

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 Clinical Support Systems Inc.

Serial No. 90136803


Caroline G. Chicoine of Husch Blackwell LLP
for Clinical Support Systems Inc.

Joanne Clifford, Trademark Examining Attorney, Law Office 125,
Robin Mittler, Managing Attorney.

Before Heasley, Pologeorgis, and Allard,
Administrative Trademark Judges.

Opinion by Heasley, Administrative Trademark Judge:

Applicant, Clinical Support Systems Inc., seeks registration on the Principal

Register of the composite mark  for services ultimately identified as “computer software services, namely, providing online, non-downloadable computer software used to allow care providers to access, enter and view patient health information at the point of care” in International Class 42.¹

¹ Application Serial No. 90136803 was filed on August 25, 2020, based on Section 44(d), 15 U.S.C. § 1126(d), and Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). Applicant later

The Examining Attorney has refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as used in connection with the identified computer services, so resembles the registered mark



for:

platform as a service (PAAS) featuring computer software platforms for use in messaging, video conferencing, file sharing, data collection and database management in the field of professional-client interaction and case management; Software as a service (SAAS) services featuring software for use in messaging, video conferencing, file sharing, data collection and database management in the field of professional-client interaction and case management in International Class 42,

as to be likely to cause confusion, to cause mistake, or to deceive.²

elected not to proceed to registration under Section 44(e) of the Trademark Act, and amended the application to rely solely on its Section 1(b), 15 U.S.C. §1051(b) filing basis.

According to the Application, “The mark consists of two overlapping bandages formed by two rectangles outlined in blue, each with numerous blue circles on each end and with an orange square in the center of the design followed by the stylized wording ‘MENDMD’ with the lettering ‘MEND’ in orange and lettering ‘MD’ in blue; all over a white background. The color white is a feature of only the inside rectangular portions of the bandages of the mark, but otherwise represents background, outlining, shading, and/or transparent area and is not part of the mark.” The colors orange, blue, and white are claimed as a feature of the mark.

Citations to the prosecution file refer to the USPTO's Trademark Status & Document Retrieval (“TSDR”) system and identify the documents by title, date, and page in the downloadable .pdf version. Citations to the briefs and other materials in the appeal record refer to the Board's TTABVue online docket system.

² Registration No. 5558267, issued on the Principal Register on September 11, 2018. The mark consists of “a blue stethoscope to the left of the word ‘mend’ in red lettering.” The colors blue and red are claimed as a feature of the mark. The Registration also identifies “computer application software for mobile phones, namely, software for use in messaging, video conferencing, file sharing, data collection and database management in the field of professional-client interaction and case management” in International Class 9. The Examining Attorney's brief, however, focuses on the similarity of the Class 42 services, and so shall this opinion. We hasten to add that consideration of Registrant's Class 9 goods would

When the refusal was made final, Applicant appealed and requested reconsideration. The Examining Attorney denied the request for reconsideration, and the appeal proceeded. We affirm the refusal to register for the following reasons.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark may be refused registration if it:

[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 [or services] of the applicant, to cause confusion, or to cause mistake, or to deceive....

15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between marks under Section 2(d), we analyze the evidence and arguments under the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973) (the “*DuPont* factors”) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 144 (2015). “Whether a likelihood of confusion exists is aided by application of the thirteen *DuPont* factors.” *Bullshine Distillery LLC v. Sazerac Brands, LLC*, 130 F.4th 1025, 1031 (Fed. Cir. 2025) (internal punctuation omitted). All relevant *DuPont* factors of record must be considered. *Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th 1363, 1371 (Fed. Cir. 2025); *In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019). But we may focus on dispositive factors, such as the similarity of the marks and

not change the outcome of this opinion, as these goods appear highly related to Registrant’s Class 42 services.

relatedness of the services. *See Sunkist Growers, Inc. v. Intrastate Distribs., Inc.*, __ F.4th __, 2025 WL 2055711, *2 (Fed. Cir. 2025).³

A. Relatedness of the Services, Channels of Trade, and Classes of Customers

The second *DuPont* factor concerns the “similarity or dissimilarity and nature of the goods or services as described in an application or registration...,” and the third *DuPont* factor concerns the “similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361; *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 1319 (Fed. Cir. 2014). A proper comparison of the services “considers whether ‘the consuming public may perceive [the respective ... services of the parties] as related enough to cause confusion about the source or origin of the ... services.’” *In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002)).

The Examining Attorney observes that Registrant’s broadly-worded services, covering software and platforms for use in “messaging, video conferencing, file sharing, data collection and database management in the field of professional-client interaction and case management,” encompass Applicant’s more narrowly worded “computer software services, namely, providing online, non-downloadable computer software used to allow care providers to access, enter and view patient health

³ This opinion follows the practice set forth in the TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03(a) (2025). It cites decisions of the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Customs and Patent Appeals by the pages on which they appear in the Federal Reporter (e.g., F.2d, F.3d, or F.4th). For decisions of the Board, this opinion cites to the Westlaw (WL) legal database and cites only precedential decisions, unless otherwise noted.

information at the point of care.”⁴ We agree, and find the respective services legally identical. *See, e.g., In re Integrated Embedded*, 2016 WL 7368696, *12 (TTAB 2016) (“Applicant’s services in Class 42 thus are subsumed under Registrant’s services, and legally identical thereto”). The evidence of record in fact shows that Registrant offers its software services in the field of health care.



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To this, the Examining Attorney adds ten third-party webpages to show that the same entity commonly offers Applicant’s sort of software for use to access, enter, and view patient health information as a feature of Registrant’s sort of software for use in messaging, video conferencing, file sharing, data collection and database

⁴ Examining Attorney’s brief, 11 TTABVUE 10.

⁵ Mend.com, Nov. 11, 2021 Response to Office Action at 8.

management in the field of professional-client interaction and case management.⁶ For example:

- **CureMD** provides a patient portal that includes messaging and data sharing as well as Electronic Health Records software that provides for information sharing and patient health information exchanges.⁷
- **DrChrono** provides an OnPatient Portal that allows physicians to securely communicate with patients as well as Electronic Health Records software for patient health information management.⁸
- **Meditech** provides Patient Connect communication software and Electronic Health Records software for patient health data management.⁹
- **Cerner** provides clinical solution software that facilitates sharing information across care teams and Electronic Health Records software for patient health information management.¹⁰
- **OpenEMR** provides health record and medical practice management software, including patient reminders, pharmacy messaging and lab integration.¹¹

Because the record shows that companies are known to offer both sorts of services under the same name or mark, on the same website, this third-party evidence supports a finding that the services are related. *In re Charger Ventures LLC*, 64 F.4th 1375, 1382 (Fed. Cir. 2023). It also shows that the channels of trade are the same, *id.*, a conclusion that follows from the legally identical nature of the recited services. *Am.*

⁶ Examining Attorney's brief, 11 TTABVUE 11-12.

⁷ CureMD.com, July 7, 2021 Final Office Action, TSDR pp. 8-21.

⁸ DrChrono.com, July 7, 2021 Final Office Action, TSDR pp. 45-58.

⁹ ehr.Meditech.com, July 7, 2021 Final Office Action, TSDR pp. 77-96.

¹⁰ Cerner.com, July 7, 2021 Final Office Action, TSDR pp. 59-63.

¹¹ Open-emr.org, December 21, 2020 Non-Final Office Action, TSDR pp. 17-23.

Lebanese Syrian Associated Charities Inc. v. Child Health Res. Inst., 2011 WL 4090447, *6 (TTAB 2011).


Applicant does not address these *DuPont* factors in its briefs, thus “[a]pparently conceding the issue[s],” *In re Morinaga Nyugyo K.K.*, 2016 WL 5219811, *2 (TTAB 2016). In its main brief, Applicant purports to “incorporate[] the arguments set forth in its May 27, 2021 Office Action response, its July 16 and 19, 2021 Requests for Reconsideration, its November 11, 2021 Office Action response, its July 7th Request for Reconsideration and its Notice of Appeal as if fully set forth herein.”¹² We have reviewed and considered the entire prosecution record. But “[i]f an applicant, in its appeal brief, does not assert an argument made during prosecution, it may be deemed waived by the Board.” *In re Katch, LLC*, 2019 WL 2560528, *2 (TTAB 2019). Attempts to incorporate prior arguments, “adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006), *quoted in In re Princeton Equity Grp., LLC*, 2025 WL 1638891, *2 (TTAB 2025). We accordingly focus on the arguments set forth and developed in the briefs.

The second and third *DuPont* factors weigh strongly in favor of finding a likelihood of confusion. Applicant’s and Registrant’s software services are related, and flow through the same channels of trade to the same classes of customers, health care providers.

¹² Applicant’s main brief, 6 TTABVUE 8.

B. Strength or Weakness of “MEND”

“Two of the *DuPont* factors (the fifth and sixth) consider strength.” *Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023). In determining strength of a mark, we consider its inherent strength, based on the nature of the mark itself, and its commercial strength or recognition. *In re Chippendales USA Inc.*, 622 F.3d 1346, 1353-54 (Fed. Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning”); 2 J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. May 2025) (“The first enquiry is for conceptual strength and focuses on the inherent potential of the term at the time of its first use. The second evaluates the actual customer recognition value of the mark at the time registration is sought or at the time the mark is asserted in litigation to prevent another’s use.”). Likelihood of confusion strength is not “an all-or-nothing measure.” *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 1325 (Fed. Cir. 2017). It “varies along a spectrum from very strong to very weak.” *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 1375 (Fed. Cir. 2005).



Although the Examining Attorney is not expected to adduce evidence of the strength or fame of the cited registered  mark, *In re Mr. Recipe, LLC*, 2016 WL 1380730, *2 (TTAB 2016), an applicant may adduce evidence of “[t]he number and nature of similar marks in use on similar goods [or services]” to show that the cited mark is comparatively weak, conceptually or commercially, and has a

“comparatively narrower range of protection.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1338 (Fed. Cir. 2015).

Although Applicant adduced a number of third-party registrations and webpages in the course of prosecution,¹³ on appeal it focuses on two third-party registrations for standard character marks:

Mark	Status	Goods/Services	Owner
IMEND Reg. No. 3432818	Renewed	<i>computer software, namely, for evaluating patient health conditions and billing or reimbursement data in the field of healthcare (Class 9)</i>	Cirdian Health Systems, Inc. of Minnesota
MEND Reg. No. 5221411	Registered	<i>healthcare services, namely, providing real-time access to medical professionals by medical patients via telephone, video, email, mobile devices or a global computer network for the purposes of monitoring and diagnosing and advising regarding medical conditions (Class 44)</i>	Mendgroup, Inc. of Washington

Applicant argues that if these two marks could coexist with the cited registered mark, “if there was no likelihood of confusion found between the Cited Mark and the IMEND and MEND marks listed above, Applicant submits there can likewise be no

likelihood of confusion between the Cited Mark  and Applicant’s Mark .

¹⁴ Applicant concludes that “[c]onsumers are used to seeing multiple

¹³ May 27, 2021 Response to Office Action at 8-14, July 16, 2021 Response to Office Action/request for reconsideration at 6-10, 11-39, Nov. 11, 2021 Response to Office Action at 8-10, 56-83.

¹⁴ Applicant’s main brief, 6 TTABVue 13.

MEND marks in the health and medical space and given the differences in the entirety of the marks at issue, they are not likely to confuse Applicant's Mark with the Cited Mark."¹⁵

However, these two third-party registrations do not demonstrate that the element "MEND" is commercially weak. As the Examining Attorney points out, one of the registrations, for MEND, was cancelled on December 29, 2023 because no Section 8 statement of use was filed.¹⁶ "The existence of a cancelled registration—particularly one cancelled for failure to provide a declaration of continued use—does not tend to show that the cited mark is weak due to third-party use." *In re Embiid*, 2021 WL 2285576, *17 n. 48 (TTAB 2021).



Beyond that, there is no evidence of the extent of use of that mark prior to its cancellation, or of the IMEND mark in the marketplace. *See Palm Bay Imps.*, 396 F.3d at 1373 ("The probative value of third-party trademarks depends entirely upon their usage. ... [W]here the 'record includes no evidence about the extent of [third-party] uses ... [t]he probative value of this evidence is thus minimal."); *In re Morinaga*, 2016 WL 5219811, at *8 ("Applicant's citation of 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

¹⁵ Applicant's main brief, 6 TTABVUE 6.

¹⁶ Examining Attorney's brief, 11 TTABVUE 14.

differences.”). At any rate, two registrations, one cancelled, “is a far cry from the large quantum of evidence of third-party use and third-party registration that was held to be significant in both *Jack Wolfskin* and *Juice Generation*.” *Sabhnani v. Mirage Brands, LLC*, 2021 WL 6072822, *13 (TTAB 2021) (internal punctuation omitted). Applicant’s evidence does not show commercial weakness.

We next consider whether it shows conceptual weakness. Here, the Examining Attorney’s efforts to discount the significance of Applicant’s evidence are less persuasive. The Examining Attorney contends that the IMEND registration is for “financial activities, specifically billing and reimbursement in the medical field.” But as Applicant notes, its recitation of services includes “computer software, namely, for evaluating patient health conditions.”¹⁷ The MEND registration was cancelled, as the Examining Attorney notes above; but as Applicant observes, it was filed and matured

to registration before the cited  registration, yet did not bar the cited mark’s progress to registration. “Applicant submits that if the Trademark Office found that that the cited registration could co-exist with prior registrations for the word marks MEND and IMEND, surely, the applied-for mark  could likewise co-exist with same.”¹⁸

We consider both of the third-party registrations Applicant cites, but find they are too few to appreciably undermine the distinctiveness of Registrant’s mark. As the

¹⁷ Applicant’s reply brief, 12 TTABVUE 5-6.

¹⁸ Applicant’s reply brief, 12 TTABVUE 5.

Board stated in *In re Sela Prods., LLC*, 2013 WL 2951800, *8 (TTAB 2013), “[a]lthough in determining the strength of the mark third-party registrations can be used in the same manner as dictionary definitions, to show that a term has a significance in a particular industry, we cannot conclude, on the basis of the two ... registrations, that [the registered mark] has a particular significance for the registrant’s goods.”

We must presume the cited registered mark is inherently distinctive--at least suggestive--because it is registered on the Principal Register without a disclaimer of “MEND” or a claim of acquired distinctiveness. Trademark Act Section 7(b), 15 U.S.C. § 1057(b); *In re Fat Boys Water Sports LLC*, 2016 WL 3915986, *8 (TTAB 2016). In the context of health care, its literal part, MEND, may indeed suggest a desired outcome of that care: that the patient will be “on the mend.” But “the fact that a mark may be somewhat suggestive does not mean that it is a ‘weak’ mark entitled to a limited scope of protection.” *In re Great Lakes Canning, Inc.*, 1985 WL 71929, *3 (TTAB 1985), *quoted in Dollar Fin. Grp., Inc. v. Brittex Fin., Inc.*, 132 F.4th at 1372.

On the whole, we find the fifth and sixth *DuPont* factors neutral in our analysis of likelihood of confusion. We accord the cited registered mark the normal scope of protection to which inherently distinctive marks are entitled. *See Sabhnani v. Mirage Brands*, 2021 WL 6072822, at *12.

C. Similarity of the Marks

A predominant inquiry in any likelihood of confusion analysis is the similarity or dissimilarity of the respective marks, considered in their entireties--taking into

account their appearance, sound, connotation and commercial impression. *DuPont*, 476 F.2d at 1361; *Heil Co. v. Tripleye GmbH*, 2024 WL 4925901, *29 (TTAB 2024). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 2018 WL 2734893, *5 (TTAB 2018), *aff’d* 777 Fed. Appx. 516 (Fed. Cir. 2019) (citing *In re Davia*, 2014 WL 2531200, *2 (TTAB 2014)).

Applicant posits that “the proper test is whether the **entire**



mark is likely to cause confusion as to the source with the **entire** mark, not whether confusion is likely between features of the marks (e.g., MEND).¹⁹



Applicant continues:

Although both marks contain the term MEND, Applicant’s Mark begins with a bandage logo made up of blue and orange with the term Mend with an upper-case letter “M” in orange followed by the term MD in uppercase lettering in blue forming a unitary term MendMD. The Cited Mark, on the other hand, begins with a stethoscope in blue and the term mend in lower case in red.²⁰

These differences suffice to differentiate the marks, Applicant contends, because: the first thing consumers see are the designs, which “have nothing in common,” as one is made of bandages, and the other of a stethoscope, which perform different functions and create different impressions;²¹ these designs are “just as likely to make

¹⁹ Applicant’s main brief, 6 TTABVUE 15-16.

²⁰ Applicant’s main brief, 6 TTABVUE 16.

²¹ *Id.* Applicant’s reply brief, 12 TTABVUE 4-5.

at least an equal impression if not more of an impression on consumers as the text portion of the marks”;²² and the MD suffix to Applicant’s mark, though a recognized abbreviation of “medical doctor,”²³ is still distinctive when used in connection with Applicant’s software services.²⁴

The Examining Attorney agrees that the marks must be compared in their entirety,²⁵ but maintains that the shared wording, MEND, must be accorded greater weight than the designs, both of which depict medical supplies,²⁶ or the suffix MD, which “refers to a medical doctor, a type of ‘care provider’ that is the intended user of applicant’s services.”²⁷

Comparing the marks in their entirety, as we must, *Palm Bay Imps.*, 396 F.3d at 1371, we find that they are indeed similar. Both follow the same structure, displaying medical designs followed by MEND. *See In re Detroit Athl. Co.*, 903 F.3d 1297, 1303 (Fed. Cir. 2018) (marks reveal identical structure). Yes, a stethoscope is for diagnosis and bandages are for treatment, but those are simply different stages in the health care process; the same health care provider could diagnose a patient with a stethoscope and treat a wound with bandages. If anything, the marks’ medical design/MEND structure makes them look like variants of each other, emanating from

²² Applicant’s reply brief, 12 TTABVUE 4.

²³ Collins Dictionary Dec. 21, 2020 Office Action at 10.

²⁴ Applicant’s reply brief, 12 TTABVUE 3.

²⁵ Examining Attorney’s brief, 11 TTABVUE 6.

²⁶ *Id.*, 11 TTABVUE 7-8.

²⁷ *Id.* Collins Dictionary Dec. 21, 2020 Office Action at 10.

the same source. As the Board has put it:

Considering the substantial similarities between the marks in this case, it seems to us that a purchaser who sees one mark and later encounters the other is likely to think, if the two marks are applied to the same or related goods and/or services, that the second mark is the same mark he had seen earlier, or, if he realizes that there are some differences in the marks, that the second is simply a slightly varied version of the first, with both serving to indicate origin in the same source.

In re Mucky Duck Mustard Co. Inc., 1988 WL 252484, *1 (TTAB 1988).

The shared word MEND is the dominant feature “because it is most likely to indicate the source of the services. ... With marks consisting of words and a design, the words are normally accorded greater weight because they are likely to make a greater impression upon purchasers, to be remembered by them, and to be used by them to request the goods [or services].” *Monster Energy Co. v. Lo*, 2023 WL 417620, *15 (TTAB 2023) (internal citation and punctuation omitted).

The suffix MD, an abbreviation for “Medical Doctor,”²⁸ merely describes one of the many health care providers who could consult Applicant’s and Registrant’s software services in the course of providing care to patients. The term is so common in the field that it fails to meaningfully differentiate the marks. *See In re Charger Ventures*, 64 F.4th at 1382 (“an additional word or component may technically differentiate a mark but do little to alleviate confusion”).

In sum, although Applicant’s design and letter elements present some dissimilarities, they are not sufficient to overcome the identity of the dominant element MEND, and the overall commercial impression of the marks is similar. For

²⁸ Collins Dictionary Dec. 21, 2020 Office Action at 10.

these reasons, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

D. Concurrent Use Without Actual Confusion

The eighth *DuPont* factor considers “the length of time during and conditions under which there has been concurrent use without evidence of actual confusion.” *DuPont*, 476 F.2d at 1361.

In its brief, Applicant asserts that “Applicant’s Mark has co-existed with the Cited Mark in the marketplace for at least four (4) years with no instances of confusion.”²⁹ It offers no evidence supporting this assertion. As the Federal Circuit has made clear, “uncorroborated statements of no known instances of actual confusion are of little evidentiary value.” *In re Guild Mortg. Co.*, 912 F.3d at 1380-81 (quoting *In re Majestic Distilling Co.*, 315 F.3d 1311, 1317 (Fed. Cir. 2003)). The Board has explained:

The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.

In re Opus One Inc., 2001 WL 1182924, *7 (TTAB 2001).

This last point is especially telling here. The absence of any reported instances of actual confusion would be meaningful only if the record revealed appreciable and continuous use of Applicant’s mark for a significant period of time in the same

²⁹ Applicant’s main brief, 6 TTABVue 18.

markets as those served by Registrant under its mark. Yet here, the Application's basis is still intent to use under Section 1(b), 15 U.S.C. 1051(b), and aside from the argument of Applicant's counsel, which is no substitute for evidence, the record is devoid of evidence of actual use of its mark. *See Embiid*, 2021 WL 2285576, at *20. Applicant's assertion of no actual confusion thus lacks probative value.

In any event, "a showing of actual confusion is not necessary to establish a likelihood of confusion." *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017). The eighth *DuPont* factor is therefore neutral.

E. Consistency of Examination – Thirteenth *DuPont* Factor

Applicant submits that:

the PTO asserts an interest in maintaining consistency in its treatment of trademark applications. *See* USPTO Consistency Initiative, available at <https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative>. As mentioned above, the USPTO has already allowed the registration of other MEND marks for goods/services that are clearly as similar to those of Applicant and the Cited Mark and as a result, should do so in this case and allow the application to proceed to registration.³⁰

We consider Applicant's argument under the thirteenth *DuPont* factor, which "relates 'to any other established fact probative of the effect of use.'" *DuPont*, 476 F.2d at 1361. Applicant's reliance on the Office's "Consistency Initiative" is misplaced.

As the Examining Attorney rightly observes, the Consistency Initiative only addresses inconsistent treatment of an applicant's co-pending applications and

³⁰ Applicant's main brief, 6 TTABVue 18-19.

recently-issued registrations, not perceived inconsistencies with third-party applications or registrations.³¹

“The Board has recognized that ‘consistency is highly desirable,’ but consistency in examination is not itself a substantive rule of trademark law, and a desire for consistency with the decisions of prior examining attorneys must yield to proper determinations under the Trademark Act and rules.” *In re Korn Ferry*, 2024 WL 3219482, *5 n. 13 (TTAB 2024) (internal punctuation and citation omitted). We are not bound by the decisions of examining attorneys in other applications. *In re Cordua Rests., Inc.*, 823 F.3d 594, 600 (Fed. Cir. 2016) (the USPTO must “examine all trademark applications for compliance with each and every eligibility requirement” regardless of the prior treatment of applications involving similar marks); *In re Nett Designs Inc.*, 236 F.3d 1339, 1342 (Fed. Cir. 2001) (“The Board must decide each case on its own merits. ... Even if some prior registrations had some characteristics similar to [applicant’s] application, the PTO’s allowance of such prior registrations does not bind the Board or this court.”). Thus, we find the thirteenth *Dupont* factor neutral.

II. Conclusion

On careful consideration of all the arguments and evidence, as well as the applicable law, we find that the marks are similar, that the respective services are legally identical and, as such, would be presumed to travel through the same channels

³¹ <https://www.uspto.gov/trademark/trademark-updates-and-announcements/consistency-initiative>. Since the Examining Attorney addressed the substance of the Consistency Initiative, her objection that Applicant only provided a hyperlink to the USPTO website is overruled.

of trade to the same classes of customers, that the cited registered mark is entitled to the normal scope of protection to which inherently distinctive marks are entitled, that there is no evidence of contemporaneous use of the marks in the same markets without confusion, and that the Consistency Initiative is inapplicable to the facts of this ex parte appeal. Because all of the *DuPont* factors either weigh in favor of confusion or are neutral, confusion is likely.

Decision: The refusal to register Applicant's mark is affirmed on the basis of likelihood of confusion. 15 U.S.C. 1052(d).