

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 Mullen Automotive Inc.*¹

Application Serial No. 90366095

Kate A. Sherlock of Archer & Greiner, P.C. for Last Mile, Inc.

Won T. Oh, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

Before Bergsman, Shaw, and Johnson,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

Mullen Automotive Inc. (“Applicant”) seeks registration on the Principal Register of the mark ELECTRIC LAST MILE SOLUTIONS (in standard characters) for, inter alia,

Batteries for electric vehicles; battery chargers for electric vehicles; charging stations for electric vehicles, in International Class 9;

¹ Electric Last Mile, Inc., the original applicant, assigned its entire right, title and interest in the mark ELECTRIC LAST MILE SOLUTIONS to Mullen Automotive Inc. on November 30, 2022, through an assignment recorded on January 31, 2023, at reel 7956, frame 0654.

Electric commercial land vehicles; license plate holders; fitted and semi-fitted covers for vehicles, in International Class 12;

Floor mats for vehicles, in International Class 27;

Retail store services in the field of electric vehicles, in International Class 35;

Charging of electric vehicles; repair and maintenance of electric vehicles, in International Class 37.²

The Examining Attorney refused to register Applicant's mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the registered mark LAST MILE for, inter alia, the goods listed below as to be likely to cause confusion:

Vehicles, namely, land vehicles; apparatus for locomotion by land, namely, land vehicles; motor scooters; electric scooters; electrically-powered motor vehicles; two-wheeled battery powered and electric vehicles and component parts therefor, namely, two-wheeled motorized vehicles; three-wheeled battery powered and electric vehicles and component parts therefor, namely, Three-wheeled motor vehicles; four-wheeled battery powered and electric vehicles and component parts therefor, namely, Four-wheeled motor vehicles; bicycles; tricycles; go-karts; motorized vehicles and structural parts therefor, namely, land vehicles; land vehicles; motorcycles; motorized and non-motorized mobility scooters; motorized golf carts; motorized, electric-powered, self propelled, self-balancing, wheeled personal mobility, transportation device; component parts for all of the foregoing; ride-on vehicles,

² Application Serial No. 90366095 was filed on December 8, 2020, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant's claimed bona fide intention to use the mark in commerce for the goods and services in all International Classes. The application also includes goods and services in International Classes 14, 16, 18, 25 and 36 that are not at issue in this appeal.

namely, bicycles, mobility scooters and push scooters, and motor scooters, in International Class 12.³

When we cite to the prosecution history, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format by page number (e.g., June 4, 2021 Office Action (TSDR 12)). When we cite to the briefs, we refer to TTABVUE, the Board's docket system by document entry and page number (e.g., 8 TTABVUE 12).

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.

We base our determination under Section 2(d) on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In

³ Registration No. 5421043 registered March 13, 2018, under Section 44(e) of the Trademark Act, 15 U.S.C. § 1126(e).

discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“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, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). *See also In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (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, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. The strength of the cited mark LAST MILE

The strength of Registrant's mark affects the scope of protection to which it is entitled. Thus, we consider the inherent or conceptual strength of Registrant's mark based on the nature of the mark itself and its commercial strength based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010) ("A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength."); *Bell's Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1345 (TTAB 2017); *Top Tobacco, L.P. v. N. Atl. Operating Co., Inc.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011) (the strength of a mark is determined by assessing its inherent strength and its commercial strength); *Tea Bd. of India v. Republic of Tea Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (market strength is the extent to which the relevant public recognizes a mark as denoting a single source); 2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 11:80 (5th ed. March 2023 update) ("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.").

At a minimum, Registrant's mark LAST MILE has been registered on the Principal Register without a claim of acquired distinctiveness and, therefore, it is inherently distinctive and entitled to the benefits accorded registered mark under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (registration is prima facie

evidence of the validity of the registration and registrant's exclusive right to use the mark in commerce).

The MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) defines the term "Last Mile" as "the walk of a condemned person to the place of execution."⁴ As such, "Last Mile" does not have a descriptive or suggestive meaning when used in connection with Registrant's Class 12 goods such as land vehicles, electrically-powered motor vehicles, and four-wheeled battery powered and electric vehicles and component parts therefor, namely, four-wheeled motor vehicles.

When we analyze the components of "Last Mile," the words "Last" and "Mile," the MERRIAM-WEBSTER DICTIONARY (merriam-webster.com) (accessed April 6, 2023) defines "Last," inter alia, as an adjective, meaning "being the only remaining" and "most recent." It defines "Mile," inter alia, as "a unit equal to 5280 feet." Alternatively, "Last Mile" means the final mile. As such, "Last Mile" used in connection with Registrant's Class 12 goods such as land vehicles, electrically-powered motor vehicles, and four-wheeled battery powered and electric vehicles and component parts therefor, namely, four-wheeled motor vehicles, suggests that Registrant's vehicles will get the driver the last mile or the last mile on an electric charge. That thought

⁴ Examining Attorney's Brief (8 TTABVue 12). *See also* THE RANDOM HOUSE UNABRIDGED DICTIONARY (2023) posted at Dictionary.com (accessed April 6, 2023) ("the distance walked by a condemned person from their cell to the place of execution.").

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff'd*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016); *In re Omniome, Inc.*, 2020 USPQ2d 3222, at *2 n.17 (TTAB 2019).

process is too complicated to detract from the inherent or conceptual strength of the mark.⁵

Applicant submitted copies of 16 third-party registrations incorporating the words “Last” and “Mile” for goods and services in International Classes 9, 12, 27, 35, or 37 to show LAST MILE “occupies a ‘crowded field’ and, as such, are considered weak and, afforded limited protection.”⁶ The third-party registrations are listed below:⁷

MARK	REG. NO.	GOODS/SERVICES
LAST MILE SOLUTION (Supplemental Register)	5051470	Wired and wireless communications products; Providing customer technical support services for wired and wireless communications equipment

⁵ Applicant contends that “Registrant’s use of the words ‘LAST MILE’ is descriptive or weakly suggestive because it describes and suggests personal transportation using one of the recreational vehicles listed for use in connection with Cited Mark, using the ordinary definitions of those words.” Applicant’s Brief, p. 6 (6 TTABVUE 12). As discussed in the main body of this decision, we do not agree with Applicant’s conclusion that “Last Mile” is descriptive or suggestive. Applicant’s contention is not supported by any evidence to persuade us otherwise.

Nevertheless, we suspect that the term “Last Mile” has a meaning other than “the walk of a condemned person to the place of execution” because three of the third-party registrations discussed immediately below include the term “Last Mile” are registered on the Supplemental Register and two of the registrants have disclaimed the exclusive right to use “Last Mile.”

With respect to possible alternative meanings, Applicant stated in its brief that “in the logistics sector, ‘last mile, has a unique meaning – it refers to the final stage of the supply chain when the goods are transported from a transportation hub to its final destination.” Applicant’s Brief, p. 6 (6 TTABVUE 12) (citing Wikipedia.org (last visited August 16, 2022)). However, Applicant did not submit a copy of the Wikipedia entry into the record and, therefore, it is not something we can consider. *See In re Jimmy Moore LLC*, 119 USPQ2d 1764, 1768 (TTAB 2016) (on appeal, Board will not take judicial notice of definitions from Wikipedia or commercial websites that do not constitute dictionary definitions). “Attorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)).

⁶ Applicant’s Brief, p. 7 (6 TTABVUE 13).

⁷ July 1, 2022 Request for Reconsideration (TSDR 18-54).

MARK	REG. NO.	GOODS/SERVICES
LMMS LAST MILE MOBILE SOLUTIONS	4524483	Computer software to track, monitor, collect and analyze data concerning the provision and distribution of aid
FROM FIRST MILE TO LAST MILE, NDS DELIVERS	4450674	Coordination of package and freight delivery by third parties, namely, arranging for pickup, delivery, storage and transportation of documents, packages, parcels, and freight via ground and air carriers
FOUNDERS OF THE LAST MILE LOGISTICS (Registrant disclaims the exclusive right to use "Last Mile Logistics")	4640395	Transportation logistics services, namely, arranging the transportation of goods for others
LAST MILE HEALTH	4674507	Providing technical business management assistance to community-based organizations in the establishment and operation of health services;
LAST MILE SOLUTIONS (Supplemental Register)	4693639	Planning and laying out fiber optic cables; providing access to fiber optic networks and infrastructure
LAST MILE LEARNING	5205337	Consulting regarding organizational and work process
INNOVATION FOR THE LAST MILE (Registrant disclaims the exclusive right to use the term "Last Mile")	5333284	Cable, satellite, fiber optic and telecommunications products, components, and accessories
THE SMART LAST MILE	5897602	Online retail stores services in the field of electronics; Installation of consumer electronics; Transport and delivery of goods; and Technical support services for consumer electronics
LAST 10-MILE (Supplemental Register)	6413204	Battery chargers
LAST MILE MADE SIMPLE	6027525	Computer programs for payload logistics

MARK	REG. NO.	GOODS/SERVICES
LAST DOES LAST MILE	6611428	Business assistance, advisory, and consulting services in the field of vaccine development and distribution
LAST MILE FOOD RESCUE	6704453	Mobile application for providing information regarding volunteer food rescue opportunities; Organizing and conducting volunteer programs and community service projects in the field of food donations

The third-party registrations Applicant submitted are of limited, if any, probative value because they do not cover the goods in the cited registration (i.e., vehicles). *See Omaha Steaks*, 128 USPQ2d at 1694 (error to rely on third-party evidence of similar marks for dissimilar goods, as Board must focus “on goods shown to be similar”); *i.am.symbolic*, 123 USPQ2d at 1751 (disregarding third-party registrations for other types of goods where the proffering party had neither proven nor explained that they were related to the goods in the cited registration); *TAO Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1058 (TTAB 2017) (third party registrations in unrelated fields “have no bearing on the strength of the term in the context relevant to this case.”); *In re Thor Tech Inc.*, 90 USPQ2d 1634, 1639 (TTAB 2009) (the third-party registrations are of limited probative value because the goods identified in the registrations appear to be in fields which are far removed from the goods at issue). *See also Key Chem., Inc. v. Kelite Chem. Corp.*, 464 F.2d 1040, 175 USPQ 99, 101 (CCPA 1972) (“Nor is our conclusion altered by the presence in the record of about 40 third-party registrations which embody the word ‘KEY’. The great majority of those registered marks are for goods unrelated to those in issue, and there is no evidence

that they are in continued use. We, therefore, can give them but little weight in the circumstances present here.”).

The third-party registrations do not detract from the inherent or conceptual strength of Registrant’s mark LAST MILE.

II. The similarity or dissimilarity of the marks

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that “[t]he proper test 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.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs. Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012).

We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1062 (Fed. Cir. 2003)).

Applicant is seeking to register ELECTRIC LAST MILE SOLUTIONS and the mark in the cited registration is LAST MILE. The marks are similar in appearance, sound, connotation, and commercial impression because they share the term “Last Mile.” Applicant argues, however, that it is improper to make any finding of fact regarding the similarity of the marks based solely on the shared term “Last Mile.”⁸ As explained below, we find that the significance of the term “Last Mile” in Applicant’s mark ELECTRIC LAST MILE SOLUTIONS is a sufficient basis upon which to find the marks similar. *See In re Denisi*, 225 USPQ 624, 624 (TTAB 1985) (“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.”). The peripheral differences in Applicant’s mark fail to distinguish the marks.

The term “Last Mile” is the dominant part of Applicant’s mark in part because Applicant has disclaimed the exclusive right to use the descriptive terms “Electric” and “Solutions.”⁹ It is well-settled that disclaimed, descriptive matter may have less

⁸ Applicant’s Brief, pp. 3-9 (6 TTABVue 9-15).

⁹ In the June 4, 2021 Office Action (TSDR 4), the Examining Attorney required Applicant to disclaim the exclusive right to use the words “Electric” and “Solutions” because they are merely descriptive (i.e., “the wording merely describes applicant’s goods and/or services because applicant’s goods and services are in the field of electric vehicles and the repair services provide an answer for an improperly working vehicle.”

significance in likelihood of confusion determinations because consumers will tend to focus on the more distinctive parts of marks. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1050 (Fed. Cir. 2018) (citing *Dixie Rests.*, 41 USPQ2d at 1533-34); *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000) (“Regarding descriptive terms, this court has noted that the ‘descriptive component of a mark may be given little weight in reaching a conclusion on the likelihood of confusion.’”) (quoting *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 752 (Fed. Cir. 1985)); *In re Code Consultants, Inc.*, 60 USPQ2d 1699, 1702 (TTAB 2001) (disclaimed matter is often “less significant in creating the mark’s commercial impression.”).

There is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, such as a common dominant element, provided the ultimate conclusion rests on a consideration of the marks in their entirety. *In re Viterro Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012); *Nat’l Data*, 224 USPQ at 751.

In addition, the structure of Applicant’s mark reinforces the term “Last Mile” as the dominant part of the mark ELECTRIC LAST MILE SOLUTIONS because “Electric” and “Solution” modify and describe “Last Mile.” That is, the meaning and commercial impression engendered by the mark is an electricity-based LAST MILE method or process.¹⁰ Here, ELECTRIC LAST MILE SOLUTIONS looks, sounds, and

¹⁰ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2020) defines “Electric” as “of, relating to, producing or operated by electricity.” June 2, 2021 Office Action

conveys the commercial impression of being a line extension of LAST MILE. *See, e.g., Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the marks may believe that applicant’s mark is a variation of opposer’s mark that opposer has adopted for use on a different product.”); *cf. In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN “more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices”).

While there is no explicit rule that we must find marks similar where an applicant’s mark incorporates the entirety of the registrant’s mark, the fact that it does increases the similarity between the two. *See, e.g., China Healthways Inst. Inc. v. Xiaoming Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant’s mark CHI PLUS is similar to opposer’s mark CHI both for electric massagers); *Coca-Cola Bottling Co. of Mem., TN, Inc. v. Joseph E. Seagram and Sons, Inc.*, 526 F.2d 556, 188 USPQ 105 (CCPA 1975) (applicant’s mark BENGAL LANCER for club soda, quinine water and ginger ale is similar to BENGAL for gin); *In re West Point-Pepperell, Inc.*, 468 F.2d 200, 175 USPQ 558 (CCPA 1972) (WEST POINT PEPPERELL and griffin design for fabrics is similar to WEST POINT for woolen piece goods); *Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *6-7 (TTAB 2019) (respondent’s mark ROAD WARRIOR is similar to petitioner’s mark

(TSDR 9). It defines “Solution” as “a method or process of dealing with a problem.” *Id.* at TSDR 21.

WARRIOR); *Toshiba Med. Sys.*, 91 USPQ2d at 1271 (applicant's mark VANTAGE TITAN for medical magnetic resonance imaging diagnostic apparatus confusingly similar to TITAN for medical ultrasound diagnostic apparatus); *Broadcasting Network Inc. v. ABS-CBN Int'l*, 84 USPQ2d 1560, 1568 (TTAB 2007) (respondent's mark ABS-CBN is similar to petitioner's mark CBN both for television broadcasting services); *In re El Torito Rests., Inc.*, 9 USPQ2d 2002, 2004 (TTAB 1988) (applicant's mark MACHO COMBOS for food items is similar to MACHO for restaurant entrees).

The Board in *In re U.S. Shoe Corp.*, 229 USPQ 707 (TTAB 1985) (CAREER IMAGE for women's clothing stores and women's clothing likely to cause confusion with CREST CAREER IMAGES for uniforms including items of women's clothing), observed that "Applicant's mark would appear to prospective purchasers to be a shortened form of registrant's mark." 229 USPQ at 709. Likewise, LAST MILE appears to be a shortened form of ELECTRIC LAST MILE SOLUTIONS.

Applicant contends that the marks are visually different because "Applicant's Mark has four times as many syllables as Registrant's marks, twenty-five letters versus eight letters, and two times as many words. Additionally, the first and last words of Applicant's Mark are absent from the Cited Mark, and consumers are very likely to recognize this distinction" (citing *Presto Prods. v. Nice-Pak Prods.*, 9 USPQ2d 1895, 1897 (TTAB 1998) ("[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.")).¹¹ However, consumers do not focus on minutia but rather overall impressions. *See Bridgestone*

¹¹ Applicant's Brief, p. 4 (6 TTABVue 10).

Ams. Tire Operations LLC v. Fed. Corp., 673 F.3d 1330, 102 USPQ2d 1061, 1064, (Fed. Cir. 2012) (“Exact identity is not necessary to generate confusion as to source of similarly-marked goods.”); *In re John Scarne Games, Inc.*, 120 USPQ 315, 315-16 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting — they are governed by general impressions made by appearance or sound, or both.”). The public does not scrutinize marks. See *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 6 USPQ 1719, 1721 (Fed. Cir. 1988) (“The purchasing public, we believe, does not indulge in such recognitional contortions but sees things as they are.”); *In re Johnson Prods. Co., Inc.*, 220 USPQ 539, 540 (TTAB 1983) (“It is undeniable that if the mark is carefully examined, the two overlapping ‘S’s can be discerned. What is more significant, however, is that this sort of studied analysis of the mark is unlikely to occur in the marketplace where these products are sold.”).

In addition, as discussed above, the structure of Applicant’s mark “counsel[] against a reflexive application of [the] principle” that the first part of a mark is generally its dominant portion. *Sabhnani*, 2021 USPQ2d 1241, at *37 (TTAB 2021) (finding that the word MIRAGE was the more significant portion of the respondent’s ROYAL MIRAGE word mark) (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)).

In sum, although we have pointed to the identical dominant portions of the marks, we acknowledge the fundamental rule that we must consider the marks in their entirety. See *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v.*

New Millennium Sports, S.L.U., 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015); *Massey Junior Coll., Inc. v. Fashion Inst. of Tech.*, 492 F.2d 1399, 181 USPQ 272, 273-74 (CCPA 1974). We note the specific differences pointed out by Applicant. These differences, however, are outweighed by the similarities of the marks. Thus, when comparing the marks overall, they are similar in appearance, sound, connotation and commercial impression. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

III. The similarity or dissimilarity and nature of the goods and services and established, likely-to-continue channels of trade and classes of consumers

The mark in the cited registration is registered for, inter alia, “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing.” The Examining Attorney argues that “Vehicles and their various accessories, parts, and attachments may be closely related goods such that the average person encountering the same or similar marks for such products is likely to be confused as to their source.”¹² To support his argument, the Examining Attorney submitted Internet evidence from the automobile dealerships and automobile manufacturers listed below:¹³

¹² June 4, 2021 Office Action (TSDR 4).

¹³ As noted below, the Examining Attorney failed to include the url and date the website was accessed when he submitted the Internet evidence in his June 4, 2021 Office Action. When making Internet evidence part of the record, the Examining Attorney or Applicant must provide (1) an image of the webpage, (2) the date the evidence was downloaded or accessed from the Internet, and (3) the complete URL address. *See In re ADCO Indus.-Techs., L.P.*, 2020 USPQ2d 53786, at *2 (TTAB 2020) (citing *In re I-Coat Co.*, 126 USPQ2d 1730, 1733

- Farrish Subaru website (no url or date accessed provided) located in Fairfax, Virginia, advertising the sales of SUBARU vehicles and automobile repair maintenance services. The website does not refer to the sales or servicing of electric vehicles;¹⁴

- Rosenthal Fairfax Honda website (no url or date accessed provided) advertising the sale of automobiles, including hybrids and electric vehicles, and automobile repair and maintenance services, including parts;¹⁵

- Tesla website (no url or date accessed provided) advertising vehicles (presumably electric vehicles although the website does not expressly state electric vehicles) and service (“Tesla cars do not require regular maintenance.”);¹⁶

- Bentley website (no url or date accessed provided) advertising vehicles and repair and maintenance services, including parts. The website does not refer to electric vehicles or servicing electric vehicles;¹⁷

(TTAB 2018)); *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1587 (TTAB 2018). If either party fails to satisfy the requirements for submission of Internet evidence, and the other party objects, the Internet material will not be considered. *See In re Mueller Sports*, 126 USPQ2d at 1587. If, on the other hand, a party fails to satisfy these requirements, and the other party fails to object, the Board may consider the Internet evidence for whatever probative value it may have. *See id.* at 1586. Applicant did not object to the Examining Attorney’s failure to include the url and date accessed in either his subsequent response or appeal brief. In fact, in the subsequent December 7, 2021 Response to Office Action ignored the Examining Attorney’s evidence all together. We will consider the Internet evidence for whatever probative value it may have.

¹⁴ June 4, 2021 Office Action (TSDR 11-12).

¹⁵ *Id.* at TSDR 13-14.

¹⁶ *Id.* at TSDR 15-16.

¹⁷ *Id.* at TSDR 17-18.

- Aston Martin website (no url or date accessed provided) advertising vehicles and repair and maintenance services. The website does not refer to electric vehicles or servicing electric vehicles;¹⁸

- Glassman Hyundai website (glassmanhyundai.com) advertising electric vehicles and service and parts, including batteries for non-electric cars;¹⁹ and

- Lia Nissan of Colonie (liannissanschenechtady.com) advertising electric vehicles and automotive repair and maintenance services.²⁰

We discuss below the similarity and dissimilarity and nature of the registered goods vis-à-vis each International Class of Applicant's goods and services.²¹

A. Applicant's Class 9 goods

Applicant is seeking to register its mark for "batteries for electric vehicles; battery chargers for electric vehicles; charging stations for electric vehicles," in International Class 9. While it seems logical that these products should be similar or related to "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing," the Examining Attorney did not

¹⁸ *Id.* at TSDR 19-20.

¹⁹ January 4, 2022 Office Action (TSDR 6-15)

²⁰ *Id.* at 16-24.

²¹ "A multiple-class application may be viewed as a group of applications for registration of one mark in connection with goods, services, or a collective membership organization in particular classes, all combined into one application. Generally, an applicant is in the same position that he or she would have been if they had filed several single-class applications instead. *G&W Labs., Inc. v. G W Pharma Ltd.*, 89 USPQ2d 1571, 1574 (TTAB 2009)." TMEP § 1403.

submit any evidence showing the same entity identifying those products with the same mark.²² In fact, the Examining Attorney did not submit any evidence showing the same entity identifying those products with different marks.²³

Likewise, the Examining Attorney did not submit any evidence showing that Applicant's Class 9 and Registrant's Class 12 goods are offered in the same channels of trade or to the same classes of consumers.

The Examining Attorney failed to meet his burden of showing that Applicant's Class 9 goods are similar or related to Registrant's Class 12 products or that those products are offered in the same channels of trade to the same classes of consumers.

B. Applicant's Class 12 goods

Applicant is seeking to register its mark for "electric commercial land vehicles; license plate holders; fitted and semi-fitted covers for vehicles," in International Class 12.

²² The Examining Attorney did not even submit any third-party registrations. Third-party registrations that cover the goods or services of the applicant and registrant may have some probative value to the extent that they may serve to suggest that goods or services are of a type that may emanate from a single source, if the registrations are based on use in commerce. *See Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1267, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (evidence that "a single company sells the goods and services of both parties, if presented, is relevant to the relatedness analysis"); *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB), *aff'd per curiam*, 864 F.2d 149 (Fed. Cir. 1988); TMEP § 1207.01(d)(iii).

²³ Contrary to his statement in the brief that "the examining attorney has provided evidence showing that entities that provide land vehicles also typically provide goods and services found in these classes 9, 27, 35 and 37, the Examining Attorney did not submit any evidence referring to "batteries for electric vehicles; battery chargers for electric vehicles; charging stations for electric vehicles."

Registrant's description of goods includes "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles." In analyzing the description of goods, we must consider the goods as they are described in the application and registration. *Stone Lion*, 110 USPQ2d at 1161; *Octocom Sys, Inc. v. Houston Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) ("The authority is legion that the question of registrability of an applicant's mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant's goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed."). *See also Paula Payne Prods. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods"). We also do not read limitations into the identification of goods. *i.am.symbolic*, 123 USPQ2d at 1748; *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) ("There is no specific limitation and nothing in the inherent nature of Squirtco's mark or goods that restricts the usage of SQUIRT for balloons to promotion of soft drinks. The Board, thus, improperly read limitations into the registration"); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *47 (TTAB 2020); *In re Thor Tech.*, 90 USPQ2d at 1638 ("We have no authority to read any restrictions or limitations into the registrant's description of goods."). Therefore, we must presume that Registrant's land vehicles include all types of land vehicles

including “electric commercial land vehicles,” Registrant’s electrically-powered motor vehicles includes all types of electrically-powered motor vehicles including “electric commercial land vehicles,” and that Registrant’s four-wheeled battery powered and electric vehicles include all types of four-wheeled battery powered and electric vehicles, including “electric commercial land vehicles.”

Applicant contends:

Registrant, the widely-known manufacturer of scooters, indicates specific uses that are exclusively related to a very different area of the sector—recreational vehicles and personal transportation. Registrant lists specific types of personal recreational vehicles, including push scooters, motorized scooters, electric scooters, mobility scooters, go-karts, golf carts, bicycles, tricycles and motorcycles, amongst other broader language for land vehicles. Registrant never uses terms such as “commercial vehicles,” “utility vehicles,” “delivery vehicles,” etc. In light of the many specific types of vehicles stated, Registrant’s silence on these other types of vehicles should not be ignored.²⁴

There are two problems with Applicant’s contention. First, Registrant’s description of goods is not restricted to “recreational vehicles and personal transportation.” As we noted above, we are bound by the description of goods and we do not read limitations in them. We must consider Applicant’s and Registrant’s goods to include all goods of the type identified. *See, e.g., Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 107 USPQ2d 1167, 1173 (Fed. Cir. 2013); *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018) (“[W]here an application contains no such restrictions, examining attorneys and the Board must read the

²⁴ Applicant’s Brief, p. 12 (6 TTABVUE 18).

application to cover all goods of the type identified, to be marketed through all normal trade channels, and to be offered to all normal customers therefor.”).

In this regard, we may not limit, by resort to extrinsic evidence, the scope of goods as identified in the cited registration or in the subject application. *E.g.*, *Dixie Rests.*, 41 USPQ2d at 1534; *In re Fisher Scientific Co.*, 440 F.2d 43, 169 USPQ 436, 437 (CCPA 1971); *FCA US LLC*, 126 USPQ2d at 1217 n.18 (“[W]e may consider any such [trade channel] restrictions only if they are included in the identification of goods or services”).

Second, under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that we find any item encompassed by the identification of goods in a particular class in the application and registration related. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB 2020); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff’d* 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017); *In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (“[I]t is sufficient for finding a likelihood of confusion if relatedness is established for any item encompassed by the identification of goods within a particular class in the application.”).

We find that because Registrant’s “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components

therefore, namely four-wheeled motor vehicles” encompass Applicant’s “electric commercial land vehicles,” the goods are in part legally identical.

Because the goods described in the application and the cited registration are in part legally identical, we presume that the channels of trade and classes of purchasers are the same. *See Viterro*, 101 USPQ2d at 1908 (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai*, 127 USPQ2d at 1801 (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods....”)); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same).

C. Applicant’s Class 27 goods

Applicant is seeking to register its mark for “floor mats for vehicles,” in International Class 27. The Examining Attorney did not submit any evidence showing the similarity or relatedness of its “floor mats for vehicles” with “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing.”²⁵ In fact, the Examining Attorney did not submit

²⁵ Again, the Examining Attorney did not even submit any third-party registrations.

any evidence showing the same entity identifying those products with different marks.²⁶

Likewise the Examining Attorney did not submit any evidence to show that “floor mats for vehicles” are offered in the same channels of trade to the same classes of consumers as “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing.”

The Examining Attorney failed to meet his burden of showing that Applicant’s Class 27 goods are similar or related to Registrant’s Class 12 products or that they are offered in the same channels of trade or to the same classes of consumers.

D. Applicant’s Class 35 services

Applicant is seeking to register its mark for “retail store services in the field of electric vehicles,” in International Class 35. The website evidence discussed above shows that brand name vehicles are sold through dealerships displaying the brand name of the vehicles. Therefore, we find that Applicant’s “retail store services in the field of electric vehicles” is related to “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles.” *Cf. In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988) (furniture is related to general

²⁶ Contrary to his statement in the brief that “the examining attorney has provided evidence showing that entities that provide land vehicles also typically provide goods and services found in these classes 9, 27, 35 and 37, the Examining Attorney did not submit any evidence referring to “floor mats for vehicles”.

merchandise store services); *In re Thomas*, 79 USPQ2d 1021, 1024 (TTAB 2006) (“It is clear that consumers would be likely to believe that jewelry on the one hand and retail stores selling jewelry on the other emanate from or are sponsored by the same source if such goods and services are sold under the same or similar marks.”); *In re Peebles Inc.*, 23 USPQ2d 1795, 1796 (TTAB 1992) (“As we have said before there is no question that store services and the goods which may be sold in that store are related goods and services ...”).

The above-noted websites also show that Applicant’s Class 35 services are offered in the same channels of trade to the same classes of consumers as Registrant’s Class 12 vehicles.

E. Applicant’s Class 37 services

Applicant is seeking to register its mark for “charging of electric vehicles; repair and maintenance of electric vehicles,” in International Class 37. The website evidence discussed above shows that brand name vehicles are sold and repaired through dealerships displaying the same trademark. Therefore, we find that Applicant’s repair and maintenance of electric vehicles and related to “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles.”

The website evidence also shows that Applicant’s Class 37 services are offered in the same channels of trade to the same classes of consumers as Registrant’s Class 12 vehicles.

F. The conditions under and consumers to whom sales are made

Applicant contends that Applicant's and Registrant's customers will exercise a high degree of purchasing care because Applicant's goods and services and Registrant's goods "are not every day impulse-purchases;" they are "one of the most expensive purchases a consumer can make."²⁷

Moreover, commercial vehicles are exclusively marketed to businesses, typically in sectors that are heavily regulated and involve specialized trades. Very often these businesses are institutional consumers. Applicant's automobiles and related software are implemented to assist businesses in transitioning their commercial fleets to electric power. Thus, the relevant consumers for Applicant's goods and services are sophisticated businesses. Given the expense of managing a commercial vehicle fleet, any purchase of Applicant's goods and services will be a multi-step institutional purchase with approvals required at multiple levels of the company. Thus, Applicant's consumers exercise a very high degree of care. Because the level of care exercised by Applicant's and Registrants' purchasers is high, this factor weighs strongly against a finding of a likelihood of confusion.²⁸

Again, there are two problems with Applicant's argument. First, there is no evidence supporting Applicant's contentions regarding commercial vehicles, relevant customers, or the purchasing process. As we noted, "[a]ttorney argument is no substitute for evidence." *Cai*, 127 USPQ2d at 1799 (quoting *Enzo Biochem*, 76 USPQ2d at 1622).

Second, Applicant focused its argument on its commercial vehicles to the exclusion of its Class 9 and 27 goods and Class 35 and 37 services.

²⁷ Applicant's Brief, p. 14 (6 TTABVUE 20).

²⁸ *Id.* at pp. 14-15 (6 TTABVUE 20-21).

Nevertheless, the inherent nature of some of Applicant's products such as batteries, battery chargers, and battery charging stations for electric vehicles, electric commercial land vehicles, and repair and maintenance of electric vehicles, suggest consumers will exercise a high degree of purchasing care. The same with Registrant's "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing."

The same presumption does not hold true regarding inherent nature of Applicant's license plate holders, fitted and semi-fitted covers for vehicles, floor mats for vehicles, and retail store services in the field of electric vehicles.

Thus, depending upon which products and services we are analyzing, consumers may or may not exercise a high degree of purchasing care.

G. Conclusion

1. Applicant's goods in Class 9

Despite the similarity of the marks, because there is no evidence the goods are related or are offered in the same channels of trade or to the same classes of consumers, we find that Applicant's mark ELECTRIC LAST MILE SOLUTIONS for "batteries for electric vehicles; battery chargers for electric vehicles; charging stations for electric vehicles" is not likely to cause confusion with the registered mark LAST MILE for, inter alia, "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing."

2. Applicant's goods in Class 12

Because the marks are similar, the goods are in part legally identical and we presume the goods to be offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark ELECTRIC LAST MILE SOLUTIONS is likely to cause confusion with the registered mark LAST MILE for, inter alia, "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing." That consumers are likely to exercise a high degree of care does not, on this record, outweigh the other *DuPont* factors.

3. Applicant's goods in Class 27

Despite the similarity of the marks, because there is no evidence the goods are related or are offered in the same channels of trade or to the same classes of consumers, we find that Applicant's mark ELECTRIC LAST MILE SOLUTIONS for "floor mats for vehicles" is not likely to cause confusion with the registered mark LAST MILE for, inter alia, "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing."

4. Applicant's services in Class 35

Because the marks are similar, the goods and services are related and offered in the same channels of trade to the same classes of consumers, we find that Applicant's mark ELECTRIC LAST MILE SOLUTIONS for "retail store services in the field of electric vehicles" is likely to cause confusion with the registered mark LAST MILE for, inter alia, "land vehicles; ... electrically-powered motor vehicles; ... four-wheeled

battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing.”

5. Applicant’s services in Class 37

Because the marks are similar, the goods and services are related and offered in the same channels of trade to the same classes of consumers, we find that Applicant’s mark ELECTRIC LAST MILE SOLUTIONS “charging of electric vehicles; repair and maintenance of electric vehicles” is likely to cause confusion with the registered mark LAST MILE for, inter alia, “land vehicles; ... electrically-powered motor vehicles; ... four-wheeled battery powered and electric vehicles and components therefore, namely four-wheeled motor vehicles; ... components for all of the foregoing.”

Decision: We affirm the refusal to register Applicant’s mark ELECTRIC LAST MILE SOLUTIONS for the goods in International Class 12 and the services in International Classes 35 and 37.

We reverse the refusal to register Applicant’s mark ELECTRIC LAST MILE SOLUTIONS for the goods in International Classes 9 and 27.