

This Opinion is Not a
Precedent of the TTAB

Mailed: February 8, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re USAPARK LLC

Serial No. 88808161

James A. Sheridan of Sheridan Law, LLC for USAPARK LLC.

Vivian Micznik First, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Acting Managing Attorney.

Before Shaw, Larkin, and Dunn,
Administrative Trademark Judges.

Opinion by Larkin, Administrative Trademark Judge:

USAPARK LLC (“Applicant”) seeks registration on the Principal Register of the standard-character mark USAPARK.NET for “Airport passenger shuttle services between the airport parking facilities and the airport; Parking lot services; Parking space reservation service; Providing a website featuring information on airport parking; Rental of parking spaces; Rental of car parking spaces” in International Class 39.¹

¹ Application Serial No. 88808161 was filed on February 24, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant’s claim of first use of the mark and first use of the mark in commerce at least as early as May 1, 2006. During prosecution of the

The Trademark Examining Attorney has 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 standard-character mark USA PARKING (PARKING disclaimed), registered on the Principal Register for "vehicle parking services" in International Class 39,² as to be likely, when used in connection with the services identified in the application, to cause confusion, to cause mistake, or to deceive.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs.³ We affirm the refusal to register.

application, Applicant asserted a claim under Section 2(f) of the Act, 15 U.S.C. § 1052(f), that its mark had become distinctive with respect to the services through Applicant's use of the mark in commerce for at least the five years preceding the claim of acquired distinctiveness, which was accepted.

² The cited Registration No. 1886343 (the "343 Registration") issued on March 28, 1995 based on a showing of acquired distinctiveness under Section 2(f), and has been renewed. The Examining Attorney cited a total of nine registrations owned by the same entity (the "Registrant") in support of the final refusal to register, but in her brief she "has withdrawn the Section 2(d) refusal based on Registration Nos. 4622076, 4708504, 4218660, 2282028, 2283699, 2272912, 2235661, and 1885321 and these registrations are no longer at issue on appeal." 6 TTABVUE 3. "The final Section 2(d) refusal is maintained as to Registration No. 1886343." *Id.*

³ Citations in this opinion to the briefs refer to TTABVUE, the Board's online docketing system. *See New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ 10596, at *2 n.1 (TTAB 2020). The number preceding TTABVUE corresponds to the docket entry number, and any numbers following TTABVUE refer to the page(s) of the docket entry where the cited materials appear. The TTABVUE page numbers do not correspond to the numbered pages in the briefs. Applicant's brief appears at 6 TTABVUE and the Examining Attorney's brief appears at 8 TTABVUE.

I. Record on Appeal⁴

The record on appeal includes Applicant's specimen of use,⁵ dictionary definitions of "USA" and "park,"⁶ USPTO electronic records regarding the cited registration,⁷ a table listing third-party registrations of marks for parking-related services containing the letters "US" in some form;⁸ and a "Consent Agreement" between Applicant and another company, Ennis, Inc. ("Ennis"), regarding the coexistence of various USAPARK- and USPARK-formative marks in applications filed by the two parties, which are exhibits to the Consent Agreement.⁹

⁴ Citations in this opinion to the application record, including the request for reconsideration and its denial, are to pages in the Trademark Status & Document Retrieval ("TSDR") database of the United States Patent and Trademark Office ("USPTO"). Because the Examining Attorney has withdrawn the final refusal to the extent that it was based on eight registrations other than the '343 Registration, we will not summarize evidence pertaining to the other registrations.

⁵ February 24, 2020 Application at TSDR 3-5.

⁶ May 12, 2020 Office Action at TSDR 2-17; June 2, 2021 Response to Office Action at TSDR 18; June 7, 2021 Request for Reconsideration at TSDR 18. Applicant unnecessarily made a dictionary definition and other evidence of record twice. The Board discourages the submission of duplicative evidence by any party appearing before it. We will cite only to the first appearance of duplicative evidence in the record.

⁷ May 12, 2020 Office Action at TSDR 21-22.

⁸ November 12, 2020 Response to Office Action at TSDR 15-31. Applicant attached the tables and a dictionary definition of "park" to its brief as Appendices B and C. 6 TTABVUE 18-29. The Board strongly discourages this practice. "Parties to Board cases occasionally seem to be under the impression that attaching previously-filed evidence to a brief and citing to the attachments, rather than to the original submission is a courtesy or convenience to the Board. It is neither." *In re Michalko*, 110 USPQ2d 1949, 1950 (TTAB 2014). As the Board explained in *Michalko*, "[w]hen considering a case for final disposition, the entire record is available to the panel," and "[b]ecause we must determine whether attachments to briefs are properly of record, citation to the attachment requires examination of the attachment and then an attempt to locate the same evidence in the record developed during the prosecution of the application," which requires "more time and effort than would have been necessary if citations directly to the prosecution history were provided." *Id.* at 1950-51.

⁹ June 7, 2021 Request for Reconsideration at TSDR 36-122.

II. Analysis of Refusal

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.” 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).

“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods or services.” *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *29 (TTAB 2021) (citing *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)). Applicant focuses on the first *DuPont* factor regarding the similarity or dissimilarity of the marks. 6 TTABVUE 8-9. Applicant also argues that the cited USA PARKING mark is weak and entitled only to a very narrow scope of protection because of the inherent weakness of its elements and the existence of the consent agreement and third-party registrations of US-formative marks, *id.* at 9-11,

and that there has been no actual confusion between its mark and the cited mark or similar third-party marks. *Id.* at 12.

A. Similarity or Dissimilarity of the Services and Channels of Trade

The second and third *DuPont* factors respectively consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” and “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051-52 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). “Apparently conceding the issue, Applicant did not address these *du Pont* factors in its brief, so we offer only a brief explanation of our conclusion.” *In re Morinaga Nyugyo K. K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

The services identified in the application are “Airport passenger shuttle services between the airport parking facilities and the airport; Parking lot services; Parking space reservation service; Providing a website featuring information on airport parking; Rental of parking spaces; Rental of car parking spaces.”¹⁰ The services identified in the ’343 Registration are “vehicle parking services.” We agree with the Examining Attorney that the unrestricted and broadly identified “vehicle parking services” in the ’343 Registration encompass at least the “Parking lot services”

¹⁰ “The Examining Attorney need not prove, and we need not find, similarity as to each [service] listed in the description of [services]. ‘[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of [services] within a particular class in the application.’” *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020) (quoting *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) and citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)).

identified in the application, 8 TTABVUE 6, making those services legally identical. *In re Info. Builders Inc.*, 2020 USPQ2d 10444, at *3 (TTAB 2020). “Thus, the second *DuPont* factor strongly supports a finding of likelihood of confusion.” *Id.*

Because we have found that the services are legally identical in part, “we must presume that [they] travel through the same channels of trade and are offered or rendered to the same or overlapping classes of purchasers.” *Id.* (citing *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968)). “Thus, the third *DuPont* factor also weighs in favor of finding a likelihood of confusion.” *Id.*

B. Similarity or Dissimilarity of the Marks

“Under the first *DuPont* factor, we consider ‘the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.’” *In re Embiid*, 2021 USPQ2d 577, at *11 (TTAB 2021) (quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005)). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Id.* (quoting *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019) (quoting *In re Davia*, 110 USPQ2d 1801, 1812 (TTAB 2014)).

“The proper test regarding similarity ‘is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.’” *Id.* (quoting *Cai v. Diamond Hong, Inc.*,

901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (internal quotation omitted)).

“The proper perspective on which the analysis must focus is on the recollection of the average customer, who retains a general rather than a specific impression of marks.”

Id. (quoting *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1630 (TTAB 2018)). The average customers here are ordinary consumers seeking to temporarily park their vehicles at a location other than where they are ordinarily parked. Because the “services are legally identical, the degree of similarity between the marks necessary to support a determination that confusion is likely declines.” *In re RiseSmart, Inc.*, 104 USPQ2d 1931, 1935 (TTAB 2012).

Applicant’s mark is USAPARK.NET in standard characters, while the mark shown in the ’343 Registration is USA PARKING in standard characters. Applicant argues that its “mark and the cited references do not have a similar appearance in that Applicant’s mark is a unitary term USAPARK.NET while the cited references include the wording USA PARKING.” 6 TTABVUE 8.¹¹

With respect to overall commercial impression, Applicant argues as follows:

The overall impression is different because applicant’s mark is a single term with a TLD of .NET in contrast to the cited references which each contain at least the two separate words USA PARKING. Furthermore, the word PARKING is highly descriptive of the parking lot services (five of nine of the cited registrations include the disclaimer of the word PARKING as follows: No claim is made to the exclusive right to use PARKING apart from the mark as shown). The descriptiveness of the term PARKING is notably in contrast to the word PARK which has multiple meanings, including, but not limited to, an enclosed piece

¹¹ Applicant understandably directs its arguments regarding dissimilarity of the marks to all of the marks in the nine registrations cited in the final refusal to register.

of ground stocked with game; a piece of ground in or near a city or town kept for ornament and recreation; a space occupied by military vehicles...; an enclosed arena or stadium used especially for ball games; an area designed for a specified type of use...amusement parks. Applicant respectfully submits that the term USAPARK.NET is a unitary term having multiple meanings, and this mark creates a distinct commercial impression from the descriptive wording USA PARKING.

Id. at 8-9.

Applicant further argues that its third-party registrations “are probative to demonstrate that USA or US has been adopted by a number of other users as a laudatory designation.” *Id.* at 9. Applicant claims that Registrant’s marks “include a weak term in that the wording USA PARKING is subject to a Section 2(f) claim in each registration and, accordingly, should be given only limited area of coverage.” *Id.* at 10. Applicant “submits that the proper scope of protection extended to a merely descriptive or even a highly suggestive term has been limited to substantially identical notation for substantially similar goods,” and that “USAPARK.NET is not substantially identical notation as the descriptive wording USA PARKING.” *Id.* Applicant argues that the Consent Agreement with Ennis “is probative of third-party marks co-existing with one another without actual confusion.” *Id.* at 12.

The Examining Attorney argues that

The marks are similar because they combine the geographic designation USA with a form of the word PARK. The applicant’s mark represents the domain name version of the registered mark. Although there is a slight difference in the sound and appearance of “USA PARKING” and “USA PARK.NET” because the applicant’s mark uses PARK while the registered mark uses PARKING, consumers are likely to overlook the slight difference in sound and appearance because the overall

connotation and commercial impression are the same – parking services for cars in the United States.

8 TTABVUE 8.¹²

In response to Applicant’s argument that the word PARKING in the cited mark is descriptive of parking-related services, while the word PARK in Applicant’s mark has multiple meanings, the Examining Attorney notes that the dictionary definition of the noun “park” made of record by Applicant includes “parking lot,” *id.* at 9, and argues that “the word PARK is descriptive of the applicant’s parking lot and associated services in the same manner as the word PARKING describes the services of the registrant.” *Id.*

In response to Applicant’s arguments regarding the weakness of the cited mark, the Examining Attorney does not address Applicant’s third-party-registration evidence, but notes that “[w]hile the ‘USA PARKING’ mark of the registrant is inherently weak because the components are descriptive and geographically descriptive, it has been registered based on secondary meaning which reflects the commercial strength of its geographically descriptive component.” *Id.* at 10. She also rejects Applicant’s Consent Agreement with Ennis because “the owner of the cited registration herein (USA Parking System, Inc.) is not a party to this coexistence agreement, [and] the agreement submitted by the applicant is not relevant to the determination of likelihood of confusion at issue between the applicant’s and

¹² The Examining Attorney limits the arguments in her brief to the mark shown in the ’343 Registration, the sole remaining registration supporting the refusal to register. Applicant did not file a reply brief to respond to the Examining Attorney’s arguments directed solely to the USA PARKING mark.

registrant's marks," in part because "the marks that are the subject of the coexistence agreement are pending marks that have not registered" and "[i]nformation pertaining to the coexistence of non-registered marks is not probative of likelihood of confusion since it does not represent actual use of the marks referenced therein, or whether that use has been so extensive that consumers have become accustomed to distinguishing between various marks." *Id.*

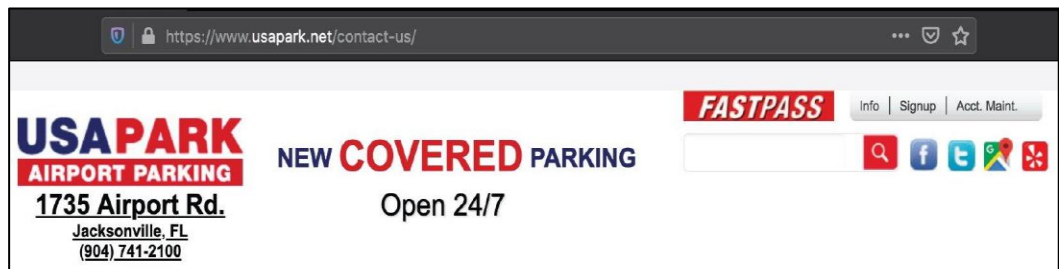
Applicant's standard-character mark USAPARK.NET and the cited standard-character mark USA PARKING have obvious similarities in appearance, sound, and meaning. Both marks begin with the initialism USA, which is followed in both marks by a word consisting of or containing "PARK." The marks differ to the extent that the second word in the cited mark is PARKING, not PARK, that there is a space between USA and PARKING in the cited mark, and that Applicant's mark ends with .NET. A consumer who retains a general rather than a specific impression of the cited mark USA PARKING for "vehicle parking services" who separately sees or hears Applicant's mark USAPARK.NET for legally equivalent "Parking lot services" is unlikely to distinguish the two marks in appearance, sound, or meaning based on these differences.

With respect to the differences between the cited mark USA PARKING and the compound word USAPARK in Applicant's mark, "[t]he presence or absence of a space between two terms is usually an inconsequential difference that even if noticed by consumers would not serve to distinguish these marks." *Chutter*, 2021 USPQ2d 1001, at *37 (DANTANNA'S and DANTANNA'S TAVERN found to be confusingly similar

to DAN TANA’S). *See also In re Best W. Fam. Steak House, Inc.*, 222 USPQ 827, 827 (TTAB 1984) (finding that BEEFMASTER and BEEF MASTER were “practically identical”); *Seaguard Corp. v. Seaward Int’l, Inc.*, 222 USPQ 48, 51 (TTAB 1984) (finding that SEA GUARD and SEAGUARD were “in contemplation of law, identical”); *Stockpot, Inc. v. Stock Pot Rest., Inc.*, 220 USPQ 52, 54 (TTAB 1983) (finding that there was “no question” that STOCKPOT and STOCK POT were confusingly similar for restaurant services), *aff’d*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984). A consumer with a general rather than a specific impression of the cited mark USA PARKING in his or her mind’s eye who separately sees or hears Applicant’s mark USAPARK.NET is not likely to distinguish the marks because USA PARKING is two words while USAPARK is one compound word.

The differences between the words PARKING in the cited mark and PARK in Applicant’s mark are similarly inconsequential. Applicant is correct that “the word PARK . . . has multiple meanings,” 6 TTABVUE 8, but this fact is irrelevant because we must determine the meaning of PARK in Applicant’s mark not in the abstract, but rather in the context of the “Parking lot services” for which it is used. *Cf. Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721-22 (Fed. Cir. 2012) (the parties’ COACH marks were identical in appearance and sound, but differed enough in meaning for confusion to be unlikely because “when applied to educational materials, [COACH] brings to mind someone who instructs students,” whereas “when used in connection with luxury leather goods, including handbags, suitcases, and other travel items, [COACH] brings to mind traveling by carriage.”).

When Applicant's mark USAPARK.NET is viewed, heard, and considered in the context of its use for "Parking lot services," there is no doubt that the word PARK in the mark would be understood to refer to "parking" rather than "an enclosed piece of ground stocked with game," "a piece of ground in or near a city or town kept for ornament and recreation," "a space occupied by military vehicles," "an enclosed arena or stadium used especially for ball games," or "an area designed for a specified type of use...amusement parks." 6 TTABVUE 8-9. A portion of Applicant's specimen of use (reproduced below) confirms this:



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The cited mark USA PARKING and the source-identifying portion of Applicant's mark, USAPARK, are essentially identical in connotation and commercial impression in the context of the involved services because each connotes parking services provided in the United States of America.

The .NET suffix in Applicant's mark has no meaningful source-identifying significance because "the term '.net' is a generic top level domain name indicator." *Apple Computer v. TVNET.net, Inc.*, 90 USPQ2d 1393, 1396 (TTAB 2007) (granting summary judgment to opposer, the owner of the ITUNES and ITUNES MUSIC STORES marks, in opposition to registration of the applicant's VTUNES.NET mark,

¹³ February 24, 2020 Application at TSDR 3.

because “although applicant has also argued that the parties’ marks are dissimilar due to the addition of ‘net’ in its mark, the similarities between the parties’ marks are greater than the differences.”) (citing *In re Martin Container, Inc.*, 65 USPQ2d 1058, 1060 (TTAB 2002) (top-level domain indicator has no source-identifying significance)). The -.NET suffix in Applicant’s mark merely indicates the Internet address of “USAPARK,” and for a consumer with a general rather than a specific impression and recollection of the cited mark USA PARKING, it could readily be misunderstood as identifying USA PARKING’s Internet address.

As noted above, Applicant argues that the obvious similarities between the marks are insufficient to make confusion likely because the descriptiveness of the words USA PARKING, and Applicant’s third-party registration evidence and Consent Agreement with Ennis, show that the cited mark is so weak that it can co-exist on the Register with USAPARK.NET because the cited mark’s protection must be “limited to substantially identical notation for substantially similar goods,” and “USAPARK.NET is not substantially identical notation as the descriptive wording USA PARKING.” 6 TTABVUE 9.

“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning).” *Morinaga*, 120 USPQ2d at 1745 (quoting *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010)). There is no question that the cited mark USA PARKING is conceptually weak for “vehicle parking services.” The initialism USA is geographically

descriptive,¹⁴ and the word PARKING is at least descriptive of, if not generic for, those services, and has been disclaimed. The registration of the cited USA PARKING mark issued under Section 2(f) of the Trademark Act, which constitutes an admission by Registrant that the mark as a whole is not inherently distinctive. *See, e.g., RiseSmart*, 104 USPQ2d at 1932 (citing *Yamaha Int’l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572, 6 USPQ2d 1001, 1005 (Fed. Cir. 1988)).¹⁵ The fact that the cited mark is conceptually weak does not end our analysis, however, because Applicant acknowledges that “even a weak mark is entitled to protection against the registration of a similar mark for closely related goods or services.” 6 TTABVue 10. *See Morinaga*, 120 USPQ2d at 1746 (affirming refusal to register a composite word-and-design mark containing the words MT. RAINIER for espresso coffee drinks on the basis of the mark MOUNT RAINIER COFFEE COMPANY registered on the Supplemental Register for coffee). We must determine whether the record shows that USA PARKING is so weak conceptually and commercially as to protectable only against what Applicant calls a “substantially identical notation.” 6 TTABVue 10.

Applicant made of record a table of third-party registrations of marks for some form of parking-related services that contain the letters “US” in some form.¹⁶ “The Board does not take judicial notice of registrations and a list of registrations does not

¹⁴ Applicant characterizes the initialism USA as a “laudatory designation,” 6 TTABVue 9, but whether it is laudatory or geographically descriptive, it is not inherently distinctive for the identified services.

¹⁵ Applicant’s own Section 2(f) claim is similarly an admission that its USAPARK.NET mark is not inherently distinctive.

¹⁶ November 12, 2020 Response to Office Action at TSDR 15-31.

make those registrations of record,” *In re Peace Love World Live, LLC*, 127 USPQ2d 1400, 1405 n.17 (TTAB 2018) (citations omitted), but the Examining Attorney did not object to Applicant’s list, arguing instead that even weak marks are entitled to protection.¹⁷ “[I]n instances where, as here, the Examining Attorney does not object to the list of registrations, the Board may consider the objection waived.” *Id.* (citing *In re City of Hous.*, 101 USPQ2d 1534, 1536 (TTAB 2012)). Applicant’s list contains information that was absent from the list in *Peace Love World Live*,¹⁸ and we will consider it.

Applicant’s reliance on these third-party registrations “as evidence of market weakness is unavailing because third-party registrations standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.” *Morinaga*, 120 USPQ2d at 1745 (citations omitted). *See also Embiid*, 2021 USPQ2d 577, at *34 (“[T]hird-party registrations, with no evidence of the extent of the use of the marks in commerce, do not diminish the commercial strength of Registrant’s mark,” and are relevant only to the extent that they “may bear on conceptual weakness if a term is

¹⁷ December 7, 2020 Final Office Action at TSDR 1; July 7, 2021 Denial of Request for Reconsideration at TSDR 1.

¹⁸ In *Peace Love World Live*, the Board held that the list of registrations did “not include enough information to be probative” because it “includes only the serial number, registration number, mark, and status (live or dead) of the applications or registrations,” and “[b]ecause the goods are not listed, we do not know whether the listed registrations are relevant.” *Peace Love World Live*, 127 USPQ2d at 1405 n.17 (citations omitted). The services for which the third-party marks are registered are listed in Applicant’s table.

commonly registered for similar goods or services.”) (quoting *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017)).

“Third-party registrations are relevant in the manner of dictionary definitions ‘to prove that some segment of the [marks] has a normally understood and well recognized descriptive or suggestive meaning, leading to the conclusion that that segment is relatively weak.’” *Id.*, at *34-35 (quoting *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675 (Fed. Cir. 2015)). “Third-party registrations used in this manner are not evidence that customers are accustomed to seeing the use of other, similar, marks in the marketplace, but rather evidence that a term is suggestive or descriptive of the relevant goods or services,” and “[s]uch terms may be conceptually weak because the more descriptive a term is, the less likely prospective purchasers are to attach source-identifying significance to it.” *Morinaga*, 120 USPQ2d at 1745-46.

Applicant’s table lists seven third-party registrations. Only the registration of the composite mark shown below



contains both the initialism USA and the word PARKING.¹⁹ Only one other registration, of the composite mark shown below for, inter alia, “aircraft parking” services, contains the initialism USA:



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The other five registrations are of marks containing the letters “US,” which can be an initialism for “United States,” but only one of those marks, US VALET for various parking services, uses the letters in that manner.²¹ The other four use the letters US to form words or initialisms that do not abbreviate “United States.”²²

Applicant’s third-party registration evidence does not come remotely close to showing that the USA portion of the cited mark USA PARKING is so descriptive that consumers will be able to distinguish that mark from USAPARK.NET based on “minor differences.” *Morinaga*, 120 USPQ2d at 1745. *See also Embiid*, 2021 USPQ2d 577, at *38-39 (three third-party registrations of PROCESS-formative marks for clothing offered to show the weakness of the cited mark TRUST THE PROCESS for clothing were “a far cry from the large quantum of evidence of third-party use and

¹⁹ November 12, 2020 Response to Office Action at TSDR 17-18.

²⁰ *Id.* at TSDR 18-21.

²¹ *Id.* at TSDR 15-16.

²² *Id.* at TSDR 16 (USV and design), 16-17 (RYDE WITH US), 21-27 (ALOEUS), 27-31 (DAY USE and design).

third-party registrations that was held to be significant in both *Jack Wolfskin* [*Ausrüstung Fur Draussen GmbH & Co. v, New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129 (Fed. Cir. 2015)] and *Juice Generation*”) (quoting *Inn at St. John’s*, 126 USPQ2d at 1746); *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at *3 (TTAB 2020) (finding that two third-party registrations of GUILD-formative marks for real-estate financing services did not show that the cited mark GUILD INVESTMENT MANAGEMENT was “particularly weak,” and noting that even weak marks are entitled to a presumption of validity under Section 7(b) of the Trademark Act and to protection against registration of a mark likely to cause confusion).

Applicant’s reliance on the Consent Agreement with Ennis is similarly unavailing. A consent agreement between an applicant and the owner of a cited registration may be an important factor militating against a finding of a likelihood of confusion in the context of the *DuPont* analysis. *See, e.g., DuPont*, 177 USPQ at 568 (“In considering agreements, a naked ‘consent’ may carry little weight,” but the “weight to be given more detailed agreements of the type presented here should be substantial.”). The Consent Agreement here, however, is not between Applicant and Registrant, but rather between Applicant and Ennis, a stranger to this appeal. It is also self-evident on the face of the Consent Agreement, and the applications attached to it, both that Ennis is only nominally a third-party user of its USPARK-formative marks, and that the consent is the sort of “naked” consent that is ordinarily given little weight in the *DuPont* analysis. *See In re Am. Cruise Lines, Inc.*, 128 USPQ2d 1157, 1162 (TTAB 2018).

Applicant and Ennis have the same address, 1615 California Street, Suite 707, Denver, Colorado 80202,²³ the same officer, Panayes J. Dikeou, who signed the Consent Agreement as Applicant's Manager and as Ennis's President,²⁴ and whose email address is used in all of their applications,²⁵ and the same counsel, James A. Sheridan.²⁶ The parties' specimens of use also show that their respective USAPARK- and USPARK-formative marks are displayed in the same color scheme, with the initialisms USA and US in blue and the word PARK in red:²⁷

USAPARK ²⁸



²⁹

The Consent Agreement recites that there has been no confusion between the companies' marks over a period of 14 years, or between the companies' marks and those of third parties,³⁰ and states that there is no future likelihood of confusion "[s]o

²³ June 7, 2021 Request for Reconsideration at TSDR 36.

²⁴ *Id.* at TSDR 39.

²⁵ *Id.* at TSDR 41, 52, 64, 72, 82, 95, 106, 117.

²⁶ *Id.* at TSDR 43, 54, 65, 73, 84, 96, 107, 118.

²⁷ *Id.* at TSDR 48-50, 59-61, 78-80, 89-92, 101-03, 112-14.

²⁸ *Id.* at TSDR 48.

²⁹ *Id.* at TSDR 113.

³⁰ *Id.* at TSDR 38 (Consent Agreement ¶ 2).

long as the Parties' uses and registration of their respective marks conform to the terms of this Agreement.”³¹ But the Consent Agreement “contains little more than [reciprocal] consent[s] to registration and . . . a statement that confusion is believed to be unlikely,” *Am. Cruise Lines*, 128 USPQ2d at 1162, and there are no “terms of this Agreement” containing “specific arrangements to avoid confusion of the public.” *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1962 (TTAB 2016) (quoting *In re Mastic Inc.*, 829 F.2d 1114, 4 USPQ2d 1292, 1295 (Fed. Cir. 1987)).

The co-existence of Applicant's USAPARK.NET mark with the USPARK-formative marks of its de facto affiliate Ennis is not probative of the weakness of the cited mark USA PARKING, or the ability of Applicant's USAPARK.NET mark to co-exist with the cited mark without creating a likelihood of confusion.

We find that the similarities between Applicant's mark USAPARK.NET and the cited mark USA PARKING in appearance, sound, and connotation and commercial impression outweigh their differences. The marks are sufficiently similar for confusion to be likely when they are used in connection with legally identical services, and the first *DuPont* factor supports a finding of a likelihood of confusion.

C. The Absence of Evidence of Actual Confusion

The eighth *DuPont* factor considers “[t]he length of time during which and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 177 USPQ at 567. Our analysis under this factor differs from our analysis regarding the second and third *DuPont* factors, where we must focus on “the

³¹ *Id.*

identifications **as set forth** in the application and the cited registration,” and may not consider “evidence of how Applicant and Registrant are **actually rendering** their services in the marketplace.” *Guild Mortg.*, 2020 USPQ2d 10279, at *6 (citing *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014)). Under the eighth *DuPont* factor, we must “look at **actual market conditions**, to the extent that there is evidence of such conditions of record. *Id.* There is no such evidence of record here.

Applicant “asserts a lack of actual confusion with applicant’s mark and the cited references over a period of **more than fifteen years**,” 6 TTABVUE 12, as well as a lack of actual confusion between its mark and the “third-party marks of the co-existence agreement, which include the marks USPARK.NET owned by Ennis, Inc.” *Id.* “These assertions are unsupported by sworn statements or other evidence, and ‘[a]ttorney argument is no substitute for evidence.’” *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, at *15 (TTAB 2019) (quoting *Cai*, 127 USPQ2d at 1799 (internal quotation omitted)). In *Guild Mortg.*, the applicant made of record “a declaration from its President and CEO . . . who attested that Applicant has used its mark since 1969” and who provide other details regarding Applicant’s business. *Guild Mortg.*, 2020 USPQ2d 10279, at *6. Here, we have only a few sentences in Applicant’s brief, and the hearsay statements in the Consent Agreement, which we have found above lacks any probative value on the issue of likelihood of confusion.

The eighth *DuPont* factor is rarely important in ex parte cases “unless the applicant provides us with contextual evidence that allows us to meaningfully assess

the length of time and degree to which the applicant's and registrant's commercial activities would have provided an opportunity for confusion to have manifested itself if it were likely." *Embiid*, 2021 USPQ2d 577, at *39 (citing *Guild Mortg.*, 2020 USPQ2d 10279, at *8). "The 'absence of any reported instances of actual confusion would be meaningful only if the record indicated appreciable and continuous use by [A]pplicant of [its] mark for a significant period of time in the same markets as those served by [Registrant] under its mark[]." *Id.*, at *41 (quoting *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992)). On this record, there is a "lack of evidence that **in the actual marketplace**, the **same** consumers have been exposed to **both** marks for the respective services, such that we could make a finding as to the 'length of time during and conditions under which there has been concurrent use without evidence of actual confusion.'" *Guild Mortg.*, 2020 USPQ2d 10279, at *8 (quoting *DuPont*, 177 USPQ at 567). We find that the eighth *DuPont* factor is neutral in our analysis of the likelihood of confusion.

D. Summary

The first, second, and third *DuPont* factors support a finding of a likelihood of confusion, as the marks are more similar than dissimilar, and the services, channels of trade, and classes of purchasers are legally identical in part. The eighth *DuPont* factor is neutral. Although the cited mark is conceptually weak, there is no evidence that it is also commercially weak, and it is entitled to protection against registration of Applicant's confusingly similar mark for legally identical services. We find on the basis of the record as a whole that Applicant's USAPARK.NET so resembles the USA

PARKING mark in the '343 Registration as to be likely, when used in connection with the “parking lot services” identified in the application, to cause confusion.

Decision: The refusal to register is affirmed on the basis of Registration No. 1886343.