

This Opinion is Not a
Precedent of the TTAB

Mailed: October 2, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

—
In re Robert Greaves

—
Serial No. 90248955

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Mark D. Hansing of McKee, Voorhees & Sease, P.L.C.,
for Robert Greaves.

Pauline Ha, Trademark Examining Attorney, Law Office 115,
Daniel Brody, Managing Attorney.

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Before Goodman, Lynch and English,
Administrative Trademark Judges.

Opinion by English, Administrative Trademark Judge:

Robert Greaves (“Applicant”) seeks registration on the Principal Register of the standard-character mark **TIMBERLINE PATIO COVERS (PATIO COVERS disclaimed)** for “consultancy, planning, laying out, construction and installation, and construction management, supervision, and project management, all of the foregoing in the field of construction, maintenance, and repair of free-standing gazebos or

covers for decks, porches, and patios for outdoor spaces of residential and commercial buildings,” in International Class 37.¹

The Examining Attorney refused registration of Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), based on a likelihood of confusion with the standard-character mark TIMBERLYNE GROUP (GROUP disclaimed) registered on the Principal Register for “building construction; general construction contracting management; building construction consulting; construction of complete post-frame, post and beam, mortise and tenon, and mass timber buildings and structures,” in International Class 37; and “architectural design services; construction drafting; interior design assist, technical consultation in the field of architecture, engineering surveying, and engineering” in International Class 42 (the “Cited Mark” or “Cited Registration”).²

When the refusal was made final, Applicant appealed. Applicant and the Examining Attorney filed appeal briefs. We affirm the refusal to register under Section 2(d) of the Trademark Act.

¹ Application Serial No. 90248955 was filed on October 12, 2020 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a) alleging October 1, 2016 as the date of first use and first use in commerce.

² Registration No. 6754949 was issued on June 7, 2022. The registration also covers goods in International Class 9, but the Section 2(d) refusal is based solely on the services in International Classes 37 and 42. *See* January 4, 2023 Office Action, TSDR 2, 4 (citing only Class 37 and 42 in the Cited Registration and comparing only Registrant’s services with Applicant’s services); July 24, 2023 Final Office Action, TSDR 2, 4-5 (same).

I. Evidentiary Issues

Before turning to the merits of the refusal, we address some evidentiary issues.

First, Applicant asks that we take judicial notice of the dictionary definition for the word “timber” in the Merriam-Webster online dictionary embedded in its brief.³ The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See, e.g., Conopco, Inc. v. Transom Symphony OPCO, LLC*, Opp. No. 91256368, 2022 WL 874335, at *7 n.8 (TTAB 2022); *In re Jimmy Moore LLC*, Ser. No. 86353015, 2016 WL 6819242, at *3 (TTAB 2016) (granting applicant’s request that the Board take judicial notice of definitions from www.merriamwebster.com). Accordingly, Applicant’s request for judicial notice is granted; we have considered this definition.

Second, to support its argument that the Cited Mark is conceptually weak, Applicant introduced plain copies of third-party registrations, notices of allowance and notices of publication for third-party applications, and a chart of the same third-party registrations and applications listing the registration/application number, the marks and any disclaimers, the status and current owners of the registrations/applications, and the identified goods/services.⁴ The Examining Attorney did not object that the hard copies of the registrations, notices of allowance and notices of publication⁵ do not reflect the current title and status of the

³ 4 TTABVUE 12.

⁴ July 3, 2023 Office Action Response, TSDR 14-67.

⁵ The notices of publication also do not list the identified goods or services although that information is set out in Applicant’s chart.

registrations and applications or that the chart is not an appropriate way to introduce third-party registrations and applications. For this reason, and because the Examining Attorney treats this evidence as of record, we have considered it and treat as true the representations in Applicant's accompanying chart. *In re 1st Realty Professionals, Inc.*, Ser. No. 7855371, 2007 WL 2315610, at *1 (TTAB 2007) (considering listing of third-party registrations and applications because the Examining Attorney did not advise the applicant that the evidence was insufficient at a point where the applicant could have corrected the error).

Third, Applicant asserts that the Cited Mark "was initially refused registration as having a likelihood of confusion with a prior-filed U.S. Ser. No. 88/379,998 for the mark T-TIMBERLINE"⁶ and that this "prosecution history establishes the Cited Mark has inherent or conceptual weakness, and Applicant's Mark is sufficiently distinct for registration."⁷ Prior to appeal, Applicant did not introduce the file history of the Cited Mark. Instead, Applicant embedded in its appeal brief the text of an "Advisory: Prior-Filed Application – Potential Refusal" that purportedly issued during prosecution of the application that matured into the Cited Registration.⁸ The Examining Attorney did not object to Applicant's argument based on the Cited Registration file history or the embedded evidence, responding instead with a substantive argument. For this reason, we accept as true Applicant's representations

⁶ 4 TTABVUE 12.

⁷ *Id.* at 14.

⁸ *Id.* at 12-13.

regarding the prosecution of the Cited Mark and have considered the embedded evidence. *See, e.g., In re Rodale Inc.*, Ser. No. 78369245, 2006 WL 2091269, at * n.4 (TTAB 2006) (Board considered summary of applicant’s prior registrations presented for the first time in its appeal brief because the examining attorney did not object and also presented substantive arguments regarding the registrations).

II. Analysis

“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 [or] mistake, or to deceive.” *In re Charger Ventures LLC*, 64 F.4th 1375, 1379 (Fed. Cir. 2023) (cleaned up). Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on likelihood of confusion. *In re E. I. DuPont de Nemours & Co*, 476 F.2d 1357, 1361 (CCPA 1973) (“*DuPont*”) cited in *B&B Hardware, Inc. v. Hargis Ind., Inc.*, 575 U.S. 138, 144 (2015); *see also In re Charger Ventures*, 64 F.4th at 1381.

We consider each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 1379 (Fed. Cir. 2019); *M2 Software, Inc. v. M2 Commc’ns., Inc.*, 450 F.3d 1378, 1381 (Fed. Cir. 2006); *ProMark Brands Inc. v. GFA Brands, Inc.*, Opp. No. 91194974, 2015 WL 1646447, at *8 (TTAB 2015) (“While we have considered each factor for which we have evidence, we focus our analysis on those factors we find to be relevant.”). “The weight given to each factor depends on the circumstances of each case.” *In re Charger Ventures*, 64 F.4th at 1381; *In re Shell*

Oil Co., 992 F.2d 1204, 1206 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 1199 (CCPA 1973).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relatedness of the services. See *In re Chatam Int’l Inc.*, 380 F.3d 1340, 1341-42 (Fed. Cir. 2004); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 1103 (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.”); see also *In re i.am.symbolic, llc*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164 (Fed. Cir. 2002)). We address these two factors and other relevant *DuPont* factors below.⁹

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

Under the second *DuPont* factor, we consider “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration” and

⁹ In its appeal brief, Applicant notes that “sophisticated purchasing” and “a valid consent agreement between the applicant and the owner of the previously registered mark” are factors that “must be considered if there is pertinent evidence in the record[.]” 4 TTABVue 10. Applicant, however, does not argue these factors nor is there any pertinent evidence. Accordingly, we give these factors no further consideration.

under the third *DuPont* factor we consider “the similarity or dissimilarity of established, likely-to-continue trade channels.” *DuPont*, 476 F.2d at 1361. We must base our comparison under the second and third *DuPont* factors on the services identified in Cited Registration and the involved application. *E.g.*, *In re Charger Ventures*, 64 F.4th at 1383 (“The relevant inquiry in an ex parte proceeding focuses on the goods and services described in the application and registration.”) (emphasis omitted); *Sabhnani v. Mirage Brands, LLC*, Can. No. 92068086, 2021 WL 6072822, at *8 (TTAB 2021) (“[A]s with the relatedness of the goods, the similarity or dissimilarity of the channels of trade must be determined based on the identifications of goods in the parties’ registrations[.]”).

With respect to the second *DuPont* factor, it is well settled that the services need not be identical or even competitive to support a finding of likelihood of confusion. Rather, it is sufficient that the services are related in some manner and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to the mistaken belief that they originate from or are in some way associated with the same producer or provider. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1369 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, Opp. No. 91117739, 2007 WL 1431084, at *6 (TTAB 2007)); *see also In re St. Helena Hosp.*, 774 F.3d 747, 752 (Fed. Cir. 2014) (A proper comparison of the goods and services “considers whether ‘the consuming public may perceive [the respective goods and services of the parties] as related enough to cause confusion about the

source or origin of the goods and services.”) (quoting *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002)).

For ease of reference, Applicant’s services are “consultancy, planning, laying out, construction and installation, and construction management, supervision, and project management, all of the foregoing in the field of construction, maintenance, and repair of free-standing gazebos or covers for decks, porches, and patios for outdoor spaces of residential and commercial buildings.” In comparing the services, we focus on Registrant’s “building construction” services in International Class 37.

The text from Applicant’s specimen of use below supports that Applicant’s and Registrant’s services are complementary.¹⁰

Timberline Patio Covers

Timberline Patio Covers is the leader in high-quality deck cover installation. **Patio deck covers and freestanding patio covers extend your living space outside your home.** ... Create a new addition to accommodate a front porch, backyard patio, or second story deck. Build a freestanding roof or gazebo. Add skylights, recessed lighting, heaters, fans, TV and speaker systems. **It is your outdoor living space we just want to help bring it to life.**

Applicant’s construction of gazebos and covers for decks, porches and patios are intended to extend living spaces from indoor to outdoor, and thus, are complementary services to Registrant’s “building construction” services. *In re Code Consultants Inc.*, Ser. No. 75645560, 2001 WL 1149619, at *4 (TTAB 2001) (“As the evidence made of record by the Examining Attorney shows, inspection of fire and sprinkler systems is

¹⁰ October 12, 2020 Specimen, TSDR 1 (emphasis added).

an important part of the construction inspection process. It is clear that there is a complementary relationship between these two activities.”); *In re Summit Hotel Corp.*, 1983 WL 51899, at *1 (TTAB 1983) (finding restaurant and hotel services related because the services are complementary).

In addition, the Examining Attorney introduced Internet printouts showing ten third parties using a single mark for both Applicant’s services and Registrant’s “building construction” services:

- SUNBURST CONSTRUCTION & Sunburst Design – “a licensed contractor” offering services including building patios and decks, “basement build-outs,” “home addition design and build services” and bathroom renovations;¹¹
- CRAIGER CUSTOM DESIGN – an “expert indoor & outdoor builder” building decks, pergolas, gazebos, and additions and offering business and home remodeling services;¹²
- ORTEGA BUILDERS – “a commercial and residential builder” building custom gazebos, patios, homes and additions, among other services;¹³
- YARDMAN’S – offering home improvement services including decks, gazebos and pergolas, patios, finished basements, kitchen and bath remodels, and additions;¹⁴
- NELSON CUSTOM BUILDERS – “specializing in remodeling, room additions, custom decks, and beautiful backyard spaces,” including gazebos;¹⁵
- MILL RUN BUILDERS – offering construction services, including home additions, sunrooms, garages, deck repair and installation, pergolas and gazebos;¹⁶

¹¹ January 4, 203 Office Action, TSDR 15-28.

¹² *Id.* at 29-46.

¹³ *Id.* at 47-69.

¹⁴ *Id.* at 72.

¹⁵ *Id.* at 74-82.

¹⁶ July 24, 2023 Final Office Action, TSDR 8-31.

- DRAKE'S – offering construction services, including small structure construction, namely, garages, gazebos, decks and additions;¹⁷
- POMPANO BEACH HOME REMODELING SERVICES – offering home remodeling and restoration services, construction of additions, and patio, gazebo and pergola design;¹⁸
- VAN SCHAIK CONSTRUCTION INC. – “new home construction, bathroom and kitchen remodels, ... patios,” decks and gazebos;¹⁹ and
- HOME CONSTRUCTION AND CONSULTING SERVICES, LLC & Design – constructing new homes as well as porches and gazebos.²⁰

Evidence that third parties offer the services of both Applicant and Registrant under a single mark is relevant to show the relatedness of the services. *See, e.g., In re Charger Ventures*, 64 F.4th at 1382 (“Because the record shows that companies are known to offer both residential and commercial [real estate] services under the same mark and, often, on the same website, we find that substantial evidence supports the Board’s finding on [the second and third *DuPont*] factors.”); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 1267 (Fed. Cir. 2002) (evidence that consumers encounter one mark designating a single source for the services of both parties supports a finding that the services are related); *In re Integrated Embedded*, Ser. No. 86140341, 2016 WL 7368696, at *12 (TTAB 2016) (websites made of record by examining attorney “demonstrate[d] that services of the type offered by both Applicant . . . and Registrant are marketed and sold together online under the same

¹⁷ *Id.* at 33-42.

¹⁸ *Id.* at 43-55.

¹⁹ *Id.* at 56-63.

²⁰ *Id.* at 65-69.

marks” and “[s]uch evidence is sufficient to find that the services at issue are related”); *see also In re Country Oven, Inc.*, Ser. No. 87354443, 2019 WL 6170483, at *6 (TTAB 2019) (evidence that third parties used a single mark for retail bakery shops and bakery products “bolster[ed]” finding of relatedness).

In view of the foregoing, we find that Applicant’s services and Registrant’s “building construction” services are closely related.

Turning to the third *DuPont* factor, there are no limitations on trade channels or consumers in Applicant’s application or the Cited Registration. Accordingly, we must presume that Registrant’s “building construction” services and Applicant’s services, namely, “consultancy, planning, laying out, construction and installation, and construction management, supervision, and project management, all of the foregoing in the field of construction, maintenance, and repair of free-standing gazebos or covers for decks, porches, and patios for outdoor spaces of residential and commercial buildings” travel through all the normal channels of trade for such services to all normal classes of consumers. *See, e.g., i.am.symbolic*, 866 F.3d at 1327; *In re Integrated Embedded*, 2016 WL 7368696, at *13.

The same evidence showing that Applicant’s and Registrant’s services are closely related demonstrates that Registrant’s and Applicant’s normal channels of trade and consumers overlap. *See, e.g., In re Charger Ventures*, 64 F.4th at 1382 (evidence of third-parties offering both residential and commercial real estate services under the same mark and, often, on the same website supported Board’s finding of relatedness under the second *DuPont* factor and “some overlap” under the third *DuPont* factor).

Consumers of building construction services may seek construction of gazebos and covers for decks, porches and patios from the same source and even at the same time as part of the same construction project.

B. Conceptual Strength or Weakness of the Cited Mark

Under the sixth *DuPont* factor, we consider Applicant's arguments that the Cited Mark is conceptually weak.²¹ *See, e.g., Spireon, Inc. v. Flex Ltd.*, 71 F.4th 1355, 1362 (Fed. Cir. 2023).

As an initial matter, the Cited Mark registered on the Principal Register with only a disclaimer of "GROUP" and no claim of acquired distinctiveness under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f). Thus we must presume that the Cited Mark is inherently distinctive. Nonetheless, we may find that the Cited Mark, or a

²¹ We do not consider the conceptual strength of the Cited Mark for Registrant's Class 9 services because the Examining Attorney did not cite this class as a basis for the Section 2(d) refusal.

The commercial strength of a mark also is relevant under the sixth *DuPont* factor. *Spireon*, 71 F.4th at 1362. The record, however, does not support that the Cited Mark is commercially weak. The goods in the third-party registrations differ from the services in the Cited Registration, as discussed below. Regardless, 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." *In re Morinaga Nyugyo Kabushiki Kaisha*, Ser. No. 86338392, 2016 WL 5219811, at *8 (TTAB 2016); *see also, e.g., Tony Lama Co. v. Di Stefano*, Opp. No. 92011422, 1980 WL 30120, at *10 (TTAB 1980) (third-party registrations "per se, are incompetent" to show "that the marks are known in the marketplace and have made such an impact upon purchasers that they have become conditioned to distinguish between these marks by" their differences). There is no marketplace evidence (as opposed to registration evidence), and therefore no support for Applicant's argument that customers "have been educated to distinguish between different marks ... on the basis of minute distinctions." Appeal Brief, 4 TTABVUE 22 (internal quotation mark and emphasis omitted); *see also id.* at 18-19.

portion thereof, is weak in the course of our *DuPont* analysis. *In re Fat Boys Water Sports LLC*, Ser. No. 86490930, 2016 WL 3915986, at *8-9 (TTAB 2016).

Applicant contends that “concurrent use and registration of Applicant and Registrant’s marks is not likely to cause confusion, because there already exists a crowded field of ‘TIMBERLINE’ formative marks for products and services in the building construction channel of trade that the PTO has previously deemed registrable and has permitted to coexist without risk of confusion.”²² Applicant relies in its brief on the following use-based registrations that it introduced, owned by ten different entities, for marks consisting of or incorporating the word TIMBERLINE for materials used in building construction:²³

²² Appeal Brief, 4 TTABVUE 14; *see also id.* at 11.

²³ Applicant introduced a number of additional third-party registrations identifying goods and services more removed from Registrant’s “building construction” than the construction materials in the cited third-party registrations. *See* July 3, 2023 Response to Office Action, TSDR 33-35, 38-39 46-49, 51-53, 62, 64, 66. Applicant correctly does not rely on these third-party registrations in its brief as the record does not reflect that the goods and services are related to Registrant’s construction services. *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 1324 (Fed. Cir. 2018) (“[T]he controlling inquiry is the extent of third-party marks in use on ‘similar’ goods or services.”). For this same reason, we find the following registration cited in Applicant’s brief has little persuasive value: Reg. No. 5819758 for the standard-character mark TIMBERLINE PROPERTY MANAGEMENT (PROPERTY MANAGEMENT disclaimed) for “real estate service, namely, rental property management of single family residential rental property” in International Class 36. July 3, 2023 Response to Office Action, TSDR 54.

Applicant also relies in its brief on seven third-party applications, only one of which is based on use in commerce under Trademark Act Section 1(a). Applicant asserts that the applications “should be given weight as the PTO has found [the marks] registrable,” issuing notices of reliance or notices of publication. Appeal Brief, 4 TTABVUE 16-17; July 3, 2023 Response to Office Action, TSDR 59-61, 63, 65, and 67. For this purpose, the third-party applications “have no probative value.” *Made in Nature v. Pharmavite*, Opp. No. 91223352, 2022 WL 2188890, at *14 (TTAB 2022) (“Applicant’s proofs that we totally disregard include a significant number of pending ... trademark applications[.] ... Third-party applications are evidence only of the fact that they have been filed[.]”); *see also In re Mr. Recipe, LLC*, Ser. No. 86040643, 2016 WL 1380730 at *6 (TTAB 2016). In any event, the six non-use-based applications are owned by the same entity that owns the registrations in item 6 below, which



1. **TIMBERLINE GEODESICS** – Reg. No. 1578694 for “geodesic dome construction components - namely heavy-duty metal connectors; beveled base plates; and nuts and bolts” in International Class 6; and “geodesic dome construction components, namely - floor plans; assembly instructions; pre-cut, pre-drilled, color coded wood struts, studs, t-blocking, triangular plywood panels, and factory assembled riser walls, all sold as a unit” in International Class 19;²⁴
2. **TIMBERLINE** (typeset) – Reg. No. 2175472 for “metal fasteners, namely, nuts, bolts, washers and screws” in International Class 6. The same entity also owns Reg. No. 2713032 for the **TIMBERLINE** mark for distributorship services involving the registered goods and other steel and metal products;²⁵
3. **TIMBERLINE** (typeset) – Reg. No. 2944489 for “chinking compounds” in International Class 17;²⁶
4. **TIMBERLINE** (typeset) – Reg. No. 2839960 for “resilient hard surfaced floor and wall coverings” in International Class 27;²⁷



5. **Timberline** PANEL COMPANY, LLC. – Reg. No. 3580226 for “structural insulated construction panels” in International Class 17;²⁸
6. **TIMBERLINE** – Reg. No. 4044094 (standard characters) for “asphalt roofing shingles” in International Class 19. The same entity owns a

we have considered. The seventh use-based application (Ser. No. 97529179) for the mark **TIMBERLINE** identifies “adhesives for glues for use in flooring applications; adhesives and glues for use with wood flooring.” Even if we were to consider this additional mark, it would not alter our findings regarding the conceptual strength of the Cited Mark.

²⁴ July 3, 2023 Response to Office Action, TSDR 32.

²⁵ *Id.* at 36, 41.

A typeset mark is legally equivalent to a mark in standard characters. *In re Viterra, Inc.*, 671 F.3d 1358, 1363, n.2 (Fed. Cir. 2012).


²⁶ July 3, 2023 Response to Office Action, TSDR 37.

²⁷ *Id.* at 40.

²⁸ *Id.* at 42.

number of registrations for TIMBERLINE formative marks for the same goods, Reg. Nos. 4389436, 5370728 and 5957366;²⁹

7. FIREFRAMES TIMBERLINE (standard characters) – Reg. No. 5256639 for “building wall framing made primarily of metal; metal windows and doors; hinges made of metal; metal window frames; metal window casements; window casements of metal; metal window sills; metal windows; metal door frames; door casings of metal; door frames of metal; metal door panels; door panels of metal; metal door units, door jambs of metal; doors of metal; metal framing for floors; metal supports for floors; aluminum framing materials, namely, door frames, window frames, and wall partitions having wood veneers; building materials, namely, aluminum millwork for doors and windows having wood veneers; aluminum doors having wood veneers; aluminum building surfacing materials, namely, beams, panels, and boards having wood veneers” in International Class 6; and “safety glass for building purposes; glass panes; architectural glass, namely, structural glass, decorative glass, fire-rated glass, impact safety-rated glass, security glass, wired glass, sidelights, window glass, glass for transoms, all the foregoing for building and/or construction purposes” in International Class 19;³⁰

8.  – Reg. No. 6043286 for “metal windows and metal doors” in International Class 6; and “non-metal windows and non-metal doors” in International Class 19;³¹

9. TIMBERLINE (standard characters) – Reg. No. 5940218 for “Polyethylene sheets having a wood grain sheet pattern for use in in making furniture or cabinets” in International Class 17;³²

10.  – Reg. No. 6687302 for goods including cabinets and bathroom cabinets and vanities.³³

²⁹ *Id.* at 43, 45, 50, and 58.

³⁰ *Id.* at 44.

³¹ *Id.* at 56.


³² *Id.* at 57.

³³ *Id.* at 55. As noted in Section I above, we have considered Applicant’s representations and the evidence embedded in its brief that the Office cited the application underlying this registration as a potential bar to registration of the Cited Mark under Section 2(d). That said, we are missing important information. For example, we do not know the goods and services

Third-party registrations are relevant to prove that a segment of a composite mark “has a normally understood and well-recognized descriptive or suggestive meaning” in connection with certain goods or services, “leading to the conclusion that that segment is relatively weak.” *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 1339 (Fed. Cir. 2015) (internal quotation marks omitted); *Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 917 (CCPA 1976) (“[T]hird-party registrations are entitled to little weight on the question of likelihood of confusion where there is no evidence of actual use, they may be given some weight to show the meaning of a mark in the same way that dictionaries are used.”).

The cited third-party registrations support that the word TIMBERLINE is conceptually weak for materials used in construction, and have some probative value regarding the conceptual strength of the Cited Mark because consumers of construction services, like Registrant’s, may purchase construction materials during the construction process. But they are not as probative as would be registrations for construction services. On the record before us, the Cited Registration is the only registration covering construction services. Thus, contrary to Applicant’s assertion, the goods identified by the third-party registrations are not as similar to Registrant’s “building construction” and related services as are Applicant’s services, namely,

covered by the Cited Mark in the application, as filed, or the application for the mark

 before it matured to registration; the goods and services in the applications may have been more closely related giving rise to the advisory under Section 2(d). We have, however, considered this mark in assessing the conceptual strength of the Cited Mark.

constructing “gazeboes or covers for decks, porches, and patios for outdoor spaces of residential and commercial buildings.”³⁴

Turning to dictionary definitions, we find that most consumers are likely to perceive the first word in Registrant’s mark as the word “timberline” (or a misspelling thereof), meaning “the upper limit of arboreal growth in mountains or high latitudes; called also tree line.”³⁵ This meaning is somewhat suggestive of Registrant’s “building construction” and related services.

Consumers who do not equate the word TIMBERLYNE with “timberline” may focus on the “timber” prefix in the Cited Mark, meaning “wood suitable for building or for carpentry.”³⁶ The prefix “timber” is conceptually weak for Registrant’s services involving “timber,” namely, “construction of complete post-frame, post and beam, mortise and tenon, and mass timber buildings and structures” and Registrant’s building services, which are broad enough to encompass the use of timber.

In sum, the Cited Mark TIMBERLYNE GROUP is an inherently distinctive, suggestive mark but we find it has some degree of conceptual weakness for Registrant’s “building construction” and related services.

³⁴ Appeal Brief, 4 TTABVUE 18 (arguing that “the goods or services of prior registrations such as TIMBERLINE GEODESIC are as similar to those in [the] Cited Mark TIMBERLYNE GROUP as those in Applicant’s Mark TIMBERLINE PATIO COVERS application”) (emphasis omitted).

³⁵ January 4, 2023 Office Action, TSDR 10 (Merriam-Webster dictionary defining “timberline” as “the upper limit of arboreal growth in mountains or high latitudes; called also tree line”).

³⁶ Appeal Brief, 4 TTABVUE 12. *See* Section I above taking judicial notice of the Merriam-Webster dictionary definition for “timber.”

C. Similarities and Difference between 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.” *DuPont*, 476 F.2d at 1361; *see also Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 746 F.3d 1317, 1319 (Fed. Cir. 2014). The issue is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impressions such that confusion as to the source of the services offered under the respective marks is likely to result. *Coach Servs.*, 668 F.3d at 1368. The focus is on the recollection of an ordinary consumer, who normally retains a general rather than specific impression of trademarks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 1007 (CCPA 1971); *L’Oreal S.A. v. Marcon*, Opp. No. 91184456, 2012 WL 1267956, at *5 (TTAB 2004); *Sealed Air Corp. v. Scott Paper Co.*, Opp. No. 91055167, 1975 WL 20752, at *3 (TTAB 1975).

We do not predicate our analysis on a dissection of the involved marks; we consider the marks in their entirety. *Stone Lion*, 746 F.3d at 1321; *Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 1007 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). But one feature of a mark may be more significant than another, and it is not improper, for rational reasons, to give more weight to a dominant feature of a mark, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *See, e.g., In re Charger Ventures*,

64 F.4th at 1382 (permissible for the Board “to focus on dominant portions of a mark”); *In re Detroit Athletic Co.*, 903 F.3d 1297, 1306, 1305 (Fed. Cir. 2018) (it was not error for the Board to focus on dominant portions of the marks).

Applicant acknowledges that the first word in its mark, TIMBERLINE, and the first word in the Cited Mark, TIMBERLYNE, “sound the same.”³⁷ These words also look very similar differing only in the letter “y” appearing in the place of the letter “i” in the third-syllable of the Cited Mark. Each mark has additional descriptive or generic matter, i.e. the disclaimed word “GROUP” in the Cited Mark and the disclaimed phrase “PATIO COVERS” in Applicant’s mark. The disclaimed terms differentiate the marks somewhat in overall appearance and sound, but given the fallibility of memory, consumers are likely to focus on and remember the only source identifying matter in each mark, namely, the first words TIMBERLYNE and TIMBERLINE, which sound the same and look highly similar. *See, e.g., See In re Charger Ventures*, 64 F.4th at 1382 (recognizing that “an additional word or component may technically differentiate a mark but do little to alleviate confusion”); *In re Detroit Athletic*, 903 F.3d at 1305 (“[N]on-source identifying nature of the words ‘Co.’ and Club’ and the disclaimers thereof constitute rational reasons for giving those terms less weight in the analysis.”); *In re St. Helena Hosp.*, 774 F.3d 747, 751 (Fed. Cir. 2014) (“[M]arks must be considered ... in light of the fallibility of memory.”) (internal quotation marks omitted); *In re Chatam*, 380 F.3d at 1342-43 (“Board properly accorded ... less weight” to generic term ALE because it had “nominal

³⁷ 4 TTABVUE 11.

commercial significance”); *Presto Prods. Inc. v. Nice-Pak Prods. Inc.*, Opp. No. 91074797, 1988 WL 252340, at *3 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered[.]”). Consumers are not likely to notice or remember the slight difference in the spelling of the first words in the marks, and if they do, the one-letter difference does not create any meaningful distinction in the appearance and pronunciation of the marks.

Still, Applicant argues that the “the use of the letter-string ‘LYNE’ [in the Cited Mark] is intentional and provides a distinct and different impression.”³⁸ Applicant does not specify the “distinct and different impression” of the Cited Mark and we find that the marks, in their entirety, have similar commercial impressions and connotations for Registrant’s and Applicant’s closely related services. As discussed above, the Cited Mark TIMBERLYNE GROUP is likely to connote a tree line or suggest that Registrant offers building construction services involving timber. Applicant’s mark TIMBERLINE PATIO COVERS is similarly likely to suggest a tree-line like cover for patios and other outdoor spaces or the construction of gazebos or covers for decks, porches, and patios made from timber.

We find that Applicant’s mark TIMBERLINE PATIO COVERS in its entirety is similar to the Cited Mark TIMBERLYNE GROUP in appearance and sound and highly similar in connotation and commercial impression.

³⁸ Appeal Brief, 4 TTABVUE 11.

III. Conclusion

As a final step, we “weigh the *DuPont* factors used in [our] analysis and explain the results of that weighing.” *In re Charger Ventures*, 64 F.4th at 1384 (emphasis omitted). The evidence demonstrates that Registrant’s “building construction” services are complementary and closely related to Applicant’s services and the trade channels and consumers overlap. We thus find that the second and third *DuPont* factors support finding a likelihood of confusion. The marks in their entirety are also similar in appearance and sound and highly similar in connotation and commercial impression such that the first *DuPont* factor also weighs in favor of finding confusion likely. Under the sixth *DuPont* factor, the Cited Mark has some degree of conceptual weakness, but it is a suggestive, inherently distinctive mark. In addition, Applicant’s services are much closer to Registrant’s services than any of the goods identified by the third-party registrations of record. On the record before us, we find that the sixth *DuPont* factor is outweighed by the first, second and third *DuPont* factors.

Based on the weight of the *DuPont* factors, we find that Applicant’s mark TIMBERLINE PATIO COVERS for Applicant’s identified services is likely to cause confusion with the Cited Mark TIMBERLYNE GROUP for Registrant’s “building construction” services in International Class 37.

Decision: The refusal to register Applicant’s mark under Section 2(d) of the Trademark Act is affirmed.