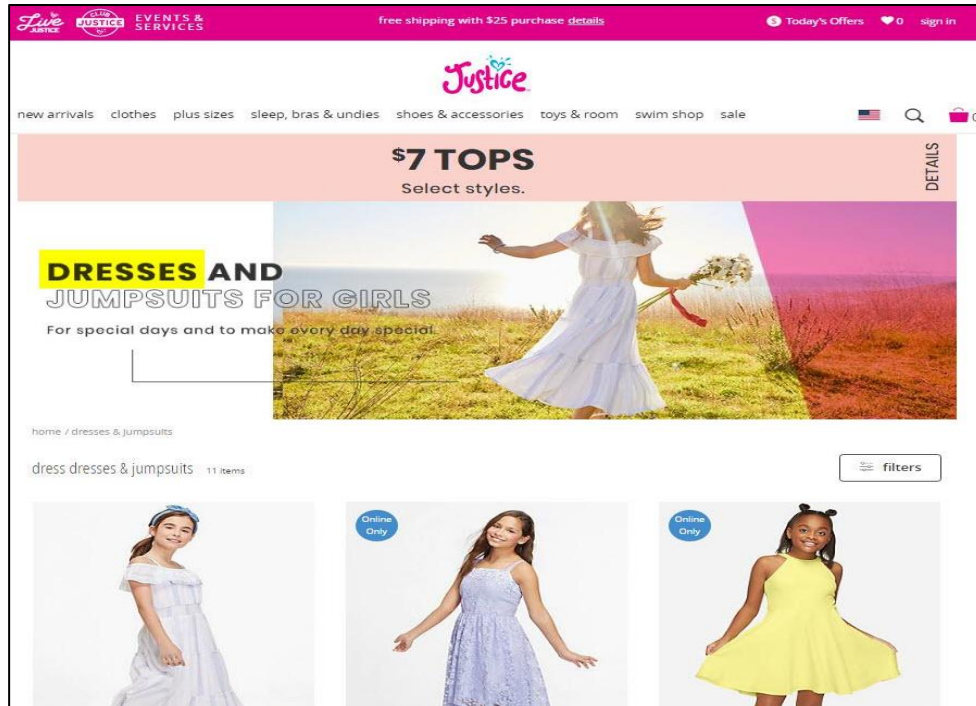
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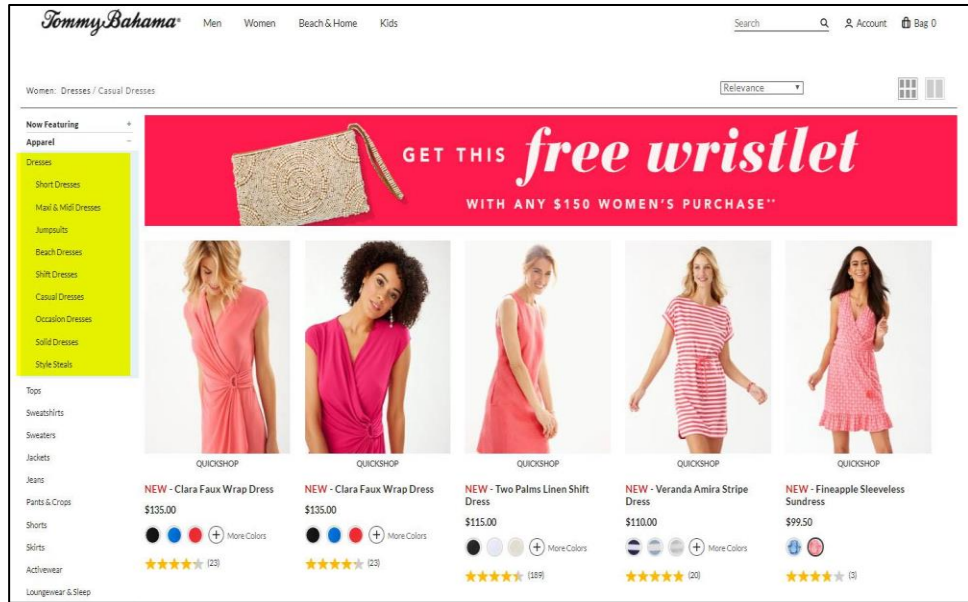
¹⁶ *Id.* at TSDR 25 (highlighting supplied by the Examining Attorney). The Hollister website also displays other clothing items. *Id.* at TSDR 26-33.

¹⁷ *Id.* at TSDR 35 (highlighting supplied by the Examining Attorney). The Justice website also displays other cosmetics. *Id.* at TSDR 36-38.



¹⁸ *Id.* at TSDR 44 (highlighting supplied by the Examining Attorney). The Justice website also displays other clothing items. *Id.* at TSDR 40-43, 45-55.

¹⁹ *Id.* at TSDR 63 (highlighting supplied by the Examining Attorney). The Tommy Bahama website also displays other cosmetics. *Id.* at TSDR 64-65.



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The Board has held in multiple cases “that women’s clothing and fragrances are closely related, complementary products,” *Wet Seal, Inc. v. FD Mgmt., Inc.*, 82 USPQ2d 1629, 1640 (TTAB 2007),²¹ and the record here shows that women’s clothing

²⁰ *Id.* at TSDR 66 (highlighting supplied by the Examining Attorney). The Tommy Bahama website also displays other clothing items. *Id.* at TSDR 67-79.

²¹ Applicant cites *In re Jacques Bernier Inc.*, 1 USPQ2d 1924 (TTAB 1987), for the proposition that the Board’s prior cases finding a likelihood of confusion between similar marks used on cosmetics and clothing “all involved comparison of well-known marks (or ‘designer’ marks), where the public expects or might believe that a well-known designer uses the same or a similar mark on clothing and cosmetics.” 4 TTABVUE 5. *Jacques Bernier* did not limit the possible relatedness of clothing and cosmetics to cases involving such marks. Viewing the case law retrospectively, the Board in *Jacques Bernier* “noted that, in general, those cases in which confusion was held likely involved marks which were found to be well known,” *Jacques Bernier*, 1 USPQ2d at 1925 (citations omitted), but held that “[e]ach case must be resolved on its own facts.” *Id.* The Board found, on the facts of that case, that confusion was unlikely because “the respective marks are not identical in sound or appearance and may have different commercial impressions.” *Id.* About 20 years later in *Wet Seal*, the Board “[n]oted that a number of cases have recognized the interrelationship between clothing and beauty aids such as fragrance products and cosmetics,” *Wet Seal*, 82 USPQ2d at 1640 at n.22, and held on the facts of that case that the involved goods (various cosmetics and clothing) and services (retail apparel store services) were related. *Id.* at 1640. In any event, in this case, as in every case, we must assess the relatedness of the involved goods on the basis of the record before us, not past findings in cases involving different records.

and bath and body care products are frequently offered under the same mark, including the same house mark. The record suggests that “these products are used together for the same purpose, to enhance physical appeal and create an overall fashion image.” *Id.* The evidence is “sufficient to persuade us that women’s clothing and [bath and body care products] are commercially related goods.” *Id.* We find that the second *DuPont* factor supports a finding of a likelihood of confusion.

With respect to channels of trade, the record shows that the identified goods are sold through the online webpages of clothing and cosmetics companies. Applicant argues, however, that the channel-of-trade restriction in its identification of goods, which provides that the goods are “all marketed and sold primarily to retail stores offering clothing and not cosmetics,” 4 TTABVUE 7-8, “limits Applicant’s goods to clothing stores,” *id.* at 8, and “excludes sales of Applicant’s goods to any customers or stores that market or sell cosmetics.” *Id.* We do not agree with Applicant’s analysis of this limitation or its effect on the likelihood of confusion.

The Examining Attorney correctly points out that the limitation is somewhat illusory on its face because “[u]se of the term ‘primarily’ leaves open the possibility that applicant is also marketing and selling to other types of retail stores, including those offering cosmetics, as well as to consumers directly.” 6 TTABVUE 9. Applicant did not limit its channels of trade “exclusively” to “retail stores offering clothing and not cosmetics,” so we must assume that at least some of Applicant’s women’s clothing

travel in other ordinary channels of trade for those goods, including, as Applicant describes it, retail stores offering cosmetics.²²

Even if there were complete exclusivity of trade channels, however, consumers would be unaware of that fact, *Wet Seal*, 82 USPQ2d at 1641, and “where products are closely related, merely because the products in fact would not be sold together would not necessarily prevent consumers, when encountering the products in different outlets, from believing the products come from the same source.” *Id.* We find that the third *DuPont* factor is neutral in our analysis of the likelihood of confusion.

C. Summary

The SUGAR BEACH marks are identical in all respects and the goods are more than sufficiently related for confusion to be likely, even if they are sold in distinct trade channels. Consumers familiar with the registered mark SUGAR BEACH for bath and body care products who subsequently encounter Applicant’s SUGAR BEACH women’s clothing, in retail clothing stores or elsewhere, could easily believe mistakenly that the cosmetics company has extended its line into women’s clothing.

Decision: The refusal to register is affirmed.

²² We note in that regard that the cited registration contains no channel of trade limitation precluding sale of the identified cosmetics in clothing stores.